

**CURRIE'S INTEREST ANALYSIS IN
THE 21ST CENTURY:
LOSING THE BATTLE, BUT WINNING THE WAR**

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In the mid-twentieth century, Professor Brainerd Currie proposed a new approach to thinking about choice of law; this approach he called "governmental interest analysis."¹ Taking the perspective of a state court judge deciding a multistate case, he began his analysis with an examination of the laws invoked by the parties to discover whether they were actually in conflict. He did this by using the methods of statutory interpretation to ascertain the policies expressed in or reasonably attributable to the competing laws, and by inquiring whether any of the respective states had an interest in effectuating those policies in the particular case. Conceiving of the state judiciary as an integral part of state government, he drew a clear line between the role of the legislature in making policy and that of the judiciary in interpreting and enforcing that policy subject only to constitutional limits. Thus, he concluded that if a judge, faced with a choice of law problem, determined that the state had a governmental interest in applying its policy to the case at hand, the judge should apply that law to decide the case, regardless of whether another state also had a competing interest in having its law applied. If the case had been brought in the other state, the judge of that other state would be expected to do the same. Almost as an afterthought, Currie summarized his complex analysis in the form of a five-step methodology, phrased in terms of how a court wishing to follow his analysis should proceed.² The bottom line of this methodology, as it was introduced initially, was that the

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1. BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 189 (1963).

2. *Id.* at 183-84.

forum court would apply forum law in all cases in which the forum had an interest.³ The other state's law would be applied only if that state had an interest but the forum had none (the "false conflict").⁴ It followed that if both states had competing policies and interests (the "true conflict"), the forum court should advance the forum's interests by enforcing its policy.⁵

Currie's contemporaries, both in the United States and in other countries, regarded his approach as revolutionary.⁶ It may be difficult today to understand why this was so. After all, as others have observed, his method of ascertaining and interpreting the policies of competing laws was used routinely to reconcile conflicting laws in force in a single state, as well as to apply constitutional texts to new situations that the framers had not contemplated.⁷ These methods, however, had not been used to solve multistate problems, particularly in cases involving international conflicts. In the field known in England and on the continent as "private international law," the primary goal was to achieve "conflicts" justice, not "substantive law" justice.⁸ The recommended method was to identify the particular jurisdiction

3. Currie later modified this methodology to permit "a more moderate and restrained interpretation" of forum policy and interest in the case of an apparent true conflict. See Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 757 (1963).

4. CURRIE, *supra* note 1, at 189; see also Comment, *False Conflicts*, 55 CAL. L. REV. 74, 75-76 (1967) (explaining that, while Currie himself used the term "false problems," others commenting on Currie's work have used the term "false conflicts" to describe the same phenomenon).

5. Currie put forth this methodology as an interim measure, designed to prevent further harm to state interests, pending development of a more satisfactory approach. See CURRIE, *supra* note 1, at 109-10 ("Where the legitimate interests of two states are in genuine conflict, the system does not reconcile them, nor determine which is more important, nor even permit the state in position to do so to pursue its own interest. It simply strikes down the one interest or the other, indiscriminately, arbitrarily, on the basis of fortuitous and irrelevant circumstances."); see also *id.* at 187 ("Let us first clear away the apparatus that creates false problems and obscures the nature of the real ones. Only then can we effectively set about ameliorating the ills that arise from a diversity of laws by bringing to bear all the resources of jurisprudence, politics, and humanism—each in its appropriate way.").

6. See Herma Hill Kay, *A Defense of Currie's Governmental Interest Analysis*, 215 RECUEIL DES COURS 9, 78-167 (1989-III).

7. See Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 284-89 (1990); Robert A. Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation*, 25 UCLA L. REV. 181, 194-95, 198-99 (1977).

8. See EUGENE F. SCOLES ET AL., CONFLICT OF LAWS 1-2 (3d ed. 2000); Gerhard Kegel, *The Crisis of Conflict of Laws*, 112 RECUEIL DES COURS 91, 185 (1964-III).

with the right to decide the choice-of-law question.⁹ The judge's role in a choice-of-law case was quite limited. The judge was supposed to decide only which jurisdiction's law should apply, not which law should apply. In making this decision, the judge was permitted to interpret the "connecting factors" that were used to identify the appropriate jurisdiction, but not the laws themselves.¹⁰ Indeed, as an initial matter, the content of the purportedly conflicting laws was irrelevant. Once the applicable law's jurisdiction had been identified, the forum court was permitted to examine the content of its applicable law for the limited purpose of deciding whether its enforcement would violate a fundamental public policy of the forum.¹¹ If so, the forum was permitted to refuse to enforce the offending law, and instead to apply forum law by default if the court could not dismiss the case without a decision on the merits.¹²

Currie's theory of governmental interests, formulated against the background of Joseph Beale's overly rigid "vested rights" version of conflicts justice¹³ and tailored for the interstate rather than the international case, brushed aside as irrelevant centuries of painstaking analysis designed to create a uniform system for resolving choice of law problems. Rather than playing a minor role in the implementation of the system, Currie's judge took center stage, armed with all the interpretative power of common-law courts. Currie expected that instead of sacrificing state interests in a quest for uniformity, judges in different states would reach different results in cases of "true conflict," where one state's policies and interests must yield to those of the other. From the perspective of traditional scholars, Currie's approach was not merely revolutionary, but also wrong-headed and ultimately destructive.¹⁴

Thus, it is not surprising that traditional scholars hastened to read the burial service of Currie's governmental interest

9. See SCOLES ET AL., *supra* note 8, at 17.

10. See *id.* at 17-18.

11. See Kegel, *supra* note 8, at 188.

12. *Id.*

13. See JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 58.1 (1935) (defining "established" rights); see also LEA BRILMAYER, CONFLICT OF LAWS § 1.2 (2d ed. 1995).

14. See Kegel, *supra* note 8, at 207 (concluding after a detailed analysis that Currie's argument left him "unconvinced").

analysis. But the service remains premature. Although only two states and the District of Columbia expressly adopted Currie's full methodology¹⁵—and one of the two, California, has mistakenly confused it with a different formulation in true conflicts cases¹⁶—judges in virtually all states in the United States now begin the choice-of-law analysis with an examination of the content of the conflicting laws.¹⁷ Currie may have lost the battle of persuading courts to choose forum law in the true conflict case, but he won the war of replacing a jurisdiction-selecting formula with an approach that focuses on the policies and interests underlying the conflicting laws. All the modern United States choice-of-law theories use policy analysis except for those few states that continue to adhere to the vested rights jurisdiction-selecting rules of the first Restatement.¹⁸ In function, if not in name, Currie's approach has pervaded the field of choice of law.

But governmental interest analysis was not merely a theory for choosing the applicable law. In its inception, it was also an approach to adjudication that eschewed reliance on rules in favor of case-by-case analysis. This aspect of Currie's thinking perhaps has been criticized even more severely than his methodology. His perceived willingness to allow judges to do justice in the individual case was attacked substantively as elevating subjectivity over the rule of law, and procedurally as incapable of handling the flood of interstate conflicts cases. That he cabined judicial discretion first by requiring a search for legislative policy and second by mandating a vindication of governmental interest was overlooked or ignored by critics, who feared that the focus on policy and interest knew no boundaries and therefore could set no predictable limits. Today, even some of Currie's most

15. See Herma Hill Kay, *Theory Into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521, 540-48 (1983) (identifying New Jersey, California, and the District of Columbia as having adopted interest analysis, but concluding that the District of Columbia no longer adhered to Currie's methodology).

16. See Herma Hill Kay, *The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience*, 68 CAL. L. REV. 577 (1980).

17. See Sedler, *supra* note 7, at 181-82.

18. RESTATEMENT OF CONFLICT OF LAWS (1934); see also Symeon C. Symeonides, *Choice of Law in the American Courts in 1999: One More Year*, 48 AM. J. COMP. L. 143, 144 (2000) (reporting no change since 1998, when only 11 states continued to adhere "to a lesser or greater degree" to the *lex loci delicti* rule in torts); Robert Allen Sedler, *Rules of Choice of Law Versus Choice-of-Law Rules: Judicial Method in Conflicts Torts Cases*, 44 TENN. L. REV. 975, 975-76 (1977).

loyal supporters, rather than defend this aspect of his thinking, have proclaimed that his analysis, while eschewing choice-of-law rules, has resulted over time in a predictable body of rules of choice of law.¹⁹ Others have taken the body of reported choice-of-law decisions and attempted to restate them into rules such as the “common domicile” rule in personal injury cases.²⁰ Currie himself, however, foresaw the possibility of substituting a “domicile” rule rather than a “place of making” rule in contracts and rejected it as unsatisfactory.²¹ The effort to turn interest analysis into a codified system may be as premature as predictions of its demise. A time like the present, when scholars continue to blur the differences between “policies” and “interests”²² or convert false conflicts into true ones courtesy of the U.S. Constitution,²³ and courts fail to grasp the analytical difference between a true conflict case in an interested forum and a true conflict case in a disinterested third state,²⁴ is not an appropriate moment for codification.

It follows that interest analysis in the twenty-first century should continue to follow the painstaking methods Currie identified. If this is done, courts may be able to build a body of choice of law precedents in each state that will provide accurate guid-

19. See, e.g., Sedler, *supra* note 18, at 977-80.

20. See Symeonides, *supra* note 18, at 5 (citing EUGENE SCOLES ET AL., CONFLICT OF LAWS § 17.47 (3d ed. 2000)).

21. See CURRIE, *supra* note 1, at 103-04.

22. See Lea Brilmayer, *The Role of Substantive and Choice of Law Policies in the Formation and Application of Choice of Law Rules*, 252 RECUEIL DES COURS 9, 75-80, 84-89 (1995).

23. See Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2525-27 (1999) (arguing that, among other things, Currie's methodology violates the Privileges and Immunities Clause of Article IV, Section 2, because application of forum law in false conflict cases discriminates against nonresidents simply because they are not “locals”). Roosevelt draws this conclusion from Currie's analysis of *Grant v. McAuliffe*, 264 P.2d 944 (Cal. 1953), apparently failing to notice that Currie had anticipated this objection and, in order to meet it, had rejected a choice of law principle that would create a preference for “locals” over nonresidents. See CURRIE, *supra* note 1, at 111-16 (rejecting a third principle that would deny to foreign married women an immunity enjoyed by local married women, for no reason except that they are foreign, and reasoning that “[n]ot only does such discrimination offend the sense of fairness; in all probability it is unconstitutional, applied to citizens of other states of the Union, as an infringement of the Privileges and Immunities Clause of Article IV, Section 2. Let us concede this without quibbling.”).

24. See *Sakorn Buckhout v. Lockheed Martin Corp.*, 176 F.3d 481 (1999) (9th Cir. Apr. 2, 1999), *rehearing den.*, May 20, 1999 (the author appeared as Of Counsel on a pro bono basis for Sakhorn Buckhout on the appeal).

ance to other state courts seeking necessary information about the formulated policies and declared interests of that state. In that event, I suspect that interest analysts will give scant attention to the five “major themes”²⁵ identified by Dean Symeonides as the Moderator of our panel, for their energies will be focused elsewhere. Thus, I expect that if Currie were a member of this panel, he would respectfully decline the invitation to confront once again Theme One, “the dilemma between ‘conflicts justice’ and ‘material justice,’” because he resolved that dilemma earlier in favor of judicial vindication of the policy of the forum state when its interests were at stake.²⁶ He would surely give short shrift to Theme Two, “the conflict between the desideratum of international uniformity and the need or desire to protect state interests,” because he refused to permit forum court judges to sacrifice their state’s interests in the hope of achieving a goal of uniformity that was not readily attainable at any event.²⁷ As to Theme Three, “the antagonism among or co-existence of, multilateral, unilateral, and substantive methods,” Currie would have little to offer.²⁸ Even if he was unaware of the similarities between his governmental interest analysis and the earlier unilateral techniques of the Italian statisticians, as seems to have been the case,²⁹ he had little patience for abstract discussions of theory apart from the specifics of particular cases. In any event, the differences between those two approaches seem to be as striking as their similarities. Currie’s reliance on the common-law judge’s methods of statutory interpretation had little in common with the efforts of the Italian statisticians to classify laws into spatial categories such as “real,” “personal,” or “mixed,” nor with the efforts of the modern unilateralists, like Pilenko and Quadri, to develop choice of law rules.³⁰ He would have more to say on Themes Four (“the tension between the goals of certainty and flexibility, and the co-existence of choice-of-law rules, and choice-of-law ‘approaches,’” and Five (“the antagonism be-

25. See Symeon Symeonides, *American Conflicts Law at the Dawn of the 21st Century*, ANNUAL AALS MEETING PROGRAM 89-90 (2000).

26. See CURRIE, *supra* note 1, at 181-82.

27. See *id.* at 100-01.

28. See *id.* at 185.

29. See SYMEON C. SYMEONIDES, *PRIVATE INTERNATIONAL LAW AT THE END OF THE 20TH CENTURY: PROGRESS OR REGRESS?* (Symeon C. Symeonides ed., 1999).

30. See Kay, *supra* note 6, at 92-96.

tween, or co-existence of, 'jurisdiction-selecting rules' and 'content-oriented' rules or approaches"). He might observe, regarding both themes, that he saw no point in continuing to seek a "certainty" through the use of "jurisdiction-selecting rules" that had proved to be unattainable with Beale's methods. He might go on to restate his belief that further advances in the field required the laying aside of choice-of-law rules and the construction of a more flexible approach that would permit judges to do what they were charged with doing: upholding, within constitutional limits, the law of the state they served.³¹

I will not address these five themes further, but rather will comment briefly on two challenges from members of today's panel designed to show that interest analysis is unfit for the twenty-first century. The first, Professor Friedrich Juenger's view that interest analysis is caught in a "time warp" of rapidly disappearing conflicts centered around restrictive tort laws³² and that it focuses on dated domestic law problems of little interest to comparativists³³ can be dealt with quickly. In response to the "time warp" charge, I would observe that an analytical focus on the classic examples of interstate choice of law is not outmoded when those examples continue to recur in the most recent litigated cases. Why should theorists abandon discussion of the 1963 decision in *Babcock v. Jackson*,³⁴ when (as our Moderator has pointed out in his most recent invaluable annual survey of the case law) 25 out of 32 cases in which a state high court has abandoned the traditional *lex loci delicti* rule in torts have been either *Babcock* or reverse-*Babcock* situations?³⁵ To be sure, a more recent version of *Babcock* could be substituted, but to do so would obscure the unchallenged influence of its holding.

31. See CURRIE, *supra* note 1, at 109-10 ("The plain truth is that the apparatus designed for the handling of real problems of conflict of laws generates problems where none existed before, and more often than not disposes of the false problems unsatisfactorily; at the same time, it provides no more than the illusion of a solution for the real problems. . . . Ultimately, the survival of such a system can be attributed only to the fact that few people care very much whether such matters are handled intelligently or not, so long as they are more or less expeditiously disposed of.").

32. See Friedrich K. Juenger, *Choice of Law: How It Ought Not to Be*, 48 MERCER L. REV. 757, 757 (1997).

33. See Friedrich K. Juenger, *The Need for a Comparative Approach to Choice-of-Law Problems*, 73 TUL. L. REV. 1309, 1325-29 (1999).

34. 191 N.E.2d 279 (N.Y. 1963).

35. See Symeonides, *supra* note 18, at 3-4.

As to the “dated problem” charge, remember that Currie chose to announce his new approach by an extended analysis of a familiar and relatively noncontroversial matter precisely to be able to focus on the shortcomings of traditional methodology without encountering the distractions that might accompany a livelier controversy.³⁶ At the time he wrote, the interstate, rather than the international, problem was the mainstay of choice-of-law litigation in the United States. Currie’s decision to begin his analysis with the problems of primary concern to the courts was neither parochial nor misguided, even if those problems may have been of scant concern abroad. Moreover, while global cases, such as those to be discussed shortly, are attracting more attention today, they have not yet fully displaced the more routine problems of tort and contract law that Currie discussed.

More serious is the challenge that can be drawn from Judge Jack B. Weinstein’s chilling hypothetical about “The Product”³⁷ that interest analysis is too complex to serve as a practical methodology in the world of global litigation that now characterizes product liability. His illustration is indeed a sobering one. Still, interest analysis may have something to offer toward its solution. As he recognizes, Judge Weinstein as a federal district court judge is bound under *Klaxon v. Stentor Electric Mfg. Co.*³⁸ to apply New York choice of law. If we assume (concededly a large assumption) that New York has decided to adopt governmental interest analysis, he would begin with an examination of New York’s law governing products liability and that of any other potentially conflicting laws offered by the parties. While this is a difficult and time-consuming task, especially given the myriad potentially applicable laws that Judge Weinstein posits, as Currie observed, the fact that laws are different does not necessarily mean that their policies are in conflict.³⁹ Careful examination may yield only a few laws with different policies that affect li-

36. See *Milliken v. Pratt*, 125 Mass. 374 (1878) (dealing with the enforcement of a married woman’s contract to guarantee her husband’s credit); CURRIE, *supra* note 1, at 78.

37. See Jack B. Weinstein, *Mass Tort Jurisdiction and Choice of Law in a Multinational World Communicating by Extraterrestrial Satellites*, 1, 1-2, 37 WILLAMETTE L. REV. 145, 145 (2000).

38. 313 U.S. 487 (1941).

39. See CURRIE, *supra* note 1, at 186 (discussing Nebraska’s experience with small loan contracts).

ability of the inventors, manufacturers, and distributors of "The Product" to the plaintiffs. If so, the competing interests of the various jurisdictions in having those policies vindicated can be identified and considered.

Judge Weinstein, in setting out his proposed bold solution to the hypothetical,⁴⁰ did not examine the content of New York products liability law, nor did he tell us either what New York law is or what any other potentially applicable laws might be. Rather, he assumed that some or all of these laws were in conflict, and suggested that "choice of law and jurisdictional inquiries should merge into one"⁴¹ so that a federal district court sitting in New York could be permitted to avoid the conflict by applying New York law, as the fairest and presumably most convenient and efficient rule of decision. My point is not that this approach might be unconstitutional (although it quite possibly fails to meet the *Phillips Petroleum Co. v. Shutts*⁴² standard), nor that it has been proposed before (although it bears obvious similarities to Albert A. Ehrenzweig's theory of "a proper law in a proper forum"⁴³), but that it is not what a judge following governmental interest analysis would or should do.

As Judge Weinstein notes, however, there may be more manageable ways of handling global litigation than expecting a "New York court adjudication [to] govern the world[.]"⁴⁴ Transfer of part or all of the litigation is already possible in the federal courts and, by treaty as Judge Weinstein suggests, might become available internationally. The choice-of-law process need not be affected by a change of venue and even might benefit from the supervision of judges knowledgeable about various legal regula-

40. See Weinstein, *supra* note 37, at 152-55.

41. *Id.* at 154.

42. 472 U.S. 797, 821-22 (1985) (holding that, in order to apply its law consistently with due process and full faith and credit, the forum state "must have a 'significant contact or significant aggregation of contacts' to the claims asserted by each member of the plaintiff class, contacts 'creating state interests,' in order to ensure that the choice of [forum] law is not arbitrary or unfair"). Judge Weinstein brushes this objection aside with the observation that the *Shutts* case "does not seem an insuperable barrier to future change." Weinstein, *supra* note 37, at 154.

43. See ALBERT A. EHRENZWEIG, PRIVATE INTERNATIONAL LAW 107-10 (1967) (discussing "lex propria in foro proprio"); see also Stanley E. Cox, *The Interested Forum*, 48 MERCER L. REV. 727, 730-32 (1997) (arguing that unless the forum can apply its own law, it should not hear the case).

44. See Weinstein, *supra* note 37, at 151.

tions of "The Product." In some jurisdictions, for example, "The Product" might be viewed as a drug and be heavily regulated. In others, it might be classed as a cosmetic and be given more leeway. Elsewhere, its sale and use might be prohibited, much like birth control substances once were (after all, a pill that makes a person look ten years younger and ten pounds lighter **MUST** be immoral).

A single judicial solution fashioned in New York to all these competing concerns is not self-evidently "fair," despite New York's reputation as a sophisticated and cosmopolitan legal environment. Currie's approach, by admitting the possibility of different solutions in different courts, may be better suited for the multinationalism of the twenty-first century.