

# A RADICALLY TRANSFORMED RESTATEMENT FOR CONFLICTS†

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*This Article proposes a radical transformation in the way ALI Restatements are written in the field of choice of law. It argues that the projected new Restatement (Third) of Conflict of Laws, insofar as choice of law is concerned, can and should be built on the best foundation we have—the constitutional opinions of the United States Supreme Court dealing with the conflict of laws, and the application of the Court’s methods to common-law conflicts. Offering critical commentary on current cases, the Article proposes a different way of classifying and organizing cases, not by kind of claim, but rather by kind of conflict. This can be achieved through familiar analytic methods, and tested against constitutional ground rules. The Article carries interest-analytic thinking to its logical conclusions to create a complete system of choice of law.*

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## I. PROPOSING A RADICAL TRANSFORMATION

This Paper proposes a radical transformation in the way Restatements by the American Law Institute<sup>1</sup> are written in the field of choice of law.<sup>2</sup> By a happy coincidence, just as I was getting to work on an earlier draft of a paper on choice-of-law methods, the ALI announced the launching of a new project, the long-awaited *Restatement (Third) of Conflict of Laws*.<sup>3</sup> What an opportunity! I scrapped that draft. Instead I offer an immodest proposal:

1. Hereinafter “ALI.”

2. The choice-of-law method proposed here is focused on ordinary interstate and transnational conflicts of tort, property, family, and, occasionally, contract laws. It can also be helpful in cases in which federal law incorporates state law.

3. Hereinafter “*Third Restatement*.” For the announcement of this project, see ALI, ANNUAL REPORT 2013–2014, at 17 (2014). Kermit Roosevelt will serve as Reporter; and Laura Little and Chris Whytock will serve as Associate Reporters. I am invited to serve among the Advisers. There will also

*Resolved:* That the new *Third Restatement*, insofar as it concerns choice of law,<sup>4</sup> write *finis* to the old doomed quest for more perfect abstract rules. Instead, the Institute should base the *Third Restatement*, insofar as choice of law is concerned, on the best foundation we have: the constitutional opinions of the United States Supreme Court in conflicts cases—and on application of the Court’s work to common-law conflicts—a method of which Brainerd Currie was the original and remains the chief expositor.<sup>5</sup>

The forthcoming *Third Restatement*, insofar as it deals with choice of law, can and should jettison the paraphernalia of previous Restatements. It should abandon their organization by claim, sub-issue, and defense; abandon the “place of most significant contact” or “most significant relationship;” and abandon any other place chosen with deliberate unconcern for the content of the law at that place. It should set aside the weighing or balancing of interests, and any other unguided misguided attempt to locate “the most interested state.” It should tear up the laundry lists of contacts, factors and considerations in light of which all that weighing and balancing is supposed to be conducted. It should give up on escape devices, loopholes and safety valves meant to undo the consequences of its own recommendations.

### A. A Complete New System

It has not been generally perceived that Brainerd Currie’s work can provide a whole new systematics,<sup>6</sup> complete in itself, for dealing with interstate and border conflicts (and, to a great extent, trans-oceanic

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be a Members’ Advisory Group. It is to be hoped that the Reporter will not feel overly confined by the pragmatic modesty of his original proposal.

4. The *Third Restatement* might well set aside other major casebook topics in favor of an exclusive focus on choice of law. Jurisdiction and judgements each could be (or already has been) the subject of an ALI project.

5. Currie freely acknowledged his debt to the Supreme Court. Brainerd Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9 (1958), reprinted in BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 191–94 (1963) [hereinafter CURRIE, *The Constitution*]. There are innumerable references to the Supreme Court’s work throughout the *Selected Essays*. Currie’s earliest such reference is indirect. He cites Paul Freund’s exegesis of Chief Justice Stone’s interest-analytic thinking in conflicts cases. Brainerd Currie, *Married Women’s Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958), reprinted in BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 77, 87 n.18. (1963) [hereinafter CURRIE, *Married Women’s Contracts*]. For Freund’s own work see *infra* note 148.

6. But see Louise Weinberg, *What We Don’t Talk About When We Talk About Extraterritoriality: Kiobel and the Conflict of Laws*, 99 CORNELL L. REV. 1471 (2014) (applying interest analysis and forum law to resolve a transnational conflict the Supreme Court decided the other way) [hereinafter “Weinberg, *What We Don’t Talk About*”]. [Note in press:] See also Jordan Hunn, Note, *Bridging The Swamp: Currie’s Interest Analysis as a Principled Solution to the Conflict of Laws Problem in Bakalar and Other Stolen Art Cases*, 50 TEX. INT’L L. J. 169 (2015) (arguing that Currie’s mode of analysis forms a convenient complete system with which to address transnational litigation over looted art). A Westlaw search also turns up William A. Reppy, Jr., *Codifying Interest Analysis in the Torts Chapter of a New Conflicts Restatement*, 75 IND. L.J. 591 (2000) (seeing the special applicability of interest-analytic methods to tort cases and arguing for an interest-analytic torts chapter in any new conflicts Restatement).

conflicts). The Constitution authorizes and even requires the determinate results this new system would yield. The processes here proposed include a whole new taxonomy—a different way of classifying and organizing cases. This change, and the advances it makes possible, cannot be achieved without interest analysis and without consulting the constitutional ground rules. The new taxonomy, under proper analysis, yields determinate resolutions for each category of cases. The transformed *Third Restatement*, then, would consist of (1) the new taxonomy, (2) interest analysis, (3) determinate resolutions of cases, and (4) testing against the constitutional ground rules as adduced from classic Supreme Court cases.

It was not Currie's original or chief purpose to create a new systematics for interstate conflicts cases. Rather, Currie set out to demolish the old ways—to rid jurisprudence utterly and forever of the old territorial approaches to conflicts. That was a job that Currie's American Legal Realist predecessors had not quite succeeded in accomplishing.<sup>7</sup> Currie no doubt influenced the mid-century conflicts revolution, a judicial flight from traditional methods of choice of law, if not a judicial flight to Currie. Whatever the extent of that influence, it is fair to say that Currie succeeded on paper in his self-imposed task of demolition.

Ingenuously, in his opening shot, *Married Women's Contracts*, Currie devised a little chart that could encapsulate in fourteen variants the universe of all two-state conflicts.<sup>8</sup> With this, he was able to evaluate the

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7. See, e.g., Michael Traynor, *Conflict of Laws: Professor Currie's Restrained and Enlightened Forum*, 49 CALIF. L. REV. 845, 845 & n.3 (1961) (comparing the limited work of earlier American Legal Realists with Currie's comprehensive and positive contributions). See also David F. Cavers, *Book Review*, 56 HARV. L. REV. 1170, 1172–73 (1943) (reviewing WALTER WHEELER COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* (1942)). Cf. Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457 (1924) (on which the book was based). Cavers remarked, "Given Professor Cook's immediate objectives, doubtless he can be excused from an obligation to carry the planting operations forward, but it is a source of some concern that his fellow workers . . . (myself again included) have likewise busied themselves chiefly with weed eradication." *Id.* Cavers himself was a major contributor to the critique of abstract choice-of-law rules, dubbing them "jurisdiction-selecting rules," and remarking insightfully that what was needed was a method for choosing laws, not places. David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 201 (1933) [hereinafter Cavers, *A Critique*]. Yet Cavers, too, could come up only with inconclusive "principles of preference." DAVID CAVERS, *THE CHOICE-OF-LAW PROCESS* 114–203 (1965). (Disclosure: I was Cavers' student. I recall that upon publication of my first conflicts papers he sent me a collection of his reprints, with an elegiac little note, remarking that, "alas, we are in a dying field.") See also Ernest G. Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736 (1924) (providing another important early critique of traditional choice-of-law methods). And see JEROME FRANK, *LAW AND THE MODERN MIND* 11–12 (1930). I mention Frank not only for his view of the thinking of Joseph Beale, Reporter of the *First Restatement* of 1934, *id.* at 48–56, and his Roscoe Pound-like emphases on public policy and social science, but also for his Holmesian understanding of what the common law is, and his thorough-going American Legal Realist point of view.

8. CURRIE, *Married Women's Contracts*, *supra* note 5, at 84. *Married Women's Contracts* is sometimes said to be the greatest law-review article ever written; I am recalling in particular a remark by Hans Baade at the University of Texas, and earlier envying remarks by Don Trautman at Harvard. The referenced page in *Married Women's Contracts* contains Currie's famous "Table I." This reduction of all possible two-state conflicts cases to a little chart is just one among this article's dazzling achievements.

results courts would reach under the traditional choice rule for every kind of conflict. His evaluative method, which he called “governmental interest analysis,” was simply the familiar lawyer’s inquiry into a law’s likely purposes in order to determine its *actual scope*. It is amazing that nobody had ever thought of applying this test in conflicts cases. If forum law passes the test, the forum, Currie concluded, was an “interested” forum. Beyond this, he was able to show, in light of Supreme Court cases on the Constitution, that *the interested forum must apply its own law*. But although Currie consistently argued for judicial resort to this obvious test and its obvious consequence, none of the articles in Currie’s *Selected Essays* focuses, as this Article does, on systematizing the choice-of-law process in accordance with his ideas.<sup>9</sup>

### B. *The Contending Modern “Approaches”*

Although Brainerd Currie’s “governmental interest analysis” succeeded in engaging the minds of academics, the same academics recoiled from his prescription of forum law. It seemed extreme for Currie to prescribe forum law even for the hardest cases in which the other state had applicable law too. So from the start commentators sought to top off Currie’s thinking with varying contending “modern approaches” to the resolution of hard cases. Sharing an antipathy to forum law, these approaches offer more accommodating solutions. Courts are counseled to take a “moderate and restrained”<sup>10</sup> view of the reach of their own laws. Interests are to be weighed or balanced.<sup>11</sup> Impairments to policies are to be compared.<sup>12</sup> It is urged that the forum apply “better” nonforum law, the superiority of which is to be determined according to factors or

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9. A summary of such a system is set out briefly as a set of rules in Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 176, reprinted in SELECTED ESSAYS ON THE CONFLICT OF LAWS 177, 183–184 (1963) [hereinafter CURRIE, *Methods and Objectives*].

10. Currie used the phrase in CURRIE, *Married Women’s Contracts*, *supra* note 5, at 116 n.58 (with an erroneous citation to Max Rheinstein). See also, e.g., Brainerd Currie, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212, 1242 (1963). Although Currie did not approve of the weighing or balancing of the respective interests of contact states, CURRIE, *Methods and Objectives*, *supra* note 9, at 182, he was prepared to accept a court’s “moderate and restrained” interpretation of the reach of its *own* law. *Id.* At 184–86. In reading him it is important to see the distinction. The latter is consistent with local law theory; the former is not. On local law theory see *infra* Part VI(G), notes 131–41 and accompanying text.

11. See, e.g., David E. Seidelson, *Resolving Choice-of-Law Problems through Interest Analysis in Personal Injury Actions: A Suggested Order of Priority Among Competing State Interests and Among Available Techniques for Weighing Those Interests*, 30 DUQ. L. REV. 869 (1992). But see CURRIE, *Methods and Objectives*, *supra* note 9, at 182.

12. Comparative impairment originally was a technique of accommodating both laws in conflict cases, devised by Chief Justice Traynor in California. See *People v. One 1953 Ford Victoria*, 311 P.2d 480 (Cal. 1957) (construing California law so as to vindicate California interest in a car without causing a forfeiture to an innocent mortgagee). Now, with Traynor gone, comparative impairment is producing irrational defendant-biased departures from California’s law. Cf. Herma Hill Kay, *Currie’s Interest Analysis in the 21st Century: Losing the Battle, but Winning the War*, 37 WILLAMETTE L. REV. 123, 126 & n.16 (2001) (observing that “California . . . has mistakenly confused [interest analysis] with a different formulation in true conflicts cases”).

considerations to be taken into account.<sup>13</sup> Meanwhile, in the absence of a list of such considerations in the early tentative drafts of the *Second Restatement*,<sup>14</sup> courts began to apply the *Second Restatement's* emerging “law of the place of most significant relationship.” The law of this place of most significant contact or relationship was thought to comprise an improvement over the *First Restatement's*<sup>15</sup> more determinate references to the place of the wrong, or the place of contracting.

The “place of most significant contact” has conquered the courts. It provides judges with lots of discretion for very little thought. The judges simply tot up “contacts” for the state they wish to choose, and declare by fiat that these “outweigh” the other state’s contacts.

Given the gulf between modernist theory and the work of the courts; given the inevitable pressure for forum law and the disdain for it; given the contending “modern approaches” to avoiding it; and given the iterated but wearying enumerations of “factors to be taken into account,” Currie’s legacy can seem to have vanished, like some dazzling inheritance dissipated among the lawyers and the quarreling heirs.

The advent of a *Third Restatement* invites us to reappraise that legacy, especially in light of additional guidance the Supreme Court has provided since Currie’s death. There is an opportunity to make a historic and needed change.

### C. *That Which Is To Be Restated*

It might be argued that the point of a Restatement is to restate what courts are actually doing. What courts are actually, doing, however, is, more or less, the *Second Restatement*.<sup>16</sup> Flawed as it is,<sup>17</sup> the *Second Restatement* is a resounding success. Since it *is* what courts are doing, simply restating the *Second Restatement* would be pointless. It should be recalled, however, that the *Second Restatement* confronted the same paradox. Although the territorial rules of the *First Restatement* were

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13. See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971) [hereinafter *Second Restatement*]; CAVERS, THE CHOICE-OF-LAW PROCESS, *supra* note 7, at 114–203 (proposing “principles of preference”); Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 299 (1966); Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1587–88 (1966).

14. By the time of promulgation in 1967, the *Second Restatement* included its much regarded but disregarded § 6, with its list of considerations and factors to be taken into account. In addition, the *Second Restatement's* provision for each sort of claim typically contains a list of possibly significant contact states. In 1967 the presumed state of most significant contact was the traditional place of events: the place of injury in tort, the place of making in contract, and so on.

15. ALI, RESTATEMENT OF THE LAW OF CONFLICT OF LAWS (1934) (Joseph Beale, Reporter) [hereinafter “*First Restatement*”].

16. *Second Restatement*, *supra* note 13.

17. See, e.g., the criticisms in Friedrich K. Juenger, *A Third Conflicts Restatement?*, 75 IND. L.J. 403, 405 (2000); Louise Weinberg, *A Structural Revision of the Conflicts Restatement*, 75 IND. L.J. 475, 475 (2000); William L. Reynolds, *The Silver Anniversary of the Second Conflicts Restatement*, 56 MD. L. REV. 1193, 1194 (1997); Russell J. Weintraub, “At Least, To Do No Harm”: *Does the Second Restatement of Conflicts Meet the Hippocratic Standard?*, 56 MD. L. REV. 1284, 1287 (1997).

under attack by American Legal Realists even before the *First Restatement* was under way, most judges were still contentedly applying the old territorial rules as the Institute was issuing successive tentative drafts of the *Second Restatement*. There was a persistent thrall of courts to territorial choice rules. It is still seen today, not only in the handful of avowedly traditionalist courts, but also in the many courts in which the place of “most significant contact” turns out to be the old traditional choice.<sup>18</sup> But Willis Reese, the Reporter of the *Second Restatement*, could hardly have devoted it to restating the *First Restatement*.<sup>19</sup> So it has come to be understood, in effect, that ALI Restatements are in fact *not* re-statements. If they were, the Institute would have to go out of the Restatement business. Instead, second and third ALI Restatements are attempts—conservative attempts, to be sure—to provide fixes and substantial improvements, based, where possible, on developing case law. As far as the *Second Restatement*’s choice-of-law efforts were concerned, improvement meant taking into account, among other things, the teachings of the American Legal Realists, that abstract rules for choosing places instead of laws—David Cavers dubbed these “jurisdiction-selecting rules”<sup>20</sup>—should not be allowed to frustrate the basic policies underlying law.

## II. A NEW TAXONOMY

We already have good theory (of which interest analysis is just one component), theory that can provide a new, very different kind of systematics for choice of law. It can provide a new way of classifying cases, a new way of organizing them, a simplified form of purposive reasoning indicating the rational scope of putatively applicable law, and a determinate resolution for each class of conflict—all solidly based on constitutional ground rules.

To begin with, we can create a new taxonomy of conflicts cases. Instead of continuing to organize conflicts Restatements (and our future casebooks and treatises as well) by kinds of *claims* (tort, contract), kinds of sub-issues (domicile, damages), kinds of defenses (limitation of actions, immunities), and kinds of spatial relations (interstate, trans-border, transnational) the new *Restatement* can be organized by kinds of *conflicts*.

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18. For a typical example, see *Townsend v. Sears, Roebuck & Co.*, 879 N.E.2d 893 (Ill. 2007) (applying a presumption favoring the law of the place of injury unless there is a place of more significant relationship with the case; holding the presumption not overcome). Indeed, in the original 1967 edition of the *Second Restatement* the traditional territorialist choices, presumptively the places of “most significant contact,” reappear from time to time in the 1971 edition.

19. RESTATEMENT OF THE LAW OF CONFLICT OF LAWS (1934) [hereinafter *First Restatement*]. See also JOSEPH BEALE, *THE CONFLICT OF LAWS* (1934).

20. See Cavers, *A Critique*, *supra* note 7, at 173.

In what follows, I carry Brainerd Currie's ideas to their logical conclusions, perhaps with somewhat more consistency than Currie himself might have approved. I must acknowledge, too, that this Article offers policy arguments from which Currie, with his prudent academic taste and disciplined technical focus, fastidiously abstained. This Article also offers what I hope are helpful or at least interesting critical analyses of some current judicial work. These will amuse and dismay you. I wish there had been space to tell more stories from the cases.

A. *The Irrelevance of Characterization*

In writing his transformative article, *Married Women's Contracts*,<sup>21</sup> Currie discovered, somewhat surprisingly, that the customary classification of conflicts cases by kind of claim is in large part *irrelevant*. Currie exposed this irrelevance by showing that the places where claims arise need not be treated as distinct from each other. Rather, they form a generic *place of events*. It makes no difference whether the place of events happens to be a place of injury or conduct, or a place of contracting or performance. Currie let the place of contracting stand for the place of performance as well, famously remarking that a contract to dance naked in the streets of Rome could hardly be adjudicated without reference to the laws of Rome.<sup>22</sup>

In his follow-up writings on tort cases, what had been the place of contracting in *Married Women's Contracts* became the place of injury—or the place of wrongful conduct, whichever a court might think appropriate in a particular tort case. This generic place of events was the place both Joseph Story, author of the 1834 *Commentaries*,<sup>23</sup> and Joseph Beale, Reporter of the 1934 *First Restatement*, would have chosen for governance. Currie showed that it does not matter whether a case is in tort or contract, or whether the laws in question are conduct-regulating or loss-allocating,<sup>24</sup> for purposes of rational analysis of conflicts cases. The

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21. CURRIE, *Married Women's Contracts*, *supra* note 5, at 83.

22. *Id.* at 103.

23. *Cf.* JOSEPH STORY, *COMMENTARIES ON THE CONFLICT OF LAWS* (1834).

24. Currie pointed out that old-fashioned choice-of-law rules created the “artificial problem” of preliminary characterization of claims. CURRIE, *Methods and Objectives*, *supra* note 9, at 84. The current fetish for overly-particularized characterization of both claims and defenses can pose a threat to rational analysis. Consider the well-known case of *Schultz v. Boy Scouts of Am., Inc.*, 480 N.E.2d 679, 686 (N.Y. 1985) (applying New Jersey's charitable immunity defense to defeat the wrongful death claim of the family of a child who committed suicide after being sexually abused on a scouting trip in New York, although under New York law the organization was not immune). In *Schultz*, all concerned were so bemused by characterization of the defense of charitable immunity as “loss-allocating,” that, in the midst of an elaborate “I love New York” campaign intended to attract tourists, the highest court in New York, in effect, declared open season on visiting Boy Scouts—at least on Boy Scouts from charitable immunity states. This is a prime example of the point that the place of injury cannot make itself safe for residents without making itself safe for nonresidents, a point I have stressed in several articles. See Louise Weinberg, *Theory Wars in the Conflict of Laws*, 103 MICH. L. REV. 1631, 1655 (2005); Louise Weinberg, *Mass Torts at the Neutral Forum: A Critical Analysis of the ALI's Proposed Choice Rule*, 56 ALB. L. REV. 807, 833 (1993); Louise Weinberg, *Against Comity*, 80 GEO. L.J. 53, 54–

legal necessity of identifying a form of action—of understanding the elements of claims and defenses—raises important questions, and may well have to be dealt with in the new Restatement. But the nature of the legal issue in controversy—the characterization of claims—need not affect the mode of analysis of any conflict.<sup>25</sup>

Currie dealt in a different way with “center of gravity” or “seat of the relationship” theories, such as “the place of most significant contact.” Currie’s chief criticism of these “seat of the relationship” theories was that they worked, so to speak, by the seat of the pants. They came with no guidance.<sup>26</sup> Who knows what the mostness of significance is?

But at a deeper level I would argue that a choice of the law of the place of “most significant contact” presents somewhat the same problem the American Legal Realists saw in the choice of the law of the “place of injury” or “the place of contracting.” These are rules for choosing *places*, not laws. The vice of such “jurisdiction-selecting rules”<sup>27</sup> is that the places chosen for governance, including the place of most significant contact, are all chosen with the same blithe disregard for the content of their laws. That traditional way of choosing law, a system whereby the specific rights of real persons are determined by jurisdiction-selecting abstractions, after

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55 (1991); Louise Weinberg, *Choosing Law: The Limitations Debates*, 1991 U. ILL. L. REV. 683, 709; Louise Weinberg, *The Place of Trial and the Law Applied: Overhauling Constitutional Theory*, 59 U. COLO. L. REV. 67, 79 (1988); Louise Weinberg, *On Departing from Forum Law*, 35 MERCER L. REV. 595 (1984).

25. Currie dealt with conflicts of concepts such as “domicile,” and off-the-merits matters such as the limitation of actions, by stating that he was solely concerned with “rules of decision.” See CURRIE, *Methods and Objectives*, *supra* note 9, at 178. However, a definition of domicile or an issue of limitation of actions can decide a case. An interest analyst would tend naturally to use the same analysis for all dispositive issues. But it is always best, as I think Currie was trying to say, for courts to articulate what is actually at stake in a dispute, and what public policy on that matter requires. See discussion of the recent Louisiana case, *Taylor v. Taylor*, No. CA 10–1503, 2011 WL 1734077, at \*2 (La. Ct. App. May 4, 2011), *infra* notes 194–208 and accompanying text. There, the appellate court applied its own shorter period of limitations to cut off an action for a declaration of non-paternity, but did not discuss the purposes of the respective limitations laws. Instead, the court directly articulated its policy on the merits of the case, “one of [its] strongest” policies, the prime directive not to bastardize a child. It is fair to say that the difference in period of limitation was only one of degree, and that both states’ laws were intended to relieve a man from the late-blooming claims of suppositious offspring. The Louisiana court insisted on affording the children living in Louisiana the benefit of the marital presumption of legitimacy, in effect holding that dependent Louisiana children were not within the intended scope of either state’s period of limitation—that in Louisiana’s courts no period of limitation could be read as opening the door to a declaration of nonpaternity on behalf of the father of a child born under coverture of marriage.

26. See Brainerd Currie, *Conflict, Crisis and Confusion in New York*, 1963 DUKE L.J. 1, 35–36, reprinted in BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 722–35 (1963) [hereinafter CURRIE, *Conflict*]. For an interesting defense of the “most significant relationship” principle of the *Second Restatement*, see Sagi Pearl, *Savigny’s Theory of Choice-of-Law as a Principle of ‘Voluntary Submission’*, 64 U. TORONTO L.J. 106 (2014). Eventually the *Second Restatement* would include an attempt to provide the needed guidance, its § 6 laundry list of factors to be taken into account. This even includes a reference to state interests. But courts rarely refer to Section 6. See Symeon C Symeonides, *A New Conflicts Restatement: Why Not?*, 5 J. P. INT’L. L. 383, 488 (2000); Louise Weinberg, *A Structural Revision of the Conflicts Restatement*, 75 IND L J 475, 488 (2000) (arguing that the trouble with § 6 is that “too many judges never actually get to it”). Slogging through a list of considerations can flesh out a judicial opinion, but is unlikely to lead to any particular result.

27. See Cavers, *A Critique*, *supra* note 7, at 173.

all, was the dragon Currie set out to slay. True, in thinking about the “significance” of a state’s “contact” with a case, lawyers and judges are likely to start thinking about the governmental interests of that state. But, as long as they remain blind to the law at a state of contact, however weighty its contacts, they are still choosing places, not law.

### B. *Slaying the Dragon and Making Discoveries*

In the course of slaying his dragon, Currie had to acknowledge that the place of events was not without virtue.<sup>28</sup> The place of injury, for example, with no other contact with a case, is nevertheless empowered to apply its own plaintiff-favoring law in its own courts, if it has plaintiff-favoring law, no matter where the plaintiff resides, since the place of injury always has interests in the safety of its territory. But he also proved conclusively, and shockingly, that the law of the generic place of events could rationally apply *in only half* the configurations of conflicts cases.<sup>29</sup>

Even more usefully, Currie showed that conflicts cases fall into *patterns*. These are identifiably different kinds of conflicts. And Currie showed how to identify each kind of conflict through analysis of the interests of the respective states. Today we can lay full stress on the discovery of patterns in conflicts cases as laying the basis for new thinking, rather than as part of the critique of the old. The analysis of governmental interests is discussed below.<sup>30</sup> For the present it will suffice to recall what is meant when a writer speaks of a state as “an interested state.” An interested state is a state the policy concerns of which would be advanced by application of its contended-for law to the litigated issue in the particular case.

### C. *Kinds of Conflicts*

There are five kinds of conflicts, quite familiar to experts in the field. They are derived from analysis of the respective laws of the forum and the nonforum<sup>31</sup> state. Only four of them need concern us here.<sup>32</sup>

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28. See CURRIE, *Conflict*, *supra* note 26, at 701; CURRIE, *Married Women’s Contracts*, *supra* note 5, at 97–98 (showing that the law of the place of events operates rationally in only half of case configurations). The place of events, without more, may favor a tort or contract plaintiff, if its law would, even though the plaintiff does not reside there. On the other hand, the place of events, without more, may *not* apply defendant-favoring law, if it has it, since the defendant does not reside there. In the former case, the safety and validating interests reflected in forum law make forum law applicable even to the nonresident. In the latter case, the forum, as place of events without more, has no interest in protecting a nonresident defendant from either tort or contract liability.

29. CURRIE, *Married Women’s Contracts*, *supra* note 5, at 109–10 (concluding that the traditional choice of the place of events “simply strikes down the one interest or the other, indiscriminately”).

30. See *infra* Part III.

31. In this Article the words “nonforum,” “other” and “foreign” may be used interchangeably and generally refer to a sister state or another country.

32. Currie identified a fifth possibility, in which the forum state is a “disinterested third state,” and there is a putative conflict of laws in two other states. BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 120, 606–09 (1963). See, e.g., *Henry v. Richardson-Merrell, Inc.*, 508 F.2d 28

First, there are “no-conflict” cases.<sup>33</sup> These are cases in which the laws of the forum and the nonforum state are the same, or would produce the same result. These cases solve themselves.

Second, there are “false conflicts.” A false conflict is a case in which forum law differs from nonforum law, but in which the policies and interests of only one of them would be advanced by application of its law.<sup>34</sup> Unfortunately, judges are not very good at distinguishing false conflicts from other false problem cases. In particular, false conflicts are often confused with the above-described “no-conflict” cases. But in a false conflict case the laws *differ*. They are “false” because, although the laws conflict, there is only one interested state.<sup>35</sup> False conflicts solve themselves, but in a different way from no-conflict cases.

Third, there is the “unprovided case.” It was Currie who eventually isolated and identified this phenomenon,<sup>36</sup> which he had previously grouped with “false conflicts” as together presenting “false problems.”<sup>37</sup>

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(3d Cir. 1975) (action in New Jersey against Delaware thalidomide producer by Canadian parents of deformed child). The disinterested third state is important since it encompasses a common situation in mass litigation, in which state-law actions are removed from scattered state courts, consolidated with federal diversity cases, and transferred, at least for pretrial litigation, to a federal district court that may have been chosen simply for the relative lightness of its docket or its expertise in mass litigation. Under the rule of *Van Dusen v. Barrack*, 376 U.S. 612 (1964), transferred cases carry with them the law of the transferor state, which is interpreted as including that state’s choice-of-law rules. *See also* *Ferens v. John Deere Co.*, 494 U.S. 516, 519 (1990). *Van Dusen* was not a mass case, but the rule of *Van Dusen* has rendered mass disaster cases almost unadministrable, as far as choosing law for the various issues in those cases is concerned. Several alternative proposals have been advanced. Judge Weinstein proposed “national consensus law” as a proxy for federal law. *See* *In re “Agent Orange” Prod. Liab. Litig.*, 597 F. Supp. 740, 755 (E.D.N.Y. 1984). Proposals for federal statutory or common-law choice rules are frequently advanced, said rules to be deployed in ordinary conflicts cases as well as mass disasters. Currie, at first enthusiastic, became wary of such proposals, fearing that, whether or not enacted by Congress, federal rules would be old-style jurisdiction-selecting rules. Brainerd Currie, *Change of Venue and the Conflict of Laws: A Retraction*, 27 U. CHI. L. REV. 341 (1960), reprinted in BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 434 (1963). From conversations with Hans Baade, Russ Weintraub, and Don Trautman, I gather that Currie was also wary of a loss of options under a single set of supreme federal choice rules.

33. *See, e.g.*, *Barimany v. Urban Pace L.L.C.*, 73 A.3d 964 (D.C. 2013) (holding that both states would immunize the defendant); *USA Waste of Md., Inc. v. Love*, 954 A.2d 1027 (D.C. 2008) (reversing judgment for an injured employee; holding that both Maryland and the District of Columbia would immunize the defendant employer from suit to further the policies underlying their respective workers’ compensation laws).

34. *See, e.g.*, *Barron v. Safeway Ins. Co.*, 152 So.3d 1085, 1088 (La. Ct. App. 2014).

35. *Id.* (in an action on a liability insurance policy, allowing Louisiana insureds to recover for injuries to their children under Louisiana law, notwithstanding the parental immunity rule at the Arkansas place of injury; citing with approval the identification of a “false conflict” in an earlier Louisiana case on similar facts).

36. Brainerd Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205 (1958), reprinted in BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 152 (1963) [hereinafter “CURRIE, *Survival of Actions*”].

37. CURRIE, *Married Women’s Contracts*, *supra* note 5, at 109–10. The forum that is the place of injury or even defendant’s residence, if it has plaintiff-favoring law, must extend its law to cover the nonresident plaintiff as well. This is required by the rationality principle of due process, since the forum cannot make its territory safe for its residents without making it safe for its nonresidents, Weinberg, works cited *supra* note 24. It is also required by the equal protection principle, since the forum cannot discriminate against the nonresident plaintiff without good reason. This is reflected in the Privileges and Immunities Clause of U.S. CONST. art. IV, § 1 and the Equal Protection Clause of the Fourteenth

The unprovided case is one in which the laws of the forum and nonforum state differ, and are in conflict, but in which neither state can advance its interests by having its law applied.<sup>38</sup> In other words, in an unprovided case neither state is an interested state. In the paradigm unprovided case, the plaintiff's state's law favors the defendant, and the defendant's state's law favors the plaintiff. It is particularly important for judges to understand the distinction between the unprovided case and every other conflict configuration in which the laws of the two states differ. In particular, it is vital that judges see the distinction between the unprovided case and the false conflict at the uninterested forum. The resolution of the case depends on that difference.

Fourth, there is the "true conflict," in which the respective states' laws differ, are in conflict, and the application of each would advance that state's policies and interests.<sup>39</sup> In other words, both the forum and the nonforum state are interested states. These are the hardest cases.

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Amendment. These truths are at the very core of the argument for *lex fori*. On the other hand, I would argue that the forum at the plaintiff's residence, having defendant-favoring law, should not extend the benefit of its defenses to the nonresident defendant, for the reasons stated in the paragraph following note 141 in the text. Even worse are extensions of the law of an uninterested nonforum state, which in their nature tend to be speculative and in any event unauthorized. The fact that courts today seem only too willing to take it upon themselves to "extend" the law of an uninterested sister state, most often to the disadvantage of a plaintiff, hardly means that Currie's identification of the unprovided case was identification of a "myth." Cf. Larry Kramer, *The Myth of the "Unprovided-For" Case*, 75 VA. L. REV. 1045, 1047 (1989). It is a myth that Currie's unprovided case is a myth. Defenses are palpably intended to protect local enterprises making a valuable contribution to a state's economy. In the unprovided case neither state is an interested state, *ex hypothesi*. For an uninterested forum to purport officiously to rule that an equally uninterested sister state "would" extend a defense peculiar to itself to an enterprise in some third state would horrify Brainerd Currie, who abhorred all such officious speculation. The forum, although uninterested, is in a position to choose law for the case. The sister state is not. And the forum is not authorized or sworn to apply any law other than its own, much less to choose law for some other state. Making similar points, see Herma Hill Kay, *A Defense of Currie's Governmental Interest Analysis*, 215 RECUEIL DES COURS 9, 11 (1989). Moreover, if the forum purports officiously to extend nonforum law to benefit a defendant residing in a third state, as Larry Kramer, *supra*, contemplates, it would plunge headlong into the abyss of unreason and general dysfunction seen in such embarrassments as the *McCann* case, discussed *infra* notes 78–99 and accompanying text. For Currie's views see *infra* notes 92–94 and accompanying text.

38. CURRIE, *Married Women's Contracts*, *supra* note 5, at 128, 152–53.

39. The classic example is the familiar case of *Milliken v. Pratt*, 125 Mass. 374 (1877), the subject of *Married Women's Contracts*. The example is clearer if one disregards Massachusetts' subsequent repeal of its law depriving married women of the capacity to contract. Currie typically referred to law and facts at the time of events. This enabled him to read the Supreme Court case that today undergirds the whole field of conflict of laws, *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930), in a way that supports his ideas. It is the way most conflicts mavens read *Dick* today, and few would wish to disturb that reading of *Dick*. But *Dick* left Currie somewhat at a disadvantage in his thinking about *Milliken v. Pratt*, precisely because the incapacity defense that, in Currie's view, made the forum in *Milliken* an "interested" one had been repealed by the time of decision. Thus, in his last major conflicts paper, Currie can be found scolding Chief Judge Gray for allowing the subsequent repeal of Massachusetts' married women's contracts law to influence his opinion in *Milliken v. Pratt*. CURRIE, *Conflict*, *supra* note 26, at 731 n.131. *Dick* was tacitly overruled on the point in *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981) (holding, *inter alia*, that the residence of the plaintiff at the time of trial has power to determine her rights, whatever the power of her former residence at the place of events). See Louise Weinberg, *Conflicts Cases and the Problem of Relevant Time: A Response to the Hague Symposium*, 10 HOFSTRA L. REV. 1023 (1982).

The discovery of the false conflict, in particular, was a great standalone achievement, a permanent contribution to conflicts theory. Whatever else judges say they are doing, they tend to try to eliminate false conflicts first. They have grasped that lesson.

Unfortunately, judges also tend to suppose that no-conflict cases are false conflicts. They tend to view all other configurations of cases, including false conflicts, as “true conflicts” because the laws differ. We will often find judges attempting to resolve an unprovided case or a false conflict as if it were a true conflict,<sup>40</sup> eliminating only “no-conflict” cases from further consideration. Given this endemic confusion, the usefulness of a Restatement that would help judges understand the typology of conflicts cases cannot be overestimated. Without this help the sort of irrational and unjust outcomes seen in the cases discussed below will continue to plague the field.

This taxonomy is integral to the interest-analytic method of reasoning, and, in turn, interest analysis is essential to classification of a case within the taxonomy. Interest analysis, in other words, both creates and explains the new taxonomy. Although these ideas are interwoven, let me try to disentangle them here.

### III. DIFFERENT ANALYTICS

#### A. *The Method*

Interest analysis is an expression of a very old tradition in Anglo-American legal thought. The conflicts question, in the end, is about the scope of law: “Does either state’s laws cover this issue?” The only convincing way to determine a law’s scope, when the law’s limits are not set out in so many words, is to identify the reason for the rule. Once we know about a law’s likely purpose, we know its likely scope.

The purposive inquiry needed to identify the nature of a conflict of laws is quick and superficial, and the answer, as a result, is likely to seem merely intuitive. But we can verify our intuition by seeing how well the law we are analyzing is tailored to its putative purpose. This familiar way of reasoning has been the stock-in-trade of lawyers time out of mind. This is what Brainerd Currie meant, when he insisted that his way of thinking was just ordinary construction or interpretation. We see this purposive

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40. See, for a particularly perplexing example, *Kearney v. Salomon Smith Barney, Inc.*, 39 Cal.4th 95 (2006). *Kearney* was an action by two Californians for tortious violation, in California and in Georgia, of statutes protecting, to varying extents, against violations of communications privacy law. Reasoning that California’s privacy interests would be more seriously impaired than Georgia’s by non-application, the California court held that the California plaintiffs could recover nothing under the California law (!). The court “explained” that California’s privacy law must be interpreted so as to accommodate *all* states’ privacy concerns, then wound up accommodating none. For a similar exercise in California logic, see *infra* notes 78–99 (discussing *McCann v. Foster Wheeler, LLC*, 225 P.3d 516 (Cal. 2010)).

sort of reasoning dating back at least as far as the “mischief rule” first found in *Heydon’s Case* in sixteenth century England.<sup>41</sup> Ultimately, in the United States, interest analysis becomes constitutional analysis. That is because analysis of a government’s interest has to do with the *rational* application of its law, and rationality in application of law, of course, is a requirement of due process.<sup>42</sup> Indeed, the Supreme Court’s original use of the term “some rational basis”<sup>43</sup> has evolved in the Supreme Court into its synonym, “an interest.”

The further testing inquiry into the relation between ends (governmental purposes) and means (legislation, rule, executive action, etc.) appears in Alexander Hamilton’s report to George Washington on the power of Congress to charter a bank.<sup>44</sup> When the question of the constitutionality of the Bank of the United States came before the Supreme Court in the great case of *McCulloch v. Maryland*, Chief Justice Marshall adopted Hamilton’s position, memorably declaring, “Let the end [i.e., purpose] be legitimate, let it be within the scope of the constitution, and all means [i.e., legislation, rule, executive action, etc.] which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”<sup>45</sup> We see the same sort of ends-and-means thinking in constitutional cases in the Supreme Court today, whether the question is one of government authority, or of individual right.<sup>46</sup> In either case the

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41. See *Heydon’s Case*, 76 Eng. Rep. 637; 3 Co. Rep. 7 (1584) (articulating a “mischief rule,” to the effect that judges should determine the mischief for which the common law does not provide, an omission that the statute is intended to repair, “and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy”).

42. Cf. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 147 (1938) (holding, under the Due Process Clause of the Fifth Amendment and the Commerce Clause, that the nation has power to regulate interstate enterprises if there is “some rational basis” for the regulation); *Home Ins. Co. v. Dick*, 281 U.S. 397, 407–08 (1930) (holding, under the Due Process Clause of the Fourteenth Amendment, that an uninterested state cannot apply its own law).

43. The earliest use of “rational basis” found by Westlaw is *Magoun v. Ill. Trust & Sav. Bank*, 170 U.S. 283 (1898). References to governmental “interest” appear as early as *Osborn v. Bank of the United States*, 22 U.S. 738, 846 (1824) (Marshall, C.J., discussing state immunity, stating, “The interest of the State is direct and immediate”); *id.* at 870 (discussing the sovereignty of the United States, stating, “The interests of the United States are sometimes committed to subordinate agents” [citing cases]).

44. ALEXANDER HAMILTON, OPINION ON THE CONSTITUTIONALITY AND EXPEDIENCY OF INCORPORATING THE UNITED STATES BANK 3 (1791) (stating that “every power vested in a government, is, in its nature sovereign, and includes, by force of the term, a right to employ all the means requisite, and fairly applicable, to the attainment of the ends of such power, and which are not precluded by . . . the constitution, . . . or not contrary to the essential ends of political society”).

45. 17 U.S. 316, 421 (1819).

46. Compare *Carolene Products*, *supra* note 42 (holding, on the issue of government authority, that Congress has power to regulate the industries in the national economy) with *id.* footnote 4 (identifying cases requiring a stricter scrutiny of governmental interest, or, as we would say today, a *compelling* interest and narrower tailoring). This famous footnote also refers to cases asserting, as we would say today, a fundamental right, cases in which the political process is inadequate, and cases involving discrete and insular minorities for whom there is a difficulty in forming coalitions. Cf. Louise Weinberg, *A General Theory of Governance: Due Process and Lawmaking Power*, 54 WM. & MARY L. REV. 1057, 1083 (2013). For comment on the tendency of formalist thinking to blind even the Supreme

Court inquires into governmental interest, and then into the “tailoring” of the government’s means to its purpose.<sup>47</sup> If the law is overbroad it might sweep in innocent conduct. If it is under-inclusive it might be pretextual and discriminatory. Either way, law as applied needs to be probed for its rationality. Interest analysis is in this high Anglo-American tradition.

As deployed in conflicts cases, interest analysis is not some arduous, heavy-breathing inquiry into original understandings or collective intention, and it does not depend on close parsing of texts and contexts. We can set that antique dictionary back on its dusty shelf. In keeping with Currie’s emphasis on simplicity, interest analysis is a quick assessment of the objectively likely purposes of a law. The answer tends to be of the most general, reductive, and superficial kind. But then there is an equally superficial follow-up question about scope, and this may be what confuses lawyers and judges—especially those schooled in traditional choice rules. Although the question about purposes (i.e., “ends”) may make enough sense, the confusion seems to arise because of the follow-up question about scope. For those accustomed to more traditional ways of thinking about conflicts, this second question can be confounding. The reasoning seems to turn back on itself in a kind of feedback loop, an elegant little twist comprehensible only to initiates of some secret order of hyper-intellectuals.

Yet from day one in law school, lawyers are taught to ask, “what is the reason for the rule?” The only use of this common question is to enable us to come to a quick conclusion about the way the law functions, and thus about its likely coverage. It is a deft way to see at a glance how far a law goes. Deft as it is, it is powerful reasoning. Once we know a law’s likely purposes, we also know its likely scope, and that gives us power to argue that a party is within that law’s protections, or beyond that law’s prohibitions or mandates. Lawyers do this every day. Yet when faced with a conflicts case they are suddenly *baffled*.

### B. A Hypothetical Case

Consider the uses of interest analysis in the following hypothetical case, modeled loosely on an old casebook chestnut, *Babcock v. Jackson*.<sup>48</sup> A New York driver plans to drive to Ontario. One of her New York neighbors, with business in Ontario, accepts a lift from her. In Ontario the driver negligently crashes into a wall, seriously injuring her passenger. She has a liability insurance policy with a New York insurance company. Back in New York, she notifies her New York insurer of the accident, but

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Court in constitutional cases to the power and persuasiveness of traditional purposive reasoning, see Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945 (2004).

47. For a current dispositive use of the “narrow tailoring” test, see *McCullen v. Coakley*, 134 S. Ct. 2518, 2534–36 (2014).

48. 191 N.E.2d 279 (N.Y. 1963).

the insurer declines responsibility on the ground that, under Ontario law a driver is not liable for injuries to passengers. She informs her neighbor that she is not liable. He brings an action for personal injuries against her in New York, and, under the terms of the policy, the insurer comes in and defends. The insurer argues that, under the law of the place of injury, Ontario, there can be no recovery. Ontario has a guest statute barring recoveries for negligence in driving when the plaintiff is a passenger in the driver's car. But New York has no such bar to recovery. What law governs the case?

The old traditional rule, tersely laid down in the *First Restatement*, was that the law of the place of wrong governs the tort.<sup>49</sup> This is the sort of rule that Joseph Beale, reporter for the *First Restatement* (1834), felt to be inevitable,<sup>50</sup> since it had been the rule at least for a century, at least since Joseph Story's *Commentaries on the Conflict of Laws* (1834).<sup>51</sup> Under that traditional rule, Ontario law must be applied, and the passenger cannot recover. Under the rule of the *Second Restatement* (the completion of which lay in the future at the time of *Babcock*, but which existed in successively released parts in tentative draft),<sup>52</sup> a judge should determine the place of *most significant contact* with the case, in light of certain systemic considerations. However, according to the original *Second Restatement* of 1967, the place of most significant relationship presumptively was going to be the place of injury. So authority both new and old was pointing to the law of Ontario, the place of injury.

In *Babcock* itself, Judge Fuld, seeking to escape from the non-remedial consequences of Ontario's law, boldly departed from New York's "place of injury" rule, influenced by and in turn influencing the *Second Restatement* as it shaped up. Fuld purported to justify a choice of forum law by identifying the various contacts between New York and the facts. While he acknowledged Ontario's contacts with the case, he held that New York was the place of *most significant contact*. New York was the seat of the parties' relationship, and the trip was planned to begin and end in New York. Cases under this "center of gravity" sort of thinking can go either way. Back in 1963 Judge Fuld might well have chosen the law of Ontario to govern the case. After all, Ontario was the place of injury. The purpose of the trip was to get to Ontario. In driving negligently in Ontario the defendant caused an unsafe condition in Ontario, with an attendant risk of harm in Ontario to the passenger, not

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49. RESTATEMENT OF THE LAW OF CONFLICT OF LAWS § 378 (ALI, 1934).

50. *Id.*, § 377 cmt. a.

51. See STORY, COMMENTARIES, *supra* note 23.

52. See *Babcock*, 191 N.E.2d at 283 (stating that the "local law of the state which has the most significant relationship with the occurrence and with the parties determines their rights and liabilities in tort."). *Id.* at 283-84 (citing *Second Restatement*, Tent. Draft No. 8, § 379(1); adding, "The relative importance of the relationships or contacts of the respective jurisdictions is to be evaluated in the light of 'the issues, the character of the tort and the relevant purposes of the tort rules involved.'" (citing *id.*, § 379(2)-(3)).

to mention to innocent Ontario residents. The trip, whatever the parties' plans, came to its sad actual end in Ontario. Most pressingly, after considering Ontario's point of view, a judge might very well suspect that this was a *cozy lawsuit* to mulct a New York insurance company—a suit in which the defendant driver was happy to testify to her own fault, simply because the plaintiff is her neighbor, and because the money would come from the insurer, not herself.

With all this to consider, at best a judge must make a stab in the dark, like some blindfolded child at an old-fashioned birthday party, spun 'round three times and told to pin the tail on the "most significant" end of the donkey. In the actual *Babcock* case, Judge Fuld just managed to find the donkey's posterior, relying on earlier intimations that the place-of-injury rule did not work well in all cases. Equipped with interest analysis, however, we can see that the case was a *false conflict*. New York was *the only interested state*. Ontario's likely purposes involved the prevention of schemes to mulct insurance companies by manipulative lawsuits in Ontario's courts. But the manipulative lawsuit, if this was one, was not in Ontario's courts. There was no Ontario insurance company to protect. There were no residents of Ontario to deter from manipulating anything. Indeed, it is hard to think of any credible reason for Ontario's rule even if the parties had been residents of Ontario, since the rule was overbroad in light of its likely purposes. For example, the rule could not rationally apply to a case in which the passenger might have been a hitch-hiker, unknown to the driver. True, as the place of injury, Ontario had interests in compensating all who might be injured on her territory, if only in order to shift and spread risks that would otherwise fall on its residents and their dependents, and to be welcoming visitors.<sup>53</sup> But those interests could not have been advanced by *barring* a suit that would have vindicated them. Ontario was an uninterested state.

New York did have an insurance company to protect, but its legislature had not provided any such excuse for denying anyone the benefit of paid-up liability insurance. New York had every interest in remedying the injury to its resident plaintiff and in allowing its resident defendant to have the benefit of her liability insurance, fully paid for the very purpose of protecting her from having to pay damages herself. The New York insurer could hardly be surprised by its liability under well-established New York law. In short, since New York was the only interested state in a false conflict case, New York law was the only rationally applicable law.

It follows, indeed, that Ontario law would be *unconstitutional as applied*, if applied by New York in this case. A choice of the law of the

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53. The interests of the place of injury are safety-related interests, which can be vindicated in the courts of the place of injury, if the place of injury has plaintiff-favoring law. That is true no matter where the plaintiff resides. See *supra* text accompanying notes 141–42 for some of the logic behind this insight.

place of injury on these facts would lack the rational basis due process requires.<sup>54</sup> (I hasten to acknowledge, nevertheless, that our increasingly formalistic Supreme Court is unlikely to see this. To the Supreme Court, I believe, the force of the traditional choice of the law of the place of injury is going to make Ontario's numerous contacts *count* no matter what. The fact of contact makes the application of a contact state's law seem *reasonable*, especially if that state is the place of injury.)<sup>55</sup>

### C. *The Stacked Deck*

For some observers, purposive reasoning—interest analysis—is a stacked deck favoring the plaintiff,<sup>56</sup> and therefore unjust. After all, as they would point out, the purpose of law is usually to remedy some perceived wrong. It is plaintiffs who rely on it. The fact that defendants must acknowledge the pleaded facts for the sake of raising an affirmative defense is no reason, in this view, to privilege plaintiff-favoring law over defendant-favoring law. And, in this view, it does privilege plaintiff-favoring law to choose law in reliance on purposive, interest-analytic reasoning, instead of on abstract, “neutral” choice rules. To those who see purposive reasoning under this cloud, stacking the law in favor of plaintiffs is clearly not consonant with either reason or justice. How can law be just, they ask, if it is not evenhanded? From their perspective, the Due Process Clause has nothing to do with any of this. From their perspective, it makes no difference that law is in its nature remedial, deterrent, regulatory, or at the very least declaratory. They point out that all law, however remedial, must have some bounds. From their perspective, it does not matter that the parties to an action in tort are not similarly situated—that one is an alleged tortfeasor, the other an alleged tort victim. It does not matter that justice for a claimed right and accountability for a claimed tort are universally sought common goods, things beneficial in themselves.<sup>57</sup>

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54. See *Home Ins. Co. v. Dick*, 281 U.S. 397, 411 (1930) (holding, under the Due Process Clause of the Fourteenth Amendment, that an uninterested state may not apply its own law). The implication is that an interested state *may*, and in the false conflict case, probably *must* apply its own law, as a matter of due process. Federal district courts may sometimes prove more adroit with state conflicts law than the states themselves. Quite a bit of current interest-analytic jurisprudence concerns federal judicial administration of Pennsylvania's choice rules. Federal district courts not infrequently engage with Pennsylvania conflicts law and do a reasonable job with it. For example, in *Lewis v. Lycoming*, 917 F. Supp. 2d 366, 376 (E.D. Pa. 2013), a case in which lawyers argued respectively for Pennsylvania and English law, after a rocky start the District Court correctly held that Pennsylvania was the only interested sovereign in a false conflict case.

55. As Hans Baade once remarked to me, “The Supreme Court is not going to declare Joey Beale's *First Restatement* unconstitutional.”

56. See Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357, 366 (1992) (finding marked plaintiff-orientedness under modern methods).

57. Cf. Symeon C. Symeonides, *Choice of Law in Cross-Border Torts: Why Plaintiffs Win and Should*, 61 HASTINGS L.J. 337, 362 (2009).

Such considerations do not move the critics of purposive reasoning, because for them, neutrality, although long ago shown by the American Legal Realists to be an unattainable goal of law,<sup>58</sup> remains the *summum bonum*, the prime directive of judicial process. Neutrality trumps all substantive considerations of public policy. There is probably no way of changing minds on such issues—on both sides these are probably ideological predispositions. Nevertheless I will have something more to say below about neutrality.<sup>59</sup>

#### IV. THE LAW OF THE FORUM

From the foregoing, we can see that, having analyzed and classified a case, a court is in a position to reach a determinate resolution. This resolution embodies the system's most controversial characteristic—its dependence upon, and embrace of, the law of the forum. As gleaned from Currie's writings (and, as we shall see, from certain Supreme Court cases), the general rule is that the interested forum should apply its own law. The uninterested forum should also apply its own law, if the other state is an uninterested one. In other words, forum law is required in virtually every case, although the Supreme Court is unlikely to say so. We will be examining the resolution of cases in some detail in the next Part. Here, we will be discussing the general problem of forum preference in conflicts cases.

##### A. A Very Controversial Choice

Currie's critics consider his general prescription for *lex fori* to discredit interest analysis utterly. Although, for Currie, forum law in every nonfalse conflict case is "the only clearly constitutional choice,"<sup>60</sup> for his earliest critics,<sup>61</sup> *lex fori* was and remains a "give-it-up"

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58. See Walter Wheeler Cook, *An Unpublished Chapter of the Logical and Legal Bases of the Conflict of Laws*, 37 ILL. L. REV. 418, 420 (1943) [hereinafter Cook, *An Unpublished Chapter*] (showing that uniformity, neutrality, and justice are mutually incompatible); CURRIE, *Married Women's Contracts*, *supra* note 5, at 120 (acknowledging that the result of governmental interest analysis, unhappily for the quest for uniformity, will depend upon the forum: "That is not a satisfactory result, but, the ideal being unattainable, it is the one that makes the most sense; it is better than chasing rainbows.").

59. For an explanation of the mutual incompatibility of neutrality with uniformity and predictability, see Cook, *An Unpublished Chapter*, *supra* note 58; and see *infra* Part VIII, note 213 and accompanying text.

60. CURRIE, *Married Women's Contracts*, *supra* note 5, at 119 ("The sensible and clearly constitutional thing for any court to do, confronted with a true conflict of interests, is to apply its own law. . . . [A] court should never apply any other law except when there is a good reason for doing so. That so doing will promote the interests of a nonforum state at the expense of the interests of the forum state is not a good reason.") (emphasis added).

61. See, e.g., Alfred Hill, *Governmental Interest and the Conflict of Laws—A Reply to Professor Currie*, 27 U. CHI. L. REV. 463, 481–502 (1960).

philosophy<sup>62</sup>—a surrender, not a solution. Most seriously, *lex fori* is perceived as hopelessly plaintiff-biased.<sup>63</sup>

Well, it *is* plaintiff-biased. Plaintiffs have enjoyed a traditional litigational advantage in their option of choosing the place of trial. Or at least they have had such an option until the Supreme Court launched its current offensive against general jurisdiction.<sup>64</sup> *A fortiori*, plaintiffs driven to sue the defendant where the defendant is “at home”<sup>65</sup> are certainly not shopping, and can expect to be confronted with defendant-favoring law, since the defendant has had the option of “shopping” for a defendant-favoring “home” in advance.

Although we can be reasonably certain that the Supreme Court will never say this, forum law is *constitutionally required* in all but one small class of cases: false conflicts in which the forum is the uninterested state. Forum law in every other case is either required by the Constitution or by constitutional principles—“postulates which limit and control.”<sup>66</sup> The law of the forum is the only clearly constitutional choice, even in certain cases in which the forum lacks an interest, as I will show. We will return to the constitutional issues in Part VII below.

### B. *The Fiddle with One String*

I pause to note the possible objection that, with all this emphasis on forum law, there seems to be little or no use for the proposed taxonomy of kinds of conflicts cases. Why base a Restatement of interstate conflicts law upon a taxonomy of four kinds of conflict if the outcome is almost

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62. CURRIE, *Married Women's Contracts*, *supra* note 5, at 121.

63. *See, e.g.*, Lea Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, 46 OH. ST. L.J. 459 (1985); Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 398–99 (1980). *See also, e.g.*, Michael E. Solimine, *An Economic and Empirical Analysis of Choice of Law*, 24 GA. L. REV. 49 (1989) (making an affirmative case for a return to territorialist choices of law).

64. *See, e.g.*, Tanya J. Monestier, *Where is Home Depot “At Home”?: Daimler v. Bauman and the End of Doing Business Jurisdiction*, 66 HASTINGS L.J. 233 (2014); Charles W. “Rocky” Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207 (2014); Kate Bonacorsi, Note, *Not at Home with “At Home” Jurisdiction*, 37 FORDHAM INT’L L.J. 1821 (2014).

65. *Cf. Daimler AG v. Bauman*, 134 S.Ct. 746, 751 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S.Ct. 2846, 2857 (2011).

66. For this language *see* *Monaco v. Mississippi*, 292 U.S. 313, 322 (1934). The discriminations involved in departures from forum law are the subject of Brainerd Currie’s well-known twin articles co-authored with Herma Hill Kay (then Schreter). Brainerd Currie & Herma Hill Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Equal Protection*, 28 U. CHI. L. REV. 1 (1960), reprinted in BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 526 (1963) [hereinafter Currie & Schreter, *Equal Protection*]; Brainerd Currie & Herma Hill Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, 69 YALE L.J. 1323 (1960), reprinted in BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 449 (1963) [hereinafter Currie & Schreter, *Privileges and Immunities*]. *See also* Weinberg, *Against Comity*, *supra* note 24; Louise Weinberg, *Insights and Ironies: The American Bhopal Cases*, 20 TEX. INT’L L.J. 307 (1985); Louise Weinberg, *On Departing from Forum Law*, 35 MERCER L. REV. 595 (1984).

always the same?<sup>67</sup> However, the *Second Restatement* with its general subservience to the single rule of the “place of most significant relationship,” or “most significant contact,” is subject to the same objection. Controversy worthy of respect surrounds every concept informing the systematics described here, just as such controversy surrounded every concept informing the systematics of previous Restatements, and will require similar fleshing out with notes and comments on each variant conflict configuration, just as such notes and comments fleshed out previous Restatements.

The more important point is that too many courts are choosing law on grounds that make scant sense. They are getting it wrong, and it should be a major goal of any new Restatement to help them get it right. Too many judges believe that the only false conflicts are no-conflict cases, in which the laws of the two concerned states are the same or in which the result would be the same.<sup>68</sup> This could be suffered, perhaps, were they not identifying all other cases as true conflicts because the laws differ. That is, they are identifying all categories in the taxonomy, except the no-conflict case, as true conflicts—because the laws differ in all three categories.

Yet in a false conflict, there is only one interested state—although the laws differ. In an unprovided case, neither state is interested—and yet the laws differ. True conflicts are the only conflicts that courts are right to identify as true conflicts—but not *because* the laws differ, although they do, but, rather, because each of the two states is an interested state. The fact that the laws of two states differ will not differentiate a true conflict from a false conflict or an unprovided case. An “interest” is not a contact. Nor is it the policy of a law. A state is an interested state if it has a factual and policy basis for applying its law to the litigated issue in the particular case. The pervasive judicial confusion about all this is producing unjust and irrational results.

Analysis of each concerned state’s legitimate governmental interest (in having its particular law applied to the particular facts) is necessary to both the classification and the resolution of a putative conflict of laws. This analysis will also help to justify the resolution of the conflict to the losing party. Such analysis can deliver extraordinary explanatory power.

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67. Of course, there will be successive tentative drafts on different parts of the project, their black letter, notes, and comments derived with the help of the Advisory Committee and the Members’ Advisory Group, and debated at large on the floor of the Institute at annual meetings of the membership.

68. *See, e.g., Siga Techs., Inc., v. Pharmathene, Inc.*, 67 A.3d 330, 342 n.36 (Del. 2013) (concluding that the case presented a false conflict because the respective laws were the same or would turn out the same in effect); *Erwin v. Cotter Health Ctrs.*, 167 P.3d 1112, 1120 (Wash. 2007) (same). The misunderstanding is more widespread than these two randomly selected instances might suggest. Yet specific identification of a false conflict is a necessity, since in a false conflict only the law of the interested state can rationally apply.

## V. NEW DETERMINATE RESOLUTIONS

A. *Prescriptions*

The following are interest-determined prescriptions for each kind of conflict.

1. In the no-conflict case, when the laws of the two states are the same, or would yield the same result, forum law should apply. Although courts think it makes no difference, it is important for the forum to be clear that it has provided its own law and thus has avoided discrimination or other irrational departure from its own law (and, incidentally, has avoided setting a misleading precedent).

2. In false conflict cases, only one state is interested, and the forum must apply the law of the only interested state. When the forum is the only interested state, its law applies. But the uninterested forum in a false conflict case must apply the law of the other state, the only interested state.<sup>69</sup> In such cases, since there is no rational application of the uninterested forum's law, and since due process requires a rational basis, the Constitution clearly requires the law of the only interested state.<sup>70</sup>

3. In the true conflict case, the interested forum must apply its own law.

4. Even in the unprovided case in which neither state is an interested one,<sup>71</sup> the forum should apply its own law.<sup>72</sup>

*The interested forum must apply its own law.* It is an axiom of the system that the interested forum must apply its own law. This is a conclusion that first Currie, then Currie and Schreter together,<sup>73</sup> and then others including myself,<sup>74</sup> have reached after giving the problem some thought, and after putting together Supreme Court cases on the Constitution and the conflict of laws. There is no reason why a plaintiff who might have been allowed to prove her case had she been injured by a resident, should lose her right to a day in court, or see a jury verdict in her favor reversed, simply because she was injured by a nonresident,

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69. Modernists might suggest that there is another exception to forum law, but the proffered exception is no exception at all. It involves cases in which the forum discerns "better law" (i.e., more remedial law) in the other state. For the argument that this perception marks the forum's own true policy, and therefore *is* forum law, and that the forum should consciously *adopt* rather than "choose" it, see *infra* Part IV(G) (discussing local law theory). See also *infra* note 141 and accompanying text.

70. *Home Ins. Co. v. Dick*, 281 U.S. 397, 410–11 (1930) (holding, on the generally accepted reading, that the irrelevant contact state may not apply its own law).

71. See, e.g., *Langelle v. Bell Helicopter Textron, Inc.*, No. 10C–12–054, 2013 WL 5460164 (Del. Super. Ct. Oct. 1, 2013). The case is discussed *infra* notes 124–29 and accompanying text.

72. Although the Supreme Court is not expected to say this, it is a conclusion required under principles of equal protection, access to courts, and the Privileges and Immunities Clause of U.S. CONST. art. IV, § 2, as well as the Equal Protection Clause of the Fourteenth Amendment. There are also solid policy arguments for forum law in the unprovided case. See *infra* Part VI.E.

73. See Currie & Schreter, *Equal Protection*, *supra* note 66; Currie & Schreter, *Privileges and Immunities*, *supra* note 66.

74. See articles cited *supra* note 29.

whether or not his home state has different ideas. The nonresident's home state remains free to apply its own law in its own courts, but it may not extend its reach to frustrate the policies of some other state in its own courts. No other rule is consonant with the dignity and autonomy of each sovereign state.

There is one qualification to these prescriptions. A way should be found to acknowledge and receive perceived "better law" (i.e., more remedial law) at the other state. The very perception of better law suggests that it is actual forum policy. If it is not possible to *adopt* the better rule outright, the forum should attempt to reinterpret or revise its own inferior rule.

Currie's work is commonly read to imply that the interests of the forum be considered *first*. At the same time, Currie insists on the importance of identifying the respective policies and interests of every concerned contact state. Nevertheless, if the forum is an interested state, the concerns of the other state in a two-state case need not, should not, and indeed, must not be allowed to deflect the interested forum from application of its own law. *The interested forum must apply its own law*. The reason the other state's law is also analyzed is that it is important to classify a case within the new taxonomy in order to reach, explain, and justify the result.

Forum law needs particular emphasis in true conflict cases, given the pressure of state interests elsewhere, and given the commentators' familiar recommendation that our courts deploy accommodating approaches in true conflicts cases.<sup>75</sup> The forum is rightly counseled to take "a moderate and restrained view" of the reach of its own non-remedial laws.<sup>76</sup> But it is also urged, as noted previously, to compare speculative "impairments" to policy engendered in either state by non-application of its law. Or it is urged to consider the needs of the interstate system, or of comity, and so on.<sup>77</sup> The problem is made acute by the tendency of courts to classify as true conflicts all cases in which the laws of two concerned states differ—that is, in all cases that courts see as conflicts cases. Since a plaintiff's traditional litigational advantage lies in its option to choose the place of trial—an option, in effect, to secure plaintiff-favoring law, the commentators' advice to "accommodate" the law of the other state, if followed, in the long run will produce consistent *defendant* bias. But even

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75. A quick glance at some other contributions to this Symposium is likely to demonstrate the accuracy of the observation.

76. See CURRIE, *Married Women's Contracts*, *supra* note 5, at 116. Although Currie was against "weighing" interests, he favored "moderation" in the interpretation of forum law. His effort in this regard was to improve the legal process by limiting the reach of retrograde defenses at the forum. In *Married Women's Contracts*, he was talking about the possibility of avoiding extending an outdated but rationally applicable forum defense to defeat an out-of-state contract creditor. It needs to be understood that Currie would not have favored the forum's construing away its own *remedial* law when the particular plaintiff was within the law's rational application.

77. See the discussion in Harry Litman, Comment, *Consideration of Choice of Law in the Doctrine of Forum Non Conveniens*, 74 CALIF. L. REV. 565 (1986).

that would be acceptable if the results in actual cases did not, all too often, seem simply irrational. Here is a startling current example.

### B. McCann

California early opted for a view of the comity due other states, a view that now borders on extreme. Perhaps the worst recent example I have seen is *McCann v. Foster Wheeler, LLC*<sup>78</sup> in the California Supreme Court. In that case, the plaintiff, a long-time California resident, had become ill with asbestos-related disease, first manifesting itself in California. He had been exposed to asbestos many years previously, working on a construction site in Oklahoma, where he resided at that time. On the construction site, he had been put to work assembling a huge boiler or generator sent to the jobsite by the defendant, a New York manufacturer. The asbestos in the case was in that piece of equipment. The defendant New York manufacturer relied on the law of the place of injury, Oklahoma, which contained a statute of repose for the construction industry with respect to “improvements” on “real estate.”<sup>79</sup> The statute insulates construction companies building “improvements” on “real estate” from asbestos liability after ten years from the date of exposure. Since this is too short a period of incubation for asbestos cases, or even for an injured party to realize that he or she has been injured, Oklahoma construction companies are, in effect, completely insulated from liability in asbestos litigation. Neither California nor New York had enacted such a law. California’s view, like New York’s, is that, since workers are limited to workers’ compensation as against their employers, and since the makers of asbestos are largely gone from the scene, the further costs of asbestos-related illness are best placed on the companies using it in their manufactures. These costs can be spread by insurance, and the costs of insurance spread over the customer base as a cost of doing business. This regime is obviously preferable to allowing most of the risk of asbestos injury to fall on the injured and their innocent dependents.

In *McCann*, if each party had relied on its own state’s law, there could have been no conflict. Neither California nor New York would deny a plaintiff access to court in an asbestos case because ten years had passed since the time of exposure. Had each party relied on its own state’s law, the case could have gone forward on the merits. California clearly had an interest in allowing its own resident a chance to prove his case in his own state’s courts. New York would have been equally hospitable to the Californian. But the New York manufacturer was relying, not on New York law, but rather on the law of the place of injury, Oklahoma, its ten-year statute of repose.

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78. 225 P.3d 516 (Cal. 2010).

79. *Id.* at 521.

It seems fair to say that a straightforward reading of the Oklahoma law would be as a protection for construction companies, not boiler makers, since that is what the statute said. It would also be fair to presume that the only intended beneficiaries of the legislation were Oklahoma construction companies. As place of injury, without more, Oklahoma had no interest in extending its local construction industry's protections to New York boiler-makers. Oklahoma, of course, was free to interpret its law broadly in its own courts, even interpreting "improvements" on "real estate" to cover Oklahoma-made boilers, or even to cover nonresident construction companies building on Oklahoma real estate. The California court, at the wildest possible stretch, speculated that Oklahoma would extend its defense of repose to shield a *non-resident non-construction* company shipping *non*-"improvements" to Oklahoma. With some strain, then, this might be considered a true conflict. But reading *McCann* without strain, it was obviously a false conflict, and California was the only interested state. This had also been the view of the Court of Appeals below.<sup>80</sup>

Reversing, the California Supreme Court (unanimously!) wound up applying Oklahoma law, to protect a New York company in which neither California nor Oklahoma had any interest. The high court achieved this feat by accepting the New York company's argument, rejected in the court below, that Oklahoma "would" extend its construction-industry protection to a New York maker of boilers,<sup>81</sup> even though New York itself offered its boiler makers no such protection. According to this theory, Oklahoma "would" do this to encourage nonresident companies to do business with Oklahoma. But the court could cite only one unconvincing Oklahoma case for such a speculation;<sup>82</sup> and the language of the statute itself offered scant support for it. Even if Oklahoma *would* extend its own law in such a case, California judges with a California plaintiff on their hands were hardly called upon to deny him a chance prove his case because Oklahoma just might.

Oklahoma's actual interests were hardly well served. Why on earth would Oklahoma want to invite dangerous products into its territory? Why would Oklahoma want to expose Oklahoma workers to contaminated New York products? Why would Oklahoma want to create competition injurious to valuable local enterprises engaged in making boilers? But even supposing the court to have been correct about what Oklahoma "would" do, how did that justify California in withholding the benefit of California law from a sick Californian? Even if the California

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80. *Id.* at 519–20.

81. *Id.* at 530.

82. The California court cited an Oklahoma case unconvincingly extending the construction statute of repose to a crane designed specifically for the construction site. But neither a crane nor a boiler nor a generator, however, huge and however specific its specifications, is what, for example, property tax authorities call an "improvement to real estate," the statutory term. This is a term of art usually describing a building.

court were correct about Oklahoma's interest, what difference should *any* interest of Oklahoma's have made to California's own law and policy? California's substantive products liability law in this regard was buttressed by the analogy of its borrowing statute, which made an exception to the borrowing of shorter statutes precisely to accommodate its own overriding remedial policy in just such cases as *McCann*.<sup>83</sup>

The California Supreme Court jumped to the bizarre conclusion that this imagined pro-disease, anti-local Oklahoma policy would be more comparatively impaired by non-application of its protections to a New York company, than California's policy of compensating sick Californians would be impaired by non-application to a sick Californian. Good grief. What about the drain on California's governmental and charitable resources? What about the Californian's pain and suffering right now? What about the likely windfall to some New York insurer bestowed so generously by the court out of the pocket of the suffering Californian?

Stretching interpretation, not of California's own law, but of Oklahoma's, seems not only irrational in *McCann*, but also officious, flying in the face of democratic theory and federalism theory, inexplicable on any theory. (I much regret having to disagree with Dean Symeonides about this.)<sup>84</sup> The California judges were not sworn to enforce any other state's law but their own. California's legislature could not enact Oklahoma law. I will have more to say below about the political theoretical problems that accompany departures from forum law.

*Apropos* of *McCann*, it is relevant that the United States Supreme Court has held that a state may vindicate its after-acquired but current interests in its own courts, on behalf of a resident who has moved to the forum away from her former residence at the place of events.<sup>85</sup> Whether or not, under a state's law, some rights "vest" at a time certain in the past, the governmental interests of a state at the time of decision are also real. Those interests no doubt include honoring vested rights, but also include the welfare of people residing within the state today, in the here and now.

In *McCann*, California was the only interested state, and thus its law was the only rationally applicable law—and thus, California law was

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83. *McCann*, 225 P.3d at 526–27.

84. Dean Symeonides thought *McCann* "well-reasoned," and, indeed, the "most noteworthy development" of its year. Symeon C. Symeonides, *Choice of Law in the American Courts in 2010: Twenty-Fourth Annual Survey*, 59 AM. J. COMP. L. 303, 328 (2011). *But see* Kay, *Currie's Interest Analysis*, *supra* note 12 (arguing that California is mishandling interest analysis). Evidently the state the policy of which is more comparatively impaired, like the place of most significant relationship, lies in the eye of the beholder. *See* Russell J. Weintraub, *Comments on the Roundtable Discussion of Choice of Law*, 48 MERCER L. REV. 871, 885 (1997).

85. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 319 (1981). *See generally* Louise Weinberg, *Conflicts Cases and the Problem of Relevant Time: A Response to the Hague Symposium*, 10 HOFSTRA L. REV. 1023 (1982) [hereinafter "Weinberg, *Relevant Time*"].

required as a matter of due process.<sup>86</sup> Forum law was the only clearly constitutional choice.<sup>87</sup> Brainerd Currie warned of the problem of discriminatory departures from forum law even as he suggested, under the apparent influence of the admired California jurist Roger Traynor, that the interested forum take a “moderate and restrained” view of the reach of its own law.<sup>88</sup> Currie even took a dim view of attempts to apply law the forum might perceive as “better.”<sup>89</sup> The fact that there is more remedial law elsewhere is not a good reason, he felt, for discrimination against a resident defendant, unless the forum reinterprets or construes away its own law, or adopts the other state’s more remedial policy as its own.<sup>90</sup> Given current Supreme Court cases tending to force plaintiffs to a place where the defendant is “at home,”<sup>91</sup> and given that home’s probable defendant-favoring law, the proposal for adoption of better, remedial law, whenever within the forum’s power, gains urgency.

C. *Against Subjunctive Maunderings and “Additional Thinking”*

One additional point about choice of law in *McCann*. In *McCann*, the court’s conjectures in the subjunctive about what Oklahoma “would” do comprise a veritable display of what is wrong with all such speculative subjunctive maunderings, and show why Currie rejected the *renvoi*.<sup>92</sup> The *renvoi* in conflicts law is the attempt to achieve a return to forum law, or, more broadly, to find better law than is available at the reference nonforum state. The forum hypothesizes speculatively that the reference state “would” apply forum law, or some other state’s law. Such subjunctive maunderings about what a reference state “would” do are not to be indulged under the proposed new systematics. It is no goal of interest analysis that the forum achieve psychological conformity with distant judges. There is no virtue in interstate harmony when it is simply another name for door-closing. The goal of interest analysis is to

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86. See *infra* Part VII; see also Louise Weinberg, *Unlikely Beginnings of Modern Constitutional Thought*, 15 U. PA. J. CONST. L. 291, 310 n.94 (2012) (discussing Supreme Court constitutional conflicts cases in part as founding modern rational-basis theory).

87. See CURRIE, *Married Women’s Contracts*, *supra* note 5, at 119.

88. E.g., CURRIE, *Conflict*, *supra* note 26, at 718 (commenting on *Bernkrant v. Fowler*, 360 P.2d 906 (Cal. 1961)).

89. CURRIE, *Married Women’s Contracts*, *supra* note 5, at 119.

90. See Weinberg, *Theory Wars*, *supra* note 29, at 1655 (arguing that the forum should adopt rather than apply “better” nonforum law); Weinberg, *A Structural Revision*, *supra* note 17, at 501–02 (arguing that the *Second Restatement’s* Section 6 should encourage adoption rather than application of nonforum law); Weinberg, *Against Comity*, *supra* note 24, at 89 (arguing that the interested forum cannot depart from its own law without effecting a change in its law as a practical matter); Weinberg, *On Departing*, *supra* note 30, at 601 (arguing that the forum departing from its own law based on some purportedly neutral choice rule should change its law overtly).

91. See *supra* notes 64–65.

92. CURRIE, *Methods and Objectives*, *supra* note 9, at 184 (stating that “there can be no question of applying anything other than the internal law of the nonforum state.”). See *supra* note 37 on the myth that that the unprovided case is a myth; see also Parts V.B., VI.B, D, and F. (discussing, respectively, the *McCann*, *Hodgkiss-Warrick*, *Rowe* and *Langelle* cases).

determine, first, the interests of the forum, then the kind of conflict the forum confronts considering the nature and effect of nonforum law, and then to reach the recommended determinate resolution.

The most important feature of the interest analyst's rejection of all such additional thinking about identified state interests is the rejection of the pervasive notion that interests, once determined, should be *weighed* or *balanced*. Currie refused to countenance the weighing or balancing of identified interests.<sup>93</sup> In this he followed the United States Supreme Court, observing that, notwithstanding national lawmaking power to weigh conflicting state interests, the Supreme Court declines to do so in conflicts cases.<sup>94</sup> The power of the forum is all that the Due Process Clause can measure. That constitutional understanding undergirds the entire interest analytic system.

But I return to *McCann*. There is something more to be said about that case.

#### D. A Whiff of Politics

Out of the blue, the *McCann* court went on to identify a new territorial limit on California's product liability law.<sup>95</sup> With this, *McCann* suddenly became much more important than a mere choice-of-law case. Almost as if in passing, the California high court, in a sweeping *obiter dictum*, ruled that in future a defendant would be responsible only "for exposing persons to the risks associated with asbestos or another toxic substance through its conduct in California."<sup>96</sup> This "would allocate to California the predominant interest in regulating the conduct."<sup>97</sup>

It is not too much to say that there is more at work here than hostility to asbestos litigation, and indeed to strict product liability altogether. The California court's determination to protect even California companies from the consequences of tortious conduct, as long as they do it elsewhere, suggests a variant on Currie's characterization of a choice rule denying to nonresidents recovery in wrongful death suits as "a license to kill."<sup>98</sup> The California court's rule is a license to resident and nonresident companies alike to kill residents and nonresidents alike—as long as the said companies mix their fatally toxic brew out of state. And, as the Chief Justice indicated, California's territorialist *coup de grâce* is not limited to asbestos litigation, but extends to all "toxic" products liability.<sup>99</sup>

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93. CURRIE, *The Constitution*, *supra* note 5, at 191.

94. *Id.* at 192–94.

95. *McCann v. Foster Wheeler L.L.C.*, 225 P.3d 516, 534 (Cal. 2010).

96. *Id.* at 536.

97. *Id.*

98. CURRIE, *Conflict*, *supra* note 26, at 703 & n.44.

99. This might even suggest a possible need in California for judicial electoral campaign finance reform, depending on the date of appointment of the judges responsible for *McCann*. California

## VI. SOME PROBLEMS OF REASONING

A. *Undervaluing the Place of Events*

It sometimes happens that, in rejecting traditional choice rules, a court will overreact and discount its own remedial interests when it is the place of injury without other connections with a case. Yet the place of injury has plaintiff-favoring interests in safety that empower it to apply its own law if it has plaintiff-favoring law. Indeed, some writers go so far as to argue that when the forum is the place of injury and has no other contact with a case, its underlying remedial interests kick in even when it has *defendant*-protecting law. In this view, having no defendant to protect, the place of injury's defendant-protecting law is magically deleted, and the state's general tort rules, like a sleeping giant, awaken and can be enforced. Currie, however, as we have seen, would stop analysis at its first stage, and would see the place of injury squarely for what it is. Having defendant-favoring law but no defendant to protect, that place of injury is simply an uninterested state. As we have seen, Currie generally disapproved of what I call "additional thinking." Interest analysis ceases after the initial determination of the policies and interests grounding the existing laws of the respective states.<sup>100</sup> This position helps to endow this analytic method with its simplicity, orderliness, clarity, and consistency.

Granted, it can seem quite *reasonable* for the forum, although it is the place of injury, to depart from its own law, when the other concerned state is clearly *the place of most significant contact* with the case and the parties, considering all the contacts that state has with the case. This is especially so since courts have not hesitated to call the place of injury merely "fortuitous" or "adventitious," even when the forum is the place of injury and has plaintiff-favoring law.<sup>101</sup> *Reasonableness*, however, is not quite the same as *rationality*.<sup>102</sup>

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appellate judges, although appointed, must stand for re-election in the next gubernatorial election after their appointment. *Judicial Selection in the States: California*, NCSC, [http://www.judicialselection.us/judicial\\_selection/index.cfm?state=CA](http://www.judicialselection.us/judicial_selection/index.cfm?state=CA). (last visited Jun. 16, 2015). Cf. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (holding that campaign contributions are political speech protected by the First Amendment); *Caperton v. Massey Coal Co.*, 556 U.S. 868 (2009) (holding, before the decision in *Citizens United*, that it is a denial of due process for an appellate judge to fail to recuse himself in a case in which one of the parties had contributed \$3 million to his electoral campaign). *Caperton* illustrates the problem *Citizens United* now poses for the appearance of neutrality in our state elected judiciaries.

100. See CURRIE, *Methods and Objectives*, *supra* note 9, at 184 (rejecting additional thinking in favor of definite identification of the nature of a conflict at the first and only stage of analysis, thus rejecting *renvoi* and interest-balancing as creating "artificial problems"); see also CURRIE, *The Constitution*, *supra* note 5, at 193–94 (rejecting the weighing of state interests). See generally *supra* Part V(C).

101. For an amusing riposte, see Judge Keating's exasperated remark in the old casebook case of *Tooker v. Lopez*, 249 N.E.2d 394, 399–400 (1969):

The dissent is, of course, correct that it was 'adventitious' that Miss Tooker was a guest in an automobile registered and insured in New York. For all we know, her decision to go to Michigan

B. *Reasonableness versus Rationality: Hodgkiss-Warrick*

Consider, in thinking about the forum as the place of injury alone, the 2013 *Hodgkiss-Warrick* case in the Kentucky high court.<sup>103</sup> In that case, Kentucky was the place of injury, but Pennsylvania was both the place of contracting and the joint domicile of the parties.<sup>104</sup> It would be reasonable to conclude that Pennsylvania was the place of “most” significant contact with the case.<sup>105</sup> Certainly, as joint domicile, Pennsylvania would have to apply its own law in its own courts. We would have to say that the choice of Pennsylvania law in the case was *reasonable*. The Kentucky high court, reversing the appellate judgment below, applied Pennsylvania’s family-immunity rule to deny underinsured motorist coverage to the Pennsylvania plaintiff.<sup>106</sup> In part, the Kentucky court thought Pennsylvania would have been concerned about the preservation of insurance assets for less cozy lawsuits than a suit between family members.<sup>107</sup>

But, reasonable or not, the choice of nonforum law in *Hodgkiss-Warrick* was irrational and unjust. In theory, it was unconstitutional. This was a true conflict case. Kentucky, the forum state, had recently adopted the better remedial view permitting intra-familial claims. And in *Hodgkiss-Warrick*, Kentucky, even solely as place of injury, had safety interests which could be vindicated by its own newly compensatory law.<sup>108</sup> Those interests extended to nonresidents as well as residents,<sup>109</sup> and fully empowered Kentucky to apply its own law. All this puts one in mind of Currie’s remark, “Where but in the conflict of laws can courts talk themselves so plausibly into indefensible results?”<sup>110</sup>

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State University as opposed to New York University may have been ‘adventitious’. Indeed, her decision to go to Detroit on the weekend in question instead of staying on campus and studying may equally have been ‘adventitious’. The fact is, however, that Miss Tooker went to Michigan State University; that she decided to go to Detroit on October 16, 1964; that she was a passenger in a vehicle registered and insured in New York; and that as a result of all these ‘adventitious’ occurrences, she is dead and we have a case to decide.

102. For an example of a true conflict in which Pennsylvania, the forum state, was also the place of injury, but Florida, the nonforum joint domicile was also the place of contracting, see *Esurance Ins. Servs. v. Weber*, 30 F. Supp. 3d 351 (E.D. Pa. 2014) (holding that Florida’s concerns outweighed Pennsylvania’s). No doubt Florida had more contacts, and even more significant contacts with the case than had Pennsylvania. *Id.* at 358–59. But the case was about a family-law exclusion imposed by the domicile, Florida, that was opposed to the forum state’s interest in compensating victims of accidents in its territory. *Id.* at 355. Pennsylvania was constitutionally empowered to disregard Florida’s family exclusion, and the district court’s decision on the point discriminated without good reason against the nonresidents. That another state has “more significant” contacts with a case is not a good reason for displacing applicable forum law.

103. *State Farm Mut. Auto. Ins. Co. v. Hodgkiss-Warrick*, 413 S.W.3d 875 (Ky. 2013).

104. *Id.* at 879.

105. *Id.*

106. *Id.* at 880.

107. *See id.* at 882.

108. *See id.* at 887.

109. *See supra* note 29 and works cited.

110. Brainerd Currie, *Justice Traynor and the Conflict of Laws*, 13 STAN. L. REV. 719, 726 (1961), reprinted in BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 629, 636 (1963).

There is a great difference between the *reasonableness* created by a state's strong contact or multiplicity of contacts with a case, and *rationality*.<sup>111</sup> A contact, such as the joint domicile, certainly leads to the reasonable conclusion that the state so connected with a case is an interested one. But contacts that make a choice seem reasonable cannot justify departures from the law of an interested forum. In a case like *Hodgkiss-Warrick*, if the forum's discrimination against the nonresident can be shown to be (at least in theory) unconstitutional, it will be because it was *irrational*—that it was for no relevant reason, whatever its seeming reasonableness.

Furthermore, reasonable choices that may seem to justify a departure from forum law may not seem quite so reasonable when the consequences of a departure from an interested forum's law are taken into account. *A priori* there would seem to be little reason in an uninsured motorist case to deny damages to an injured individual whose insurance is fully paid up, as the *Hodgkiss-Warrick* court did, on the thinking that this would preserve the assets of a multistate insurer, no matter what the status of the plaintiff or how cozy the lawsuit. The insurer has every opportunity (and the best actuarial skills and resources) to assess the full costs of uninsured motorist coverage and of litigation at a remedial forum, and to spread those costs in the premium charged. This last consideration would seem to be particularly persuasive in the absence of evidence that in family-immunity states the identical insurance is cheaper.

As a rule, in true conflict cases generally, cases in which, by definition, both states are interested states, a choice of nonforum law can seem irrational notwithstanding the other state's interest. How does it comport with reason to withhold the benefit of a state's own law from its own resident in its own court in order to accommodate the less remedial law of a defendant's chosen place of operations, chosen for its permissive regulatory environment? How does it comport with reason to allow a windfall to the insurer, and to cause an insured to lose the benefit of paid insurance? How is it just to allow a tortfeasor to escape even nominal responsibility for a proved injury? To validate a tortious act? To reverse a jury verdict finding injury, causation, and fault, as facts? To allow the unspread risk of a tort to fall entirely on the injured resident, her innocent dependents, and the resources of the forum state? To turn a blind eye to, or invalidate the claims of, a contract creditor? Beyond these symptoms of dysfunction, we will see the judicial oath flouted, legislation unenforced, and very possibly discrimination against nonresidents or among residents. We will see courts losing any

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111. Cf. CURRIE, *Change of Venue*, *supra* note 31, at 436 ("Not only are choice-of-law rules detached from [local] law, but 'policy' in turn is detached from choice-of-law rules.").

appearance of neutrality,<sup>112</sup> and a race to the regulatory bottom. How, in *McCann*, did it comport with reason to withhold the benefit of a state's own law from its own resident in its own courts, for which the resident has been paying taxes, in order to invite such massive dysfunction? How, in *Hodgkiss-Warrick*, did it comport with reason to prevent the place of injury from vindicating its interests in safety and deterrence? To effectuate its interest in welcoming visitors and investors? To vindicate its compensatory interest in its own newly minted law, created expressly for the purpose of reaching paid-for insurance assets in just such cases?

### C. *A Glance at Political Theory*

Two observations from general political theory might be helpful here. First, judicial choices of nonforum law would seem to be, in a sense, undemocratic, since the state's voters have had no say in the other state's laws. This is so even if one or both parties are nonresidents. The nonresident plaintiff comes to the forum, precisely, for the forum's own remedial law, having shopped for it. The defendant is within its jurisdiction, having submitted itself to the burdens as well as the benefits of the forum state's law. Second, it might reasonably be considered disrespectful of American horizontal federalism and the dignity of each autonomous state in its own courts, to expect a state court to defer to the laws of other states, or for courts to hold themselves bound by principles of "comity," or by the imagined influence of the Full Faith and Credit Clause,<sup>113</sup> to disregard their own state's laws and the oath of office.

### D. *Regulatory Interests: The Rowe Case*

The place of injury is not the only contact with a case that can be needlessly and unjustly discounted at the forum. Perhaps because in many tort cases the defendant's only duty to the plaintiff is a general duty of due care, there is a tendency to regard as too altruistic to be taken seriously the forum's regulatory interest in governing the conduct of its resident defendant.<sup>114</sup> In acute instances of disregard of law that is

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112. In the cases shortly to be discussed, *see infra* Parts VI.D, F., which exhibit this embarrassing phenomenon, the courts favor the home *enterprise* but must disregard their own state's law to do it, sometimes even to the extent of straining to apply an uninterested state's law. In such cases courts can appear to lack neutrality, since they favor the home party, although their law does not. The embarrassment of this is magnified when the favored home party is a powerful company. In such cases the appearance of cronyism or other undue influence is hard to avoid.

113. *See* *Alaska Packers Ass'n v. Indus. Accident Comm'n*, 294 U.S. 532 (1935) and other cases cited *infra* notes 146–66. Full faith and credit is not due to laws, but only to judgments. *Id.* at 547 (remarking that Full Faith and Credit as applied to laws would be "absurd," since it would require in every conflicts case that the forum apply the other state's law but never its own). The Supreme Court will sometimes treat the Full Faith and Credit Clause, if the lawyers do, as bearing on a choice of law. But when it does, its analysis is indistinguishable from analysis under the Due Process Clause.

114. *See generally* Gerald L. Neuman, *Extraterritoriality and the Interest of the United States in Regulating Its Own*, 99 CORNELL L. REV. 1441, 1443 (2014) (arguing a need for recognition of regulatory interests which would favor a nonresident plaintiff as against a resident defendant). A

regulatory, the forum's choice of nonforum law may even countenance a violation of its own law.

To take an excruciating example, consider *Rowe v. Hoffman-LaRoche, Inc.*<sup>115</sup> In *Rowe*, a Michigan plaintiff sued Hoffman-LaRoche, a New Jersey pharmaceuticals company, for personal injuries. Reversing the court below, New Jersey applied Michigan's less stringent warning requirements for pharmaceuticals, rather than New Jersey's own safer warning requirements.<sup>116</sup> Taking the allegations of the complaint as true, as we must in thinking about this question, the Michigan plaintiff would not have used the defendant's product had the needed warning appeared, as required by the law of New Jersey. Her injuries, which were serious, would have been prevented. (We are talking about a violation of New Jersey legislation.<sup>117</sup> As a tortious violation of a statute, the violation in *Rowe* should have been taken as negligence *per se*.<sup>118</sup>) The New Jersey high court managed to avoid its own law by changing its mind midstream, holding this obvious false conflict to be a no-conflict case, having at first perceived it as a true conflict. The court concluded that the two statutes were "substantially congruent."<sup>119</sup> The difference lay only in the conclusiveness *vel non* of the presumption that FDA approval of a warning was sufficient to insulate a pharmaceuticals company from product liability.<sup>120</sup>

With better guidance from a new Restatement, the New Jersey court might have seen its duty to respect New Jersey's own regulatory interest in enforcing New Jersey law requiring New Jersey makers of pharmaceuticals to provide more adequate warnings of their products' dangerous side-effects. The near-congruence of the two laws, if it exists, showed, rather, that both states share an interest in the adequacy of warnings. Michigan's law does protect Michigan manufacturers from liability when they comply with FDA warning requirements. But Michigan requires the makers of pharmaceuticals to pay for injuries their products cause if they fail to comply with FDA warning requirements. Michigan had zero interest in protecting New Jersey corporations from anything. It had zero interest in imposing, or power to impose, its will on other states' courts in order to deny its own injured residents better protection than available at home. Given the two states' shared concern, it was irrational to use the bounds on Michigan's warning requirements to impose a hurdle to product liability in New Jersey. In effect, Michigan

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similar point is made vis-à-vis the defendant in the *Kiobel* case in the same symposium in Weinberg, *What We Don't Talk About*, *supra* note 6, at 1521.

115. 917 A.2d 767 (N.J. 2007).

116. *Id.* at 775.

117. N.J.S.A. 2A:58C-4.

118. *See, e.g.*, *Eaton v. Eaton*, 575 A.2d 858, 866 (N.J. 1990) (noting that violation of a statute regulating motor vehicles is either evidence of negligence or negligence *per se*).

119. *Rowe*, 917 A.2d at 768.

120. *Id.*

had obviously established a floor, not a ceiling, for injured residents seeking recovery in another state. Here, suit was in New Jersey of necessity, since Hoffman-LaRoche is not “at home” in Michigan.<sup>121</sup>

In *Rowe*, the New Jersey court not only denied the benefit of enhanced warnings to a Michigan plaintiff to protect a New Jersey company in which Michigan had no interest, but also denied the benefit of forum law to a nonresident. This would have been discriminatory in any case as between New Jersey residents and residents of other states. But this New Jersey law was regulatory, intended not only to benefit New Jersey residents, but rather to benefit all users of New Jersey pharmaceuticals. Of course, the discrimination involved would be permissible if there were a good reason for it. But to apply the law of a state with no interest in its application is hardly a good reason. Indeed, to apply the law of an *interested* nonforum state is also not a good reason to escape the obligations of the interested forum’s own law.

Worse, the decision looks embarrassingly like an attempt simply to protect the home party. The New Jersey court favored a powerful New Jersey company over a seriously injured nonresident. And because it did so by shielding the New Jersey company from liability for a violation of New Jersey’s own legal standards, it stripped its decision of any appearance of neutrality. At the same time, New Jersey’s decision in this case left users of the company’s product everywhere at risk of physical injury—even new Jersey users using the product in New Jersey.

This result cannot be blamed on any need in New Jersey for judicial electoral campaign finance reform.<sup>122</sup> New Jersey has an appointed judiciary. Rather, like many cases today, *Rowe* seems driven by an ideological desire to protect companies, a disapproval of regulation, a disapproval of product liability, and a dislike of litigation altogether. Proved damages enshrined in jury verdicts cannot prevail against such views. Only an inviolable directive to apply the interested forum’s law would stand a chance. A presumption in favor of the *uninterested* forum’s law, rebuttable only by a showing that the nonforum state is an interested one, would also help.

### E. *Unprovided Cases*

It remains to explain more fully why forum law is necessary even in the unprovided case, in which neither concerned state is an interested one.<sup>123</sup> Recall that, in the typical example, the plaintiff resides in a

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121. *See supra* notes 64, 65. But Michigan’s long-arm statute would have provided jurisdiction. Mich. Comp. Laws § 600.705 § 600.705(2).

122. *Cf. Caperton v. Massey Coal Co.*, 556 U.S. 868 (2009) (holding it a denial of due process for a judge to fail to recuse himself in a case in which the appellant company’s chairman and chief officer had contributed \$3,000,000 to that judge’s election campaign).

123. Westlaw has been of little help in finding current unprovided cases in state courts, largely because the judges tend to think a contact state is an interested one, no matter what. *But see, e.g.*,

defendant-favoring state and the defendant resides in a plaintiff-favoring state.

The importance of forum law must be stressed even in unprovided cases. The forum at least has jurisdiction. As we have also been reminded, the defendant has submitted itself to the benefits and burdens of forum law. If, as is likely, the plaintiff is suing in her home state, she can hardly be blamed for forum shopping, especially since her home state, *ex hypothesi*, has defendant-favoring law. She certainly has not shopped for its defendant-favoring law. The defendant's insurer can hardly complain of defendant-favoring law. But even if the forum takes a moderate and restrained view of the reach of its own defense, and allows the plaintiff to prove her case under the better law of the defendant's home state, the insurer still has no reason to complain, as it cannot be surprised by its insured's own state's law. Indeed, in theory the insurer has actuarially factored into its premium the probability of trial at a plaintiff-favoring state, or has had every opportunity of doing so. The judge in that state is sworn to enforce the forum state's own laws. All this considered, it would be astonishing if the forum should *not* apply its own law. It would be irrational—a denial of due process—to apply the *other* state's law. The other state, *ex hypothesi*, is an uninterested state. In comparison with the law of the uninterested sister state, forum law is the only clearly constitutional choice.

The attentive reader will note with some misgivings that the plaintiff is unlikely to prevail in her defendant-favoring home court. But she *can* prevail. If her home state takes the aforementioned moderate and restrained view of its defense, or if she shops for plaintiff-favoring law, or is forced by the rules of personal jurisdiction to sue where this defendant is at home, she does—and should—prevail. Dishearteningly, in unprovided cases, today's judges at the defendant's state will all too often accommodate the defendant-favoring law of the plaintiff's uninterested home state.

#### F. *Langelle*

Take, for example, the 2013 *Laugelle* case in the Delaware Superior Court.<sup>124</sup> *Laugelle* was a wrongful death case arising out of a helicopter

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N.Y.C. Asbestos Litig. *ex rel* Tedrick, v. Colgate Palmolive Co., 921 N.Y.S.2d 466, 475 n.17 (N.Y. 2011). Unfortunately, the New York court in that asbestos case felt bound to apply its rule that in unprovided cases the law of the place of injury should govern, whatever its law. *Cf.* Neumeier v. Keuhner, 31 N.Y.2d 121 (1972). For a similarly arbitrary flight from forum law in a correctly identified unprovided case, *see, e.g.*, Miller v. Gay, 470 A.2d 1353 (Pa. Super. Ct. 1983).

124. *Langelle v. Bell Helicopter Textron, Inc.*, No. 10C-12-054, 2013 WL 5460164 (Del. Super. Ct. Oct. 1, 2013). The degree of confusion over choice-of-law theory was extraordinary in this case. The court explained that a no-conflict case should be eliminated at the outset, and then that the law of the place of most significant contact should be applied. Counsel tried to persuade the court that if only one state was interested, that would be a false conflict, and the law of the only interested state should apply. The court refused to “engraft” this “complexity” onto Delaware analytics. The court also rejected

crash in the Gulf of Mexico, off Texas. The pilot and all passengers were killed. The issue was the availability *vel non* of damages for the mental anguish of the pilot's widow and children. The plaintiffs were residents of Massachusetts, and the defendant, the Bell Helicopter company, was incorporated in Delaware. Delaware would allow damages for mental anguish, but Massachusetts would limit recovery to pecuniary losses. There was no argument for either Texas law or admiralty law. The case was a classic unprovided case: Delaware law favored the plaintiffs, but their own state's law favored the defendant. The Delaware Superior Court, however, purported to find a true conflict, in that the two laws would produce differing results.<sup>125</sup> It topped this off by listing contacts to consider, as recommended in the *Second Restatement*, but the list pointed in different directions and could not resolve the case. The Delaware court wound up reasoning that, because the anguish the plaintiffs suffered would be felt in Massachusetts, Massachusetts was the place of "most" significant contact with the anguish, and therefore Massachusetts law must apply.<sup>126</sup> And therefore the plaintiffs could not recover for the mental anguish suffered in Massachusetts.<sup>127</sup> I am not making this up.

Depriving the nonresident of the benefit of forum law, a benefit that a resident would have enjoyed in the same case, might not be discriminatory if there were some good reason for the denial. But in *Laugelle*, the nonforum state, Massachusetts, was an uninterested state in an unprovided case. Massachusetts had no interest in applying its "pecuniary losses only" rule to protect a Delaware company. Forum law was the only clearly constitutional choice in *Laugelle*, if only because it would have avoided offending anti-discrimination principles. Instead, the Delaware court provided a windfall to the defendant's insurer, and left uncompensated the plaintiffs' damages—damages that, although non-pecuniary, were fully compensable under Delaware's own law.<sup>128</sup>

In *Langelle*, Massachusetts may well have had the most significant contact with the plaintiffs domiciled there. but that contact was irrelevant. Massachusetts' policy in its "pecuniary losses only" rule is to protect defendants from paying for non-pecuniary losses in wrongful death cases.<sup>129</sup> But there was no Massachusetts defendant in the case. Massachusetts could hardly complain if its residents were fully compensated for their actual damages. Delaware irrationally enforced the law of a state with no interest in such enforcement, a law which Delaware

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comparative impairment for cases in which the laws of the respective states differed, although supposing comparative impairment to be the usual way to resolve true conflicts. At the same time, the Delaware court expressed the view that true conflicts are presented in all cases in which the laws of the respective states differ. *Id.* at \*2.

125. *Id.*

126. *Id.* at \*4.

127. *Id.*

128. *Id.*

129. *Id.* at \*3.

had no sworn duty to enforce. The obvious advantage was that in flouting its own law, Delaware protected the home company from its own legislation. The obvious disadvantages lay in stripping the nonresident plaintiffs of compensation for damages suffered, at the same time stripping the court's decision of an appearance of neutrality as between the parties.

### G. *Adjudicatory Interests and Local Law Theory*

Even when the forum is an “uninterested” one, it may nevertheless have some power to act in an *adjudicatory* interest. Of course, legislative jurisdiction is quite different from adjudicatory jurisdiction, and, strictly speaking, jurisdiction does not necessarily imply lawmaking power.<sup>130</sup> Yet there is some relation.<sup>131</sup>

Legislative power emerging from adjudicatory power is most clearly seen in cases in which venue is universal, since in those cases, typically, universal venue has been provided precisely because it is deemed important to provide justice wherever the defendant can be found. There is a mutual, reciprocal, shared interest in providing adjudicated resolutions for such cases. Universal jurisdiction is found today in admiralty,<sup>132</sup> and to some extent in the field of international human rights,<sup>133</sup> as once, perhaps, it might have been found in the law merchant—the general commercial law to which Justice Story referred in *Swift v. Tyson*.<sup>134</sup> The unifying idea in these examples of universal venue is that there is a shared reciprocal interest among civilized nations in

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130. This was an implicit holding of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

131. Cases implying lawmaking power from a jurisdictional grant include *So. Pac. Co. v. Jensen*, 244 U.S. 205 (1917) (implying lawmaking power from the Article III grant of jurisdiction over all maritime cases); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938) (applying federal common law to a riparian boundary dispute because the disputed boundary was also the border between two states, and the case thus might have arisen in the original jurisdiction of the Supreme Court); *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) (deploying the cause of action explicitly contemplated in the grant of alien tort jurisdiction in 28 U.S.C. § 1350). For a likely explanation of the current Court's strange blindness to the cause of action described in the Alien Tort Statute, see Weinberg, *What We Don't Talk About*, *supra* note 6, at 1480–81. It seems reasonable to suppose, as well, that states share reciprocal interests in furnishing access to local law as well as to local courts in a transitory action. U.S. CONST. art. IV, § 2 (requiring each state to extend the privileges and immunities of its citizens to citizens of other states); *Hughes v. Fetter*, 341 U.S. 609 (1951) (holding under the Full Faith and Credit Clause, U.S. CONST. art. IV, § 1, that the state without an interest in declining to adjudicate a transitory action between its own residents must adjudicate their case).

132. Admiralty cases enjoy universal venue. No venue statute is applicable in admiralty.

133. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (holding cognizable a civil action in tort for a violation of international norms of human rights, and holding said action to be adjudicable wherever the perpetrator can be served with process). *Filartiga* has been badly impacted and perhaps destroyed by *Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659 (2013). For commentary see generally Ross J. Corbetta, *Kiobel, Bauman, and the Presumption against the Extraterritorial Application of the Alien Tort Statute*, 13 NW. J. INT'L HUM. RTS. 50 (2015); Weinberg, *What We Don't Talk About*, *supra* note 6.

134. 41 U.S. 1 (1842) (holding that, on issues of general as opposed to local interest, federal courts were free to supply an independent judgment as to the nature of the true general rule); *overruled*, *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (holding unconstitutional the course of conduct pursued by federal courts under the doctrine of *Swift v. Tyson*).

providing access to courts wherever, in cases of these kinds, the defendant or the property in controversy can be found. Conjoined with the existence of a jurisdiction granted, there is a presumption that the jurisdiction should be exercised.<sup>135</sup>

This presumptive duty of courts suggests a corresponding duty to provide the forum's brand of justice. Except for federal law, the only law the judges at the forum are sworn to uphold and enforce, as we have argued here, are the laws of the sovereign that grants them jurisdiction. Only rarely would a judge have positive authority to apply any other law. A judge has no sworn duty to any other sovereign. A judge purporting to apply the law of another sovereign is, in a sense, officious. Absent a specific statutory grant of power or a clear holding from the state's highest court (either of which would, in effect, convert nonforum law into domestic law in advance), the "interested" court has only the authority of questionable custom when it sets about attempting to evade its own state's statutes and cases and to flout the judicial oath of office.

In the unusual case presenting a putative conflict at a disinterested third state, Currie argued that the forum should apply the law most nearly *like* forum law.<sup>136</sup> This prescription runs into a couple of problems. First, it seems a lost opportunity. Perhaps the uninterested forum can clear a path to remedial law, if one of the two concerned states has remedial law. Second, the Supreme Court has already prescribed rules for federal courts handling similar or analogous diversity cases on motion to transfer, and the Court's prescription preserves the plaintiff's litigational advantage in choosing the forum state. The important instance of such cases, however, turns out to be a mass disaster, in which numerous cases dispersed in various locations are removed to federal court, consolidated, and transferred to an irrelevant forum, one often chosen merely for its uncrowded docket, or because one of the judges has some expertise with mass disasters. As to those cases, it must be acknowledged that the Court's rules have rendered the mass disaster virtually unadministrable.<sup>137</sup>

To be sure, in all cases in which a court discerns "better law" in the concerned nonforum state, the court should find a way to apply it.<sup>138</sup> But the recognition of its superiority should simultaneously be a Realist

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135. *Cohens v. Virginia*, 19 U.S. 264, 404 (1821).

136. CURRIE, *Married Women's Contracts*, *supra* note 5, at 120. Currie was expounding local-law theory. His conviction that the interested forum must apply its own law is the prime directive in CURRIE, *Methods and Objectives*, *supra* note 9, at 183. Indeed, Currie understood and made clear that in virtually all cases, whether the forum were an interested one *or not*, forum law was the only clearly constitutional choice. *See supra* note 60 and accompanying text.

137. *See Van Dusen v. Barrack*, 376 U.S. 612 (1964) (holding that transferred state-law cases are governed by the law of the transferor state including its choice rules); *Ferens v. John Deere Co.*, 494 U.S. 516, 519 (1990) (extending the rule of *Van Dusen* to the transferor state's statute of limitations). For the special problems of administering mass disaster cases under these rules, *see supra* note 32.

138. *Cf. Weinberg, Against Comity*, *supra* note 24, at 93–94; Weinberg, *Mass Torts*, *supra* note 29, at 843; Louise Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. CHI. L. REV. 440 (1982). *See generally* Symeonides, *Why Plaintiffs Win*, *supra* note 57, at 337.

recognition of the desirability of a change in forum law and policy. This is not only because, as a practical matter, lawyers will rely on the subordination of forum law in arguing the next case, but also because local-law theory suggests the advisability of adopting the better law, if practicable, whenever nonforum law is perceived to be better.<sup>139</sup> The thinking is that the very perception of what is better, in itself, reveals the forum's true policy.<sup>140</sup> In other words, *all law in courts is forum law*.<sup>141</sup> In that sense there is no law of conflict of laws.

Generally speaking, "better law" is remedial law. Defendant-favoring law can be applied rationally only to defendants residing at the forum, or at the only interested state. Defenses tend to be specialized and localized, favoring particular classes of resident enterprises and subordinating a state's more widely shared policies of safety, integrity, validation, and risk-spreading. A rule providing a defense to an industry or enterprise should be understood to be for the protection of local interests in the particular local industry or enterprise. Of course the law of the place of a defendant's activities also serves the expectations of the defendant and the general interest in uniformity and predictability. But none of those adjudicatory ideals should trump widely shared, indeed universal, substantive interests—the policies underlying the common law at the most basic level. These policies are plaintiff-favoring, since they are compensatory and deterrent or, in the case of contract law, validating and facilitating. There is little social value in a plaintiff-favoring state's deferring to defendant-protecting law in the nonforum state, since such law would deny remediation *for no reason*. Moreover, nonremedial law countenances wrongdoing in tort and the breach of obligations in contract, contradicting the widely-shared interests of all places in safety and in the integrity and effectiveness of transactions.

If consistent plaintiff bias seems wrong to you, it might help to remember the obvious—that in an adversary system one or the other party must lose. The logical alternative to consistent plaintiff bias is

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139. Weinberg, *Theory Wars*, *supra* note 29, at 1634.

140. See David F. Cavers, *Two "Local Law" Theories*, 63 HARV. L. REV. 822, 823 (1930) (discussing two versions of this truth); Cook, *supra* note 8, at 477 (arguing that the forum purporting to apply the law of some other sovereign is revealing its own preferred policy); Weinberg, *Against Comity*, *supra* note 24 (arguing generally that reciprocal deference to the courts of other putatively concerned sovereigns can produce universal denials of justice); *id.* at 89 (arguing that the interested forum cannot depart from its own law without effecting a change in its law as a practical matter); Weinberg, *Theory Wars*, *supra* note 29, at 1654–55 (arguing that the forum should adopt rather than apply "better" nonforum law); Weinberg, *A Structural Revision*, *supra* note 17, at 501–02 (arguing that the *Second Restatement's* § 6 should encourage adoption rather than application of nonforum law); Weinberg, *On Departing*, *supra* note 30, at 601 (arguing that the forum departing from its own law based on some purportedly neutral choice rule should change its law overtly).

141. For some discussion of local law theory, see Stanley E. Cox, *Razing Conflicts Facades to Build Better Jurisdiction Theory: The Foundation—There Is No Law but Forum Law*, 28 VAL. U. L. REV. 1 (1993). For foundational writing on local law theory see WALTER WHEELER COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 3–47 (1942); see also, e.g., *Guinness v. Miller* 291 F 769, 770 (S.D.N.Y. 1923) (Hand, L.) (remarking, "No court can enforce any law but that of its own sovereign").

consistent defendant bias. And consistent defendant bias comes with the severe dysfunction previously noted.<sup>142</sup> A third alternative would have cases decided now one way, now another, as if by the toss of a coin. This is to return blindfolded to the law of the place of events, or the place of most significant contact, or any other place chosen with lofty disregard for the law at that place, allowing the risk of loss to fall now on a plaintiff, now on a defendant, depending on happenstance.<sup>143</sup> Neutrality of a sort would be achieved. But that sort of neutrality abdicates decisionmaking, leaving results to chance—to the vagaries of the law at the state chosen. The experiment of gambling with people’s rights has been tried for a very long time and found wanting. That is why there was a felt need for a *Second Restatement*. As Currie showed half a century ago, “neutral” choices abstracted from law and policy do produce rational results—but in only half of conflict configurations. And they produce irrational results in the other half.<sup>144</sup> What rational jurist would opt for a system by which the chance of a just result is no higher than the chance of “heads” on the toss of a coin?

There will be those who nevertheless will continue to see the forum riding roughshod over the concerns of other states, and coming down unreasonably hard on defendants, all on the basis of some trumped-up “interest.” Indeed, some might go so far as to suggest that general principles of comity might be insufficient. Surely, they might suggest, the Constitution must guard against the worst excesses of *lex fori*. Are there no constitutional ground rules, they might ask, to prevent the tyranny of the selfish state?<sup>145</sup> There are, indeed, constitutional ground rules. The Supreme Court’s relevant cases underscore much of the argument of this paper, just as they undergird Currie’s critique of the old traditional approaches, and just as solidly can ground the proposed *Third Restatement*. Under the Supreme Court cases, the law of the forum is not only more likely to be the just choice, but is in fact, as Brainerd Currie understood, the only clearly constitutional choice.

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142. See *supra* this Part, Subsection B, final paragraph.

143. Abstract rules, if applied in a principled way by judges who either don’t know any better or want to achieve some particular result thereby, have the virtues as well as the disadvantages of abstraction. CURRIE, *Married Women’s Contracts*, *supra* note 5, at 102 (describing the results of principled application of the law of the place of events as “capricious”). In half the configurations of cases choice of the law of the generic place of events will be irrational, although only in half. See *supra* notes 28–29 and accompanying text.

144. CURRIE, *Married Women’s Contracts*, *supra* note 5, at 98.

145. See Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 250–51 (1992), for the confused argument that constitutional ground rules, including the Full Faith and Credit Clause and the Privileges and Immunities Clause, prevent a state court from enforcing its own state’s law in a case in which its own law is applicable, but in which another state’s law is argued. *But see* the governing Supreme Court cases to the contrary, discussed *infra* Part VII. In *Alaska Packers*, for example, Justice Stone explained that requiring a state to apply another state’s law in a two-state case, but never its own, would be “absurd.” *Alaska Packers Ass’n v. Indus. Accident Comm’n*, 294 U.S. 532, 547 (1935).

## VII. THE CONSTITUTIONAL GROUND RULES

Before crediting or blaming Brainerd Currie for the twentieth-century revolution in conflicts theory<sup>146</sup> it would be well to remember the path-breaking earlier work of the United States Supreme Court. The Justices were deploying interest-analytic reasoning two decades before Currie did.<sup>147</sup> Currie acknowledged his debt to the Court, and in particular to the work of Chief Justice Stone.<sup>148</sup>

In its cases on the conflict of laws, the United States Supreme Court long ago embraced interest analysis. The Court foreshadowed that kind of thinking decades before Currie set it out in a systematic way and brought it to bear upon his demolition of traditional choice rules. Moreover, interest analysis has not only won “liberal” Justice Brennan’s explicit stamp of approval for a unanimous court,<sup>149</sup> but also “conservative” Chief Justice Rehnquist’s verbatim adoption of Brennan’s statement of the position.<sup>150</sup> A half-century before this, Chief Justice Stone (then Justice Stone) had written his opinion in *Carolene Products*,

146. See, e.g., David L. Noll, *The New Conflicts Law*, 2 STAN. J. COMPLEX LITIG. 41, 59 (2014); Sagi Peari, *The Choice-Based Perspective of Choice-of-Law*, 23 DUKE J. COMP. & INT’L L. 477, 480 (2013); Symeon C. Symeonides, *In Memoriam: Arthur T. Von Mehren*, 119 HARV. L. REV. 1962, 1965 (2006); Arthur T. von Mehren, *American Conflicts Law at the Dawn of the 21st Century*, 37 WILLAMETTE L. REV. 133, 138–39 (2001) (disclosure: I was von Mehren’s student).

147. See, e.g., *Pac. Empl’rs Ins. Co. v. Indus. Accident Comm’n*, 306 U.S. 493, 504–05 (1939) (holding that the interested forum at the place of injury is free to apply its own law; there is no constitutional obligation to apply the law of the place of contracting); *Alaska Packers Ass’n v. Indus. Accident Comm’n*, 294 U.S. 532, 547–48 (1935) (holding that the interested forum at the place of contracting is free to apply its own law; there is no constitutional obligation to apply the law of the place of injury); *Home Ins. Co. v. Dick*, 281 U.S. 397, 407–08 (1930) (holding that the uninterested forum may not, consistent with due process, apply its own law).

148. CURRIE, *The Constitution*, *supra* note 5, at 190. Currie’s first acknowledgment to the Court was a reference to my old teacher, Paul Freund. See CURRIE, *Married Women’s Contracts*, *supra* note 5, at 87 nn. 18–20: “The analysis in terms of state interests employed here has been most explicitly suggested by Freund, *Chief Justice Stone and the Conflict of Laws* . . . .” Cf. PAUL FREUND, *CHIEF JUSTICE STONE AND THE CONFLICT OF LAWS* (1949); Paul Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210 (1946). Although Freund clerked for Justice Brandeis, he was building on the interest-analytic work of [then] Justice Stone. But Freund must be counted a father of interest analysis in his own right, given the cited works’ creative contributions to interest-analytic thought. However, Freund’s attraction to interest *weighing*, although conveyed in exquisite prose, should not be permitted to influence the new *Third Restatement*. See CURRIE, *Methods and Objectives*, *supra* note 9, at 181: “[A] court is in no position to ‘weigh’ competing . . . interests. . . .”

149. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981) (“The lesson from *Dick* . . . , which found insufficient forum contacts to apply forum law, and from *Alaska Packers*, . . . which found adequate contacts to sustain the choice of forum law, is that for a State’s substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.”). This test need not be discounted as enunciated in a plurality opinion, since none of the dissenting Justices in *Hague* disagreed with it.

150. Rehnquist at the time was not yet Chief Justice. See *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 818–19 (1985) (Rehnquist, J.): “[F]or a State’s substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.” (quoting *Hague*, 449 U.S. at 313). “The dissenting Justices were in substantial agreement with this principle.”

a case about the regulatory power of the federal sovereign with a legitimate governmental interest.<sup>151</sup> It is in this tradition that, in the same year, the Court, by Justice Brandeis, decided what may be the leading case on the federal sovereign *without* a legitimate governmental interest, *Erie v. Tompkins*.<sup>152</sup> And in the same vein the Court, also by Justice Brandeis, decided the leading case on the powerlessness of the state sovereign without a legitimate governmental interest, *Home Insurance v. Dick*.<sup>153</sup>

I have said that the interested forum *must* apply its own law and have doubted that the Supreme Court would ever say so. On the other hand, there are major Supreme Court cases holding that the interested forum *may* apply its own law—that the interested state has *power* to apply its own law. The modern test of state power, as stated in *Allstate Ins. Co. v. Hague*,<sup>154</sup> is the existence of a sufficient governmental interest. Specifically, according to the Court, there must be a contact or contacts with the state, generating legitimate governmental interests, such that application of that state's law will be neither arbitrary nor fundamentally unfair.<sup>155</sup>

The Court has also spoken to the question of the power of the interested forum as against other contact states. In *Alaska Packers v. Industrial Accident Commission*, the Court held that the interested place of contracting need not apply the law of the place of injury.<sup>156</sup> And in *Pacific Employers v. Industrial Accident Commission*, the Court held that the interested place of injury need not apply the law of the place of

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151. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) (holding that Congress has power to regulate an industry in the national economy when there is some rational basis for the legislation): “[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.”

152. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78–79 (1938) (holding that federal courts have no power to make law for Pennsylvania or any other state because Congress, i.e., the nation, has no such power but must legislate for the nation only; and that the final authority on a state's law is the highest court of that state).

153. *Home Ins. Co. v. Dick*, 281 U.S. 397, 407–08 (1930) (holding that a state which at all relevant times had no connection with a case has no power to govern that case). It is a remarkable coincidence that Justice Brandeis was the author of the opinions in both *Dick* and *Erie*, both cases striking down choices of irrelevant law. However, although a state remains free to define under its own law what *time* is relevant to a case, the Supreme Court has held that a state may vindicate its *current* interests at the time of trial, thus tacitly overruling *Dick* on the point. *Hague*, 449 U.S. at 317–19 (permitting the forum to allow its current resident full recovery although at the time of events she resided elsewhere; permitting the forum to treble the liability of the defendant insurer although at the time of events a branch of the insurer elsewhere was involved). See Weinberg, *Relevant Time*, *supra* note 85.

154. 449 U.S. 302 (1981). It is not necessary to record this as a plurality opinion, as the dissent did not disagree. See *Shutts*, 472 U.S. at 818–19: “The dissenting Justices were in substantial agreement with this principle.”

155. *Hague*, 449 U.S. at 312–13.

156. *Alaska Packers Ass'n v. Indus. Accident Comm'n*, 294 U.S. 532, 547 (1935). In *Alaska Packers*, California's workers' compensation system was apparently the only compensation system reasonably available to the plaintiff, who had to return to California to receive his wages. *Id.* at 542.

contracting.<sup>157</sup> Moreover, under *Allstate Insurance Co. v. Hague*,<sup>158</sup> an interested forum state is free to apply its own *current* policies, and to disregard those of a sister state, notwithstanding that the sister state was the only state concerned at the time of the events in litigation.<sup>159</sup> It matters not a whit if a sister state can be deemed a place of *more* significant relationship to the litigated issue. The interested forum retains power to apply its own law, and the Court will not weigh or balance state interests—the forum need weigh no other state’s interests against its own.<sup>160</sup>

Two of these Supreme Court cases, *Home Insurance v. Dick*<sup>161</sup> and the *Allstate* case just mentioned, bookend the whole field by establishing what choices of law are due process and what are not; what is rational and what is irrational. Those cases remain as foundational in the field today as they were when handed down.

Very similar constitutional and theoretical thinking can also be discerned today in Supreme Court cases on constitutional law generally,

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157. *Pac. Empl’rs Ins. Co. v. Indus. Accident Comm’n*, 306 U.S. 493, 504–05 (1939). *Pacific Employers* and *Alaska Packers* were conflicts of workers’ compensation systems, not easily classifiable, since the overriding general purpose of all workers’ compensation laws is to protect the employer from tort claims. But, at the same time, all such systems are intended to compensate the worker with a reasonable percentage of lost wages plus medical and related pecuniary losses. In other words, these are no-conflict cases, equally protecting the employer and equally providing some compensation to injured employees, with differences, which, if not *de minimis*, are insufficient to change the classification as “no-conflict” cases. From *Alaska Packers* and *Pacific Employers* one might predict the later Court’s position giving access to additional compensation when a worker has received compensation from one sovereign and applies for additional compensation in another. *See Thomas v. Wash. Gas Light Co.*, 448 U.S. 261, 286 (1980) (interstate); *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 725–26 (1980) (in admiralty, federal-state).

158. 449 U.S. 302, 317–18 (1981). *See supra* note 85 and accompanying text. As previously noted, *Hague* tacitly overrules *Home Ins. Co. v. Dick* on *Dick*’s insistence on a narrow understanding of the concept of relevant time. *But see, e.g., Kipling v. State Farm Mut. Auto. Ins. Co.*, 774 F.3d 1306 (10th Cir. 2014) (reversing judgment for damages on a jury verdict, barring the plaintiff with an after-acquired residence from access to stacked uninsured motorist policy coverages as forbidden under the anti-stacking law of Minnesota, the place of original issuance of the policies). This was the very issue involved in *Allstate Ins. Co. v. Hague*, but the federal Court of Appeals did not mention *Hague*. The federal court purported to find the place of most significant relationship under the *Second Restatement*, using Colorado’s choice-of-law method.

159. *See supra* note 157.

160. *See, e.g., Nevada v. Hall*, 440 U.S. 410 (1978) (holding that, as place of injury, California need not apply the sovereign immunity law of the state of Nevada in an action in California against the state of Nevada for the tort of a University of Nevada truck driver, where the injured plaintiff was a Californian, and the accident occurred in California). Nevada had waived its immunity against tort claims, but only for suits in its own courts, and then only for a very limited sum. It should be noted, however, that the Supreme Court has just granted certiorari in part to decide whether *Nevada v. Hall* should be overruled. *See Calif. Franchise Tax Bd v. Hyatt*, 2015 WL 1331684 (U.S. June 30, 2015). It may be relevant that in *Alden v. Maine*, 527 U.S. 706 (1999) (holding that a state has a federal constitutional immunity even in state courts) that the Court did not overrule *Nevada v. Hall*, but distinguished and thus saved it. The ground of distinction was, precisely, that *Nevada v. Hall* was about an interstate conflict. Each state is allowed to decide for itself what the immunity of a defendant is. There is an analogy in the federal Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602, 1605 [“FSIA”]. Under the FSIA, in American courts the immunity of a foreign country is determined under American law (the FSIA), not the foreign country’s.

161. 281 U.S. 397 (1930).

both as to rights against, and challenges to, assertions of government power.<sup>162</sup> Because of the resemblance between “governmental interest” in conflicts theory and the “rational basis” or governmental “interest” required of every application of law, the Supreme Court’s constitutional cases seem particularly dependent on interest analysis. Of course the Supreme Court’s constitutional interest analyses can differ in some ways from interest analysis in conflicts cases. The Supreme Court does not “weigh” interests as between state sovereigns, but perforce does weigh governmental interests as against individual rights. We see this weighing process in the Court’s regime of tiered scrutiny for abridgments of individual right. Nevertheless, whether the question is one of abridgment of right or of original governmental authority, the result will depend on an identified legitimate governmental interest.<sup>163</sup> In conflicts cases, the purposive inquiry into legitimate governmental interest is, in this way, always close to, if not quite the same as, the constitutional question, which is the typical due process inquiry into rational basis.

Times change, and there is a revived retrograde territorialism, most notably in the Supreme Court’s transnational cases.<sup>164</sup> The constitutional ground rules, however, as set out here, remain good law. To the extent this is true, it is time for our courts, when confronted with an asserted conflict of laws, to see the risk of unconstitutionality in a search for “reasonableness” in lieu of rationality—in abstract weighing of degrees of “significance” in lieu of purposive interpretation of the commands of the court’s own sovereign. Recall to mind our discussion of the *McCann* case.<sup>165</sup> The disposition in that case would seem to have been unconstitutional, within the meaning of the Due Process Clause of the Fourteenth Amendment. The California Supreme Court withheld the benefit of California’s law from an asbestos-injured Californian and applied the irrelevant law of Oklahoma to protect a New York party—a party in whom neither California nor Oklahoma had any interest. The California court attempted officiously to imply a far-fetched conjectural interest in Oklahoma, the place of injury, whose only rational interest as place of injury had to be remedial. In consequence, the court’s choice of the law of the place of injury, Oklahoma, to bar recovery was not only

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162. See Weinberg, *A General Theory of Governance*, *supra* note 46.

163. *Id.* at 1071–72.

164. *Id.*; see, e.g., *Daimler AG v. Bauman*, 134 S. Ct. 746, 746 (2014) (holding, as a matter of due process, that a parent foreign company doing business in California is not within the general jurisdiction of courts in California in an action for the torts of its subsidiary foreign company when such torts occur entirely within the borders of a foreign sovereign, and neither the parent nor the sub can be said to be “at home” in California); *Kiobel v. Royal Dutch Petrol. Co.*, 133 S. Ct. 1659 (2013) (holding that an act of Congress, and specifically the Alien Tort Statute, may not apply to conduct occurring within the borders of a foreign sovereign); *Morrison v. Nat’l Austrl. Bank Ltd.*, 561 U.S. 247 (2010) (holding that Rule 10(b)-5 actions do not lie for securities fraud on a foreign exchange). We see this territorialist inclination earlier in cases such as *Wortman v. Sun Oil Co.*, 486 U.S. 717 (1988) (holding that the forum may apply its own period of limitations, since limitation of actions was traditionally for the forum state). See Weinberg, *What We Don’t Talk About*, *supra* note 6.

165. *McCann v. Foster Wheeler L.L.C.*, 225 P.3d 516, 530 (Cal. 2010). See *supra* Part V(B).

unconstitutionally discriminatory, but also unconstitutionally irrational. True, the place of injury had defendant-protecting law, but that law had nothing to do with the defendant in the case, which was incorporated and doing business in New York. True, the sick plaintiff, although a long-time resident of California, had been exposed to asbestos not in California, where he first fell ill, but in Oklahoma. But under *Allstate Ins. Co. v. Hague*, the after-acquired residence of the plaintiff has legitimate interests in applying its own law on its resident's behalf,<sup>166</sup> as the California court itself acknowledged.<sup>167</sup> The California court wound up handing an irrelevant defense to a New York company that New York itself did not provide, denying a Californian the benefit of California law.

None of the miscarriages of justice described in this paper would have occurred had there been clear guidance from a persuasive source, such as a new Restatement, on the general constitutional necessity of access to forum law.

### VIII. RULES VERSUS REASON

#### A. *Three Paradoxes*

There may seem to be more than one paradox here. Our attempt to criticize the *First Restatement's* "rules" and jettison the *Second Restatement's* "rule" seems to result in nothing more than a new set of rules. But there is no paradox in this. Rules requiring that we determine the scope of the actual laws in controversy are very different from rules that require a choice of a governing state in disregard of the law in that state. As David Cavers would have said, the point of a choice of law is to choose law, not places.

Another seeming paradox is that Currie, so opposed to traditional "rules," was not at all proposing, as is widely assumed, some "approach" not based on rules. Currie himself set down his analysis as a simple set of rules.<sup>168</sup>

There is a third seeming paradox. In seeming to propose that a new Restatement be based on anything other than "rules," we may be supposed to have forgotten that a Restatement *is* basically just another set of "rules."<sup>169</sup> ALI Restatements are characterized by "black letter" rules accompanied by extensive notes and comments. But, here too, there is no paradox. There is no reason the systematics of interest analysis cannot be stated in black letter. Whatever instinctive concern we may

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166. *Hague*, 450 U.S. at 320 (sustaining the constitutionality of the law of the forum, an after-acquired residence of the plaintiff). It helped that the plaintiff was the appointed administratrix of her husband's estate, and that the estate was being probated in the forum state. *Id.* at 319. Cf. Weinberg, *Relevant Time*, *supra* note 85.

167. *McCann*, 225 P.3d at 519.

168. *See supra* note 9.

169. Cf. Michael Coenen, *Rules Against Rulification*, 124 *YALE L.J.* 644 (2014).

share about typical Restatement “black letter,” as long as the *Third Restatement* is to go forward in any event, why not have it restate the best legal theory we have in choice of law, rather than continue on the path of choosing places connected with events, without regard to the laws at those places, and in defiance of the requisites of actual rational application of law?

By “rational application,” it should be clear by now that interest analysts do *not* mean “reasonable application,” in the sense that the contact-counting courts of our time mean it—the sense in which the Supreme Court probably will always sustain it. We are not concerned with the seeming reasonableness of choosing for governance a state that seems closely connected in some way with the facts of a case. Our concern is not with the reasonable grasp of a territory, but rather with the rational scope of law, objectively construed as to its likely function. A new Restatement can take on the important task of clarifying for judges and lawyers the link between the rational basis required by due process and the purposive functional reasoning by means of which a rational basis is discovered. And a new Restatement can offer and justify the determinate resolution of each kind of conflict it identifies.

An alternative path for the proposed *Third Restatement* is proffered by the distinguished organizer of this Symposium, Dean Symeon Symeonides. Notwithstanding his perception of a general academic antipathy to “rules,”<sup>170</sup> Dean Symeonides welcomes the new *Third Restatement* as an opportunity, long overdue, for a return to rules.<sup>171</sup> He does not mean the rules governing interest analysis, proposed here, but rather he intends a return to jurisdiction-selecting rules—to be sure, not the simplistic and dangerous rules of the past, but rules that are “sophisticated.” The new rules can require consideration of state policies and interests, and provide flexibility and escapes to soften any untoward effects. In Symeonides’ view, these sophisticated rules will also have advantages interest analysis cannot offer. These will be uniform, neutral, clear rules, providing predictability and certainty. In short, Dean Symeonides argues that good rules will embrace all that we have learned since promulgation of the *Second Restatement*,<sup>172</sup> while retaining the virtues of traditional choice rules.

I do not like to throw cold water on such hopefulness, or on anything proposed by Dean Symeonides, whom I admire enormously. No one could be more knowledgeable than Dean Symeonides, more conversant with the choice rules followed both here and abroad—which he reads in their original languages! No one has more helpfully served the profession in our field or has been as deeply appreciated. So Symeonides’

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170. E-mail message from Symeon Symeonides to the author (Nov. 5, 2014) (on file with the author).

171. Symeon Symeonides, this Symposium, *Remarks*, 2015 U. ILL. L. REV. 1847, 1915–16.

172. *Id.* at 1918–21.

views are of major importance. But the recent experience with “sophisticated” choice rules, authored or influenced by Dean Symeonides himself, in my view has not been encouraging.

Sophisticated choice rules, it may be remembered, decorated the ALI’s complex litigation project.<sup>173</sup> That project’s proposals were intended for enactment by Congress. Its choice-of-law provisions<sup>174</sup> were much influenced by Dean Symeonides’ own impressive codifications.<sup>175</sup> The latter have won adoption or have been considered for adoption by several legislatures. The *Complex Litigation Project’s* sophisticated choice rules for mass torts were comprised of hierarchies of combined contacts, such as the place of conduct that is also the place of injury. The hierarchies were mandatory. Each combination of contacts required careful judicial consideration of numerous enumerated factors before the next combination could kick in. Only if the designated combination of contacts was unavailable on the facts could a judge move on to the next combination of contacts in the hierarchy.

These arduous complexities were apparently founded on the belief that judges should not concern themselves with the content of the respective laws contended for. Of course, judges do know what the respective laws are, and how they differ, and which law favors which party. But the thinking of the authors of the *Complex Litigation Project* was that judges should be indifferent to outcomes. This veil of indifference was apparently thought necessary to ensure perfect neutrality. It is a cherished goal of writers in this tradition that there be a return to mechanical jurisprudence. Mechanical jurisprudence (the judge puts a rule into the juridical slot machine and the automatic result pops out) was discredited by the American Legal Realists a century ago.<sup>176</sup> Sophisticated as the *Complex Litigation Project’s* rules may be, in this regard its authors had not taken account of the lesson the American Legal Realists in the field had taught us, that it is *law* that must be chosen—not places.<sup>177</sup>

The *Complex Litigation Project’s* rules, with their mandatory hierarchies of combined contacts, provided mechanical justice in order to strip judges of discretion to follow their own predilections. Much was sacrificed to achieve this. The mandatory hierarchies displaced even the familiar unsophisticated traditional choice rules, rules which at least had offered simplicity and common sense, inviting uniform application. The

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173. ALI, *COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS* (1994) [hereinafter “*Complex Litigation Project*,” or “Project”].

174. *Id.*, ch. 6.

175. For Symeonides’ support of my attempt to soften the particular rigor of the Project’s mandatory hierarchies of contracts, see *infra* note 186 and accompanying text.

176. Cf. Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908) (taking aim at formalists whose proposals, if followed, would, in effect, reduce courts to something like slot machines).

177. Cavers, *A Critique*, *supra* note 7, at 173.

*Project's* complexities made acceptance by Congress or uniform adoption most unlikely, and threatened to wear out even the most meticulous of judges.<sup>178</sup>

In 1993, in a last-ditch effort to scuttle this unappealing machinery, Fritz Juenger, Don Trautman,<sup>179</sup> and I agreed to offer alternative motions from the floor of the American Law Institute, although last-minute motions from the floor have almost no chance of success. Juenger moved and argued for rules more attentive to multistate justice.<sup>180</sup> This motion was defeated.<sup>181</sup> Trautman argued for federal common-law authority to choose among state laws.<sup>182</sup> This motion failed as well.<sup>183</sup> I spoke in favor of both motions.<sup>184</sup> Additionally, I made a motion of my own. My more timorous and more technical proposal simply would have converted the proposed mandatory hierarchies of combinations of contacts to more palatable rules of alternative reference.<sup>185</sup> Dean Symeonides spoke in support of this motion. Symeonides' support appeared to surprise President Perkins as much as it did me, for Perkins asked Symeonides to repeat that he wanted to speak in support.<sup>186</sup>

To everybody's astonishment, there was a large show of hands in favor of this motion of mine. Outgoing President Roswell Perkins, advised by the newly elected President, Charles Alan Wright,<sup>187</sup> agreed that there should be a recount, and requested that those who had voted in favor of my motion stand up.<sup>188</sup> Wright, saving outgoing President Perkins the trouble—and coming to the rescue of the *Project's* Reporter,

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178. See *infra* this Part, Subsection B, discussing the good work of Louisiana's appellate court. Cf. David F. Cavers, *Conflict of Laws Round Table*, 49 TEX. L. REV. 211 (1971) (expressing concern that conflict-of-laws scholars have done the courts a disservice by proffering conflict-resolving formulas that are often so complex and difficult to apply that they are of little use in the daily resolution of cases).

179. Disclosure: I was Trautman's student.

180. See motions and debate, *in* scattered portions of PROCEEDINGS OF THE AMERICAN LAW INSTITUTE, 70TH ANNUAL MEETING (1993). Professor Juenger's motion is at *id.*, 252. His remarks in support of his motion, and debate from the floor, with further remarks at 258–59.

181. *Id.* at 260.

182. *Id.* at 261. I had argued with Don Trautman for this “policies underlying” construction, in a few hurried minutes preceding the ALI floor debate. His proposed motion would have used the phrase, “in accordance with the law of torts.” I urged him to change this to “in accordance with *the policies underlying* the law of torts.” His faith in the genius of the common law made him reluctant to do this. I called his attention to the recent successive waves of tort reform. “Is that all there is?” he asked—meaning “That's not all there is.” But, “That's all there is,” I said. Just then the gavel sounded and we took our widely separated seats. After Trautman's own motion was defeated, when he came to speak in support of my motion, to my delight I heard him forcing himself to say, his voice breaking a little, “*the basic policies underlying* the law of torts.” *Id.* at 272.

183. *Id.* The debate on Professor Trautman's motion is reprinted as edited at 54 LA. L. REV. 835, 837 ff. (1993) where it serves as the basis of a symposium.

184. Louise Weinberg, ALI, PROCEEDINGS, 70th Annual Meeting 255–56 (1993) [hereinafter 70th Annual Meeting].

185. *Id.* at 267. I spoke to the motion, *id.* at 268, and again, at 274–76.

186. *Id.* at 273 (to Dean Symeonides): “Do you want to say that again?”

187. Wright served as President of the Institute from 1993 to 2000, the year of his death. Charles Alan Wright, 1927-2000, A.L.I. REPORTER (Summer 2000), available at [https://www.ali.org/ali\\_old/R2204\\_CAW.htm](https://www.ali.org/ali_old/R2204_CAW.htm).

188. 70th Annual Meeting, *supra* note 184, at 277.

Professor Mary Kay Kane (his co-author at the time), said he would count the votes himself. (This was apparently irregular, judging from the fact that the official *Proceedings* attribute the count to President Perkins.)<sup>189</sup> By this count, the motion failed 89 to 65<sup>190</sup> (although by my own flustered count it *carried*). I think this motion did as well as it did in part because of Dean Symeonides' point, that a rule of alternative reference would permit different choices for conduct regulation on the one hand and loss-allocation on the other. It also helped that, as I argued, my proposal would have preserved all the fine hard work in Professor Kane's notes and comments, and could have saved the Institute from the proposed rules' exhausting mechanism. In any event, notwithstanding the Institute's "approval," the *Project's* complicated but arbitrary choice rules have been justly ignored ever since.<sup>191</sup>

### B. *The Right Idea*

Dean Symeonides refers us to his codification of conflicts rules for Louisiana,<sup>192</sup> by which the failed rules of the *Complex Litigation Project* apparently were influenced. And it is true that Louisiana courts are doing a fine job in conflicts cases, at least from what I have seen. But it also appears that they are doing it with something like interest analysis, or at least with Louisiana public policy, which amounts to the same thing, but not with the Louisiana choice-of-law code—although they do not say so.<sup>193</sup>

For example, in *Barron v. Safeway*(2014),<sup>194</sup> the Louisiana Appeals Court affirmed the trial court in declining to bar recovery in a direct action against the Louisiana plaintiff driver's insurer for injuries to his three children, notwithstanding that there was a defense of parental immunity under the law of the place of injury.<sup>195</sup> The Louisiana Appeals

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189. *Id.* at 277.

190. The by-play in which Wright figured is not recorded in the 1993 *Proceedings*, and the repeat vote on the Weinberg motion in which voters had to rise, is recorded as "a show of hands." As long as I am correcting the record, let me add, lest the unlikely reader of those 1993 *Proceedings* attribute the various references to "emotion" to me, that a reading of my extensive and very dry extempore remarks will convince anybody who can get through them of my actual boringness. The "emotion" to which reference was made had to do with a hard-breathing debate between plaintiffs' and defendants' lawyers.

191. Congress did not enact the rules proposed by the ALI. As of December 6, 2014, Westlaw found only one case mentioning the existence of the Project's proposed choice rules, and no court, state or federal, using them. The search query was "(choice conflict!) & "complex litigation" /s (ALI Institute) & da(aft 1987)."

192. Symeonides, *supra* note 171, at 1899–90, 1917–19.

193. *See, e.g.,* *Barron v. Safeway Ins. Co.*, 152 So.3d 1085 (La. Ct. App. 2014); *Taylor v. Taylor*, No. CA 10–1503, 2011 WL 1734077, at \*2 (La. Ct. App. May 4, 2011). After this was written Dean Symeonides distributed his invaluable current survey, in which he acknowledges Louisiana's departures from its conflicts code. Symeon C. Symeonides, *Choice of Law in the American Courts in 2014: Twenty-Seventh Annual Survey*, 63 AM. J. COMP. L. 1, 30 (2015).

194. 152 So.3d 1085 (La Ct. App 2014); *cert. den.*, 161 So.3d 643 (La. 2015).

195. *Id.* at 1087.

Court referred to the appropriate Code section on choice of law but, eliding all that machinery, instead moved directly to Louisiana policy.<sup>196</sup> The appeals court did not consider the policy of the place of injury's parental immunity rule.<sup>197</sup> The court preferred a remedial result,<sup>198</sup> thus giving the Louisiana family the benefit of their insurance and creating a fund for the care of the children. The only role of Louisiana's sophisticated choice rules seems to have been to hinder the court from acknowledging its interest analysis as such, thus making it appear that the court had not to recognized the classic false conflict.

To take another fine example, in *Taylor v. Taylor*,<sup>199</sup> a presumptive father petitioned the Louisiana courts for a declaration of non-paternity.<sup>200</sup> The child in question had been born under coverture of marriage, before the parents' divorce, when the parents were domiciled in Texas.<sup>201</sup> Under Texas law the father's petition for a declaration of non-paternity was timely.<sup>202</sup> But the petition was time-barred under the law of Louisiana, where, after a divorce the mother and child were living.<sup>203</sup>

The Louisiana appeals court duly referred to the list of overarching considerations the state's conflicts Code furnished.<sup>204</sup> These provide that a court is to choose the law of the state that is "determined by evaluating the strength and pertinence of the relevant policies of all involved states in the light of: (1) the relationship of each state to the parties and the dispute; and (2) the policies and needs of the interstate and international systems, including the policies of upholding the justified expectations of parties and of minimizing the adverse consequences that might follow from subjecting a party to the law of more than one state."<sup>205</sup> This is followed, for each type of claim, by the Code's mandatory hierarchies of combinations of contacts, requiring a resolution to be sought at each grouping of contacts before proceeding to the next.<sup>206</sup> Each of these evaluations is to be done in light of the preliminary list of considerations.

The *Taylor* court relieved itself of these exhaustive and exhausting procedures by ignoring them. Indeed, the Court leapfrogged over the choice-of-law problem altogether, and applied Louisiana's shorter statute of limitations,<sup>207</sup> not by focusing on the time bar as such, but rather by going directly to what was at stake in the case. Without considering the

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196. *Id.* at 1088–89.

197. *Id.* (holding that Louisiana, on the facts of the case, had "the more substantial interest.").

198. *Id.* at 1090.

199. *Taylor v. Taylor*, No. CA10-1503, 2011 WL 1734077 (La. Ct. App. May 4, 2011).

200. *Id.* at \*1.

201. *Id.*

202. *Id.*

203. *Id.*

204. LA. CIV. CODE ANN. art. 3515 (1992); *Taylor*, 2011 WL 1734077, at \*1–2.

205. LA. CIV. CODE ANN. art. 3515 (1992).

206. *Id.* cmt. d.

207. *Taylor*, 2011 WL 1734077, at \*2.

policies underlying either Texas's longer period of limitations for such petitions, or the forum's own period of limitations, the court simply referred to the marital presumption of paternity as among the strongest known to Louisiana's law, and to the imperative policy of not delegitimizing a child.<sup>208</sup>

Principled application of "rules" instead of reason in such a case might have led to the very bastardization of a child that the Louisiana court rightly would not permit itself to contemplate. Sooner or later, principled application of rules in lieu of reason is bound to lead to injustice, a truth apparent to humankind ever since Antigone was not allowed to bury her brother,<sup>209</sup> and Procrustes' guest's feet had to be cut off to fit his bed.<sup>210</sup> In former times, as a last resort, the best judges would find "escapes" from rules yielding unjust results. The better the judge, the more adept at finding an escape; the judge too "principled" to do so would barge haplessly into injustice. The body of law we know as the conflict of laws in itself was in origin probably just such an "escape" from rigid and inflexible laws. An escape so favored as to be considered traditional was an assertion, as a last resort, of local "public policy." This is essentially what the Louisiana court does these days to circumvent its "sophisticated" code. Brainerd Currie would have applauded this. He famously remarked, "[W]hy not summon public policy from the reserves and place it in the front line where it belongs?"<sup>211</sup>

Jurisdiction-selecting rules, including rules mandating "the law of the place of most significant contact" or "most significant relationship," require lawyers and judges to embark on an imaginary spaceship and leave planet Earth behind them. From these heights, judges can deal in disinterested abstractions and hurl thunderbolts: now striking one party, now the other, as chance would have it. As Brainerd Currie put this, "The

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208. *Id.* at \*2: "The presumption that the husband of the mother is the father of the child has been referred to as the strongest presumption in the law. This is because there is a strong policy of favoring the legitimacy of children.' [citation omitted] During this time, Louisiana has been the state to determine custody and support matters concerning the child. Louisiana has a substantial interest, if not ultimate responsibility, in determining the parentage of this child who has been a domiciliary of this state for most of her life. We find no error in the trial court's determination that Texas law is not applicable to a disavowal [of paternity] action in this case." In referring to Louisiana's policy, the *Taylor* court mentioned a further interest, a possible "continuing responsibility," suggesting that the child might even be residing elsewhere at the time of decision. Although I have argued that the relevant facts are those existing at the time of decision, Weinberg, *Conflicts Cases and the Problem of Relevant Time*, *supra* note 85, the phenomenon of continuing responsibility, although altruistic, is not unknown, particularly in international settings. I am thinking here of the continuing concern former imperial powers not infrequently express vis-à-vis their former colonies. See, e.g., Alissa J. Ruben, *France Adds Troops in Central African Republic*, N.Y. TIMES (Nov. 26, 2013), [http://www.nytimes.com/2013/11/27/world/europe/france-adds-troops-in-central-african-republic.html?\\_r=1](http://www.nytimes.com/2013/11/27/world/europe/france-adds-troops-in-central-african-republic.html?_r=1) (reporting the second occasion in 2013 that France sent troops to a former colony). See generally Neuman, *Extraterritoriality*, *supra* note 114.

209. SOPHOCLES, *ANTIGONE* (J. E. Thomas, transl., 2005).

210. OVID, *2 METAMORPHOSES VII* (Brookes More, ed., 1949).

211. CURRIE, *Married Women's Contracts*, *supra* note 5, at 88.

trouble is that in order to take a detached viewpoint we must establish ourselves on Cloud Nine, or some other place out of this world. . . .”<sup>212</sup>

But even on Currie’s “Cloud Nine,” having achieved disinterestedness, the code-makers find that their long-sought prize of neutrality and uniformity eludes them. The reason these lie beyond their grasp is that uniformity and neutrality *are mutually exclusive*. They cannot both be had in the same case, not in the long run. Consider the reality that the defendant most able to pay damages is likely to be a company, and that, as every corporate lawyer will tell you, the best hope for uniformity is most likely to be a reference to the single well known place at which a corporation bases itself and upon which it bases its planning. After all, any damages caused by the corporation, and any links up or down its chain of transactions, could be scattered among several states and extend abroad. So uniformity is always best served by choice of the law of the state where the defendant corporation *is*. And of course this is a place that, over the run of cases, has been chosen because it is reasonably welcoming to the defendant’s activities. But defendant-favoring law is not neutral. In our attempt to ensure *uniformity*, our choice of governance at defendant’s base has defeated our hope for *neutrality*. Walter Wheeler Cook and other American Legal Realists long ago pointed this out, Cook remarking that the codifiers seeking these noble but incompatible ends were like “bab[ies] . . . cry[ing] for the moon.”<sup>213</sup>

Even apart from their inevitable defendant bias, the ideals of uniformity and certainty do not seem to comport with *American* ideals. American federalism, with its individually governed states, reflects a constitutional value judgment that a nation offering *options* is a superior, more free environment for individuals and enterprise. Indeed, in the extreme case, uniformity can be dangerous.<sup>214</sup>

One of Currie’s more extravagant observations is that, if the place of events had exclusive power to govern events on its territory, and full faith and credit was necessarily given to its judgments, a failure of its legislature to enact a wrongful death act operative in negligence cases would provide immunity in that state from damages for negligence resulting in wrongful death, and judgments dismissing wrongful death claims in that state would, under the Full Faith and Credit Clause, have to be recognized in every other state, and so the place of events would have created a license to kill in negligence cases.<sup>215</sup> My point here, is that, to

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212. Brainerd Currie, *The Verdict of Quiescent Years*, 28 U. CHI. L. REV. 258 (1961), reprinted in BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 584, 595 (1963).

213. Cook, *An Unpublished Chapter*, *supra* note 58, at 420.

214. For example, nobody doubts that the near-collapse of the Greek economy today has something to do with Greece’s inability to manage its own currency. When a federation, upon imposing a uniform currency, refuses for the occasion to assume the debts of its members, and lacks the nationalizing principles with which the United States is blessed, uniformity can be gravely injurious. See, e.g., Allen Mattich, *Why Greece Still Haunts the Eurozone*, WALL ST. J. (Dec. 9, 2014), <http://blogs.wsj.com/moneybeat/2014/12/09/why-greece-still-haunts-the-eurozone/>.

215. See discussion of the “open season on Boy Scouts” case, *supra* note 24.

the extent that the Full Faith and Credit Clause laudably makes the United States a unitary juridical entity, its very uniformity can become oppressive. Enforcement of American full faith and credit to judgments, essential as it is, brooks no exceptions for a state's public policy.<sup>216</sup>

The states, already struggling to entice industry as they give up revenue, grant subsidies, and shower tort "reforms," a low minimum wage, and other favors on any company that will maintain a presence in their territories, certainly will not be helped by uniform defendant-favoring law to escape from the non-virtuous circle in which they spiral downward in frantic competition to reach the regulatory bottom. If what we want is unfair and unsafe local markets, unsafe local workplaces, unsafe local transport, and difficulties in compensating injured victims thereof, not to mention a degraded local environment, depleted state resources, and blighted local landscapes—if that is a world we want to live in, the uniform choice of defendant's preferred law would seem to be our best bet.<sup>217</sup>

Like most enacted law, codified jurisdiction-selecting rules cannot be "sophisticated"—peace to Dean Symeonides—however multi-layered, combined, and hierarchical, no matter how generous the escapes provided. Not in the way that the common law can. Although, as Dean Symeonides has argued,<sup>218</sup> sophisticated codifications today work toward reasonable flexibility and judicial discretion, and do provide escape clauses, a code simply cannot deal with all of life's infinite exigencies, not in the way the common law does. Inevitably the codifier's work must result in something like the demanding complexities of the Louisiana code. The perfect sophisticated code would be engrafted with exceptions and qualifications, and exceptions to the exceptions, like the epicycles upon epicycles which Ptolemaic astronomers engrafted on planetary orbits to conform them to observation.

All this considered, any proposal for a *Third Restatement* that would continue the same old unavailing struggle to discover more perfect, uniform, and neutral—but sophisticated and flexible—jurisdiction-selecting rules should be a non-starter.

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216. Cf. *Fauntleroy v. Lum*, 210 U.S. 230 (1908).

217. There is a good argument that the prevailing preference for deregulatory law could be self-defeating. Strong federal regulation, for example, can cartelize an industry, enabling its members to do better business without damage to their competitiveness, at least in this country. Arguably it can improve competitiveness abroad as well. Doing better business improves the brand, so an improved American brand might be able to command premium pricing in nonforum markets.

218. See Symeon C. Symeonides, "Codification and Flexibility in Private International Law," GENERAL REPORTS OF THE XVIIIITH CONGRESS OF THE INTERNATIONAL ACADEMY OF COMPARATIVE LAW [RAPPORTS GÉNÉRAUX DU XVIIIÈME CONGRÈS DE L'ACADEMIE INTERNATIONALE DE DROIT COMPARÉ] (K.B. Brown and D.V. Snyder, eds., 2011).

## IX. CONCLUSION

As the new *Third Restatement* gets under way, it offers a splendid opportunity, as far as choice of law is concerned, to come to grips with the Supreme Court's interest-analytic constitutional cases on the conflict of laws, from *Dick* through *Shutts*, and to treat them as the foundation for the field that they are.

The work of the most celebrated theorist of the conflict of laws, building on the Supreme Court's interest-analytic cases on the Constitution, offers the finest framework for a changed and complete system of choice of law. This system provides, beyond its rational analyses, a new way of classifying and organizing conflicts cases. It offers determinate resolutions for each class of cases. Although the Supreme Court may never say that the forum, in all but a limited class of cases, must apply its own law, a new Restatement can say that it *should*. Accompanied by illustrative cases and comments, illuminated by discussions of innumerable theoretical and technical issues beyond the scope of this paper, the *Third Restatement*, insofar as it deals with choice of law, can make a long-awaited, great and needed change.

The interest-analytic thinking that is at the heart of the radical transformation proposed here, after all, is as traditional a way of thinking as traditional choice rules were. Since earliest times American judges and lawyers have reasoned purposively about a rule to determine its scope. The Supreme Court today uses this very analysis in virtually every constitutional case. The projected *Third Restatement* can make a final break with the stale rules of the past—the futile search for an ever more perfect *place*—and provide a new beginning for the law of conflict of laws—a rational and clearly constitutional way of choosing, not the best *place*, but the necessarily governing *law*.