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Recommended Citation

Simson, Gary J. (1991) "Plotting the Next Revolution in Choice of Law: A Proposed Approach," *Cornell International Law Journal*: Vol. 24: Iss. 2, Article 5.
Available at: <http://scholarship.law.cornell.edu/cilj/vol24/iss2/5>

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Plotting the Next “Revolution” in Choice of Law: A Proposed Approach

In this essay I invite readers to consider the attractiveness of the following approach for resolving choice-of-law problems:

1. Ascertain whether any state¹ has a greater interest *in determining the outcome of the case* at hand than the forum state.
2. If so, make the choice(s) of law that a court sitting in the foreign state and applying that state’s conflicts law would make.
3. If not, apply forum law with regard to each issue in the case unless:
 - a. The foreign elements in the case bring into play a policy that would not be materially implicated if the case were confined in its elements to the forum state;
 - b. Such policy militates strongly in favor of a choice of nonforum law; *and*
 - c. The policy preference expressed in the forum state’s internal law is not so strong as to belie the possibility that the forum state’s lawmakers could intend it to yield to another policy in a multi-state case.

I outline below reasons for adopting an approach along these lines and expand upon its possible ingredients. I do not claim to offer a finished approach, nor do I make a concerted attempt to establish the inferiority of other approaches, whether Currie’s or those proposed by my cohorts in this symposium. When I invited Professors Brilmayer, Kramer, and Singer to speak at the AALS program on which this symposium is based, I urged them to be as constructive as possible in their remarks—to aim not at exposing difficulties in governmental interest analysis but at broadening the scope of conflicts debate by proposing, however tentatively, approaches that might merit adoption over the Currie approach. I write this essay in a similar affirmative, suggestive vein.

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1. I use the term “state” here interchangeably with “jurisdiction.” My proposal is intended to apply to international as well as intranational cases.

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I. The Initial Choice of Jurisdiction

In essence, my proposed approach calls upon a court to make a choice of jurisdiction (identify the state that should have authority to determine the outcome of the case before the court)² and then a choice of law (decide the case as the selected jurisdiction would decide it by applying the selected jurisdiction's conflicts law from the perspective of a court sitting in that jurisdiction). Under the approach, the forum state is the selected jurisdiction unless another state has a greater interest in determining the outcome of the case at hand.

A. The Policy Objective and Means-End Strategy

I propose this initial choice of jurisdiction as a means for courts to serve an important policy: maximizing long-term enforcement of the forum state's interests in determining the outcomes of cases with some connection to the forum state. In characterizing this policy as an important one, I do not assume that states ordinarily have interests in the outcome of a conflicts case similar in magnitude to their interests in the outcome of litigation in which the states themselves, rather than private litigants, are the parties. I do assume, however, that at least in the aggregate a state has a material stake in the way in which conflicts cases with some connection to the state are decided.³

The proposed approach seeks to implement this interest-maximizing policy by a strategy of identifying the forum state as the selected jurisdiction unless another state has a greater interest. As is probably apparent, this strategy is based on notions of reciprocity. It reflects an assessment of whether, in light of the relative magnitude of state interests, the enforcement of forum state interests is maximized in the long run by (a) enforcing the nonforum interest and thereby inviting reciprocal treatment in cases heard in other states' courts or (b) enforcing the forum interest and thereby forgoing the possible benefits of reciprocity.⁴

To be sure, reasonable people may differ as to whether the proposed strategy is the optimal one for maximizing long-term enforcement of forum interests. In particular, in light of comments by Professor

2. The choice-of-jurisdiction aspect of my proposal develops a concept that I put forward a number of years ago in the context of a discussion of full faith and credit limitations on choice of law. See Simson, *State Autonomy in Choice of Law: A Suggested Approach*, 52 S. CAL. L. REV. 61, 73-78 (1978).

3. In doing so, I part ways with Professor Juenger, who seems to assume that the state interests implicated in conflicts cases cannot be worth talking about because of the difference in magnitude between such interests and those implicated in suits between states. See Juenger, *Governmental Interests—Real and Spurious—in Multistate Disputes*, 21 U.C. DAVIS L. REV. 515 (1988).

4. I am relying on rather basic principles of game theory. See generally R. AXEL-ROD, *THE EVOLUTION OF COOPERATION* (1984). Since courts are obviously repeat players in the choice-of-law enterprise, such principles seem quite apt.

Kramer on an analogous matter,⁵ I suspect that he would insist that, at least where the forum state is "tied" with another state for the greatest interest in determining outcome, the court should adopt a considerably more sophisticated and varied strategy—one attuned, for example, to the volume of particular types of cases litigated in the forum and other states' courts. Perhaps, in theory, courts might be well-advised to pursue a more complex strategy. I am quite skeptical, however, that in practice they would be willing and able to devote the time and energy needed to formulate a strategy that serves the interest-maximizing policy at issue better than the strategy I propose.⁶ If my skepticism seems unwarranted, I refer the reader to the depressingly long list of cases every year in which courts apply the Second Restatement's most-significant-relationship test—one calling upon courts to assess the significance of various enumerated contacts in light of seven "factors underlying choice of law"⁷—by doing little, if anything, more than counting

5. See Kramer, *More Notes on Methods and Objectives in the Conflict of Laws*, 24 CORNELL INT'L L.J. 245, 273-74 (1991) (discussing resolution of "true conflicts" under governmental interest analysis if forum's only concern is long-term advancement of domestic policies); Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 314 (1990) (same).

6. Cf. B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 119 (1963) (maintaining that, under governmental interest analysis, the "sensible and clearly constitutional thing for any court to do [in true-conflict cases involving a forum interest] is to apply its own law. In this way it can be sure at least that it is consistently advancing the policy of its own state.").

7. The language quoted in the text is from RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6, comment c (1971). The following sections of the Second Restatement illustrate the nature of the most-significant-relationship test:

§ 145. The General Principle [for torts]

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

- (a) the place where the injury occurred,
- (b) the place where the conduct causing the injury occurred,
- (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
- (d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

§ 6. Choice-of-Law Principles

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include:

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,

contacts.⁸

B. Outcome-Determining Interests

In outlining my approach in the introduction, I used italics in the phrase "interest in determining the outcome of the case" to signal the reader that I would not be discussing interests in the usual Currie sense of interests in applying the policies underlying the states' internal laws. After spelling out below more fully the type of interests I have in mind, I contrast them more clearly to Currie-style interests.

Basically, I suggest that a state should be found to have an interest in determining the outcome of a case if and only if the outcome will affect the welfare of people who make their home in the state. As a corollary, I suggest that the magnitude of a state interest of this sort depends upon the magnitude of the effect of the outcome on these people's welfare.

These outcome-determining interests share with Currie-style interests the assumption that a state's interests should in some way be measured in terms of impact on local residents.⁹ Under the Currie approach, a policy underlying a state law gives rise to an interest only if application of the policy in some way benefits the residents of the law-

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- (f) certainty, predictability and uniformity of result, and
 - (g) ease in the determination and application of the law to be applied.

8. The annual installments of "Choice of Law in the American Courts," published in recent years in *The American Journal of Comparative Law*, provide a relatively painless way of confirming that there are many such cases. Though far from comprehensive in discussing choice-of-law decisions of the preceding year, these surveys reveal a sizable number of essentially contact-counting applications of the most-significant-relationship test. See, e.g., Symeonides, *Choice of Law in the American Courts in 1988*, 37 AM. J. COMP. L. 457 (1989). Although Professor Kramer is considerably more sanguine than I with regard to courts' willingness and competence to develop interest-maximizing strategies, he apparently takes at least as gloomy a view as I do of courts' applications of the most-significant-relationship test. See part VI ("A Word on the Second Restatement") of Professor Kramer's forthcoming survey of 1990 cases as the next installment in the "Choice of Law in the American Courts" series.

9. A state often defines "residence" in different ways for different purposes, and different states often define the term differently for the same purpose. See Reese & Green, *That Elusive Word, "Residence,"* 6 VAND. L. REV. 561 (1953). As indicated in the text, I am using "residence" to mean the place where a person settles or makes his or her home, and I do so for present purposes on the view that persons who satisfy this definition of state residence are those most likely to benefit or burden the state's operations. Although this definition will not always be free of difficulty in application and may require further refinement, I suggest that it generally should prove quite workable. Other than proposing that likelihood of benefit or burden to a state's operations also be a central consideration in determining where multistate corporations reside for purposes of my approach, I treat this issue as beyond the scope of the present essay. For critical analysis of the significance that courts using governmental interest analysis have attached to the different corporate contacts of place of incorporation, principal place of business, and place of doing business, see Note, *Interest Analysis Applied to Corporations: The Unprincipled Use of a Choice of Law Method*, 98 YALE L.J. 597 (1989). See also the treatment of corporate residence in G. SIMSON, ISSUES AND PERSPECTIVES IN CONFLICT OF LAWS: CASES AND MATERIALS 154-58 (2d ed. 1991).

making state. In my view—and apparently Currie's as well¹⁰—an understanding of state interests that attaches special significance to impact on local residents is appropriate in light of the fact that the people who settle in a state are those most likely to benefit or burden its operations.

The outcome-determining interests featured in my approach differ from Currie-style interests, however, in two fundamental ways. First and most obviously, their focus is markedly different. They look at possible outcomes of litigation, while Currie interests look at policies underlying states' internal laws. Moreover, they take into account impact on local residents regardless of its beneficial or disadvantageous nature, while Currie interests take into account only beneficial effects. As may be immediately apparent and as Part II should in any event make clear, the outcome-determining interests in my approach implicitly embrace, by virtue of these differences in focus, a much broader range of state interests than those recognized by the Currie approach. They tacitly acknowledge that states may have interests in applying not only their own internal laws but also—for purposes of furthering such choice-of-law policies as protecting justified expectations or serving the needs of the interstate and international systems—other states' internal laws. Moreover, they tacitly recognize that states may have interests in applying their own internal laws not only to advantage local residents but also—for reasons of basic fairness and morality—to disadvantage them.¹¹

The second basic respect in which the outcome-determining interests that I have described differ from Currie interests is that the former are "objective" in the sense of being independent of any wishes, desires, or thought processes on the part of the state. Professor Kramer discusses in his paper the debate within interest analysis circles as to whether interest analysis is subjective only insofar as it requires inquiry into the policies that the lawmaking state had in mind in adopting a law, or whether its subjectivity extends to requiring inquiry into whether the lawmaking state would consider a particular policy applicable under the facts of the case.¹² The outcome-determining interests that I describe are ascertained by the court without any such subjective inquiry. The court may not always find it easy to ascertain the effect of the outcome on the residents of the different states with some connection to the facts

10. See, e.g., B. CURRIE, *supra* note 6, at 85-87. See also Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation*, 25 UCLA L. REV. 181, 202 (1977).

11. I am not suggesting that interest analysts never find an interest when application of a state's law would disadvantage the one party who is a resident of that state. I recognize that they occasionally do so by, for example, finding that under the facts of the case application of the law would benefit the state's general population by serving a deterrent policy underlying the law. See, e.g., *Marra v. Bushee*, 317 F. Supp. 972 (D. Vt. 1970), *rev'd on other grounds*, 447 F.2d 1282 (2d Cir. 1971); *Hurtado v. Superior Court*, 11 Cal. 3d 574, 114 Cal. Rptr. 106, 522 P.2d 666 (1974).

12. Kramer, *More Notes on Methods and Objectives in the Conflict of Laws*, *supra* note 5, at 265.

of the case. I suggest, however, that its inquiry is substantially more manageable and concrete than one, like Currie's, that significantly turns on articulating what state lawmakers had in mind.¹³

C. An Illustration, and Some Possibilities for Simplification

Assume that, though obviously inebriated, X, a resident of state A, is served several alcoholic drinks by the bartender of a tavern in state B. While driving home from the tavern, X falls asleep at the wheel soon after reentering state A. X's car crashes into one owned and driven by Y, a state A resident. Y's car is totally ruined in the crash, and Y suffers injuries that lead to a one-week stay in a local hospital and several follow-up visits to Y's family doctor. Alleging that the accident was the result of negligence on the tavern's part in serving the obviously inebriated X, Y sues the tavern in state B for compensation for personal injury and property damage. Although the law of state A does not recognize Y's claim as a basis for recovery against the tavern, the claim would be actionable under the dram-shop act of state B.

Under the proposed approach, the court must seek to ascertain whether state A has a greater interest than state B, the forum state, in determining the outcome of the case. If so, then state A is the selected jurisdiction; if not, then the jurisdiction chosen is state B. Most obvious are the outcome-determining interests arising out of the potential impact of the case on the welfare of the parties before the court.¹⁴ State A is plainly interested in whether or not Y, one of its residents, is compensated for loss, and state B is plainly interested in whether or not the tavern, one of its residents, is required to compensate Y for loss. Moreover, with the same amount of money at stake for each of the parties, it seems reasonable to assume that these interests related to potential impact on the parties are equivalent and that, if these are the only material interests, the court should make the choice of jurisdiction in favor of the forum state.

More problematic are the outcome-determining interests stemming from the case's potential impact on the welfare of persons not before the court. It would appear, for example, that the fact that the drinks were served in state B gives rise to an interest on the part of state B in determining the outcome because (a) the outcome of the case may affect the degree of care exercised by establishments serving drinks in state B, and (b) the degree of care exercised in serving drinks in state B is most apt to

13. For commentary questioning the practicality of governmental interest analysis in light of its reliance on identifying the policies behind the potentially applicable laws, see Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315, 317-19 (1972); Rheinstein, Book Review, 11 AM. J. COMP. L. 632, 663 (1962).

14. In a case involving more than two parties, my approach should be applied to one plaintiff and one defendant at a time. If it were instead applied to all litigants at once to produce a single choice of jurisdiction for any case, parties' rights and liabilities would often vary depending on a consideration—the number of litigants joined in the particular case—seemingly irrelevant to the justice of granting the individual claims.

affect the welfare of state B residents. By the same token, the fact that a state A hospital and doctor treated Y for injuries from the accident indicates a possible outcome-determining interest on the part of state A because the outcome may affect whether these state A residents receive full and reasonably timely payment for services rendered.

The principal difficulty presented by non-party-related interests like the state B interest based on the in-state service of the drinks is whether such "general deterrent" interests are comparable in magnitude to party-related ones. The impact, for example, that the outcome of Y's suit will have on the welfare of the general populace of state B seems far less certain and tangible than its impact on the welfare of either Y or the tavern. Even if establishments serving drinks in state B know that they will never be held liable to plaintiffs like Y from states without a dram-shop act (or common-law equivalent), it seems doubtful in light of other possible deterrents that their behavior will be materially affected. They still face the possibility of civil liability for failure to exercise reasonable care in serving drinks if the victim of the inebriated patron's driving should prove to be a resident of state B or another dram-shop state. Such irresponsible behavior also may give rise to criminal liability or loss of liquor license.

If, as I suggest, general deterrent interests of this sort typically are insubstantial by comparison with party-related ones, courts reasonably may adopt a rebuttable presumption that such interests are insubstantial and not material to the choice of jurisdiction.¹⁵ Indeed, courts may even be justified in excluding them entirely from consideration in the choice of jurisdiction, on the theory that any advantages in terms of individual fairness that attention to such interests may bring are outweighed by the potential for inviting judicial error and manipulation.

Non-party-related interests like the state A interest based on the hospital's and doctor's in-state residence are problematic for somewhat different reasons. Such contingent interests relating to the welfare of specific persons not before the court at times may prove to be substantial. They tend to be highly indefinite in magnitude, however, absent judicial determination of matters having little, if anything, to do with the events giving rise to litigation. The state A interest based on the hospital's and doctor's in-state residence, for example, may vary in magnitude from nonexistent to substantial depending on the likelihood that Y will be able to make full and reasonably timely payment on the medical bills regardless of the outcome of Y's suit. To ascertain the magnitude of this possible interest a court therefore would be obliged to make findings of fact about Y's financial status and insurance coverage and to invite proof and argument by the parties to that end.

15. Cf. Alexander, *The Concept of Function and the Basis of Regulatory Interests Under the Functional Choice-of-Law Theory: The Significance of Benefit and the Insignificance of Intention*, 65 VA. L. REV. 1063, 1077 & n.57 (1979) (discussing dubious empirical support for certain purported deterrent effects).

In light of the various and insistent demands on courts' time and energies, it would not be unreasonable for courts to use rebuttable presumptions (that interests of this sort are insubstantial) or other devices to try to minimize the frequency with which they would be obliged to conduct such collateral inquiries in making a choice of jurisdiction. Indeed, the likely advantages and disadvantages of expanding the scope of adversary proceedings to include inquiries of this type may well be such as to justify excluding from the choice-of-law calculus contingent interests relating to the welfare of specific persons not before the court.

In this regard it is important to consider whether a court logically could limit its inquiry to third parties, like the hospital and doctor, with some obvious connection to the occurrence or transaction giving rise to litigation. Is the court obliged, if it investigates a possible state A interest relating to the hospital and doctor, to broaden its inquiry to include tavern employees whom the tavern might feel the need to lay off if required to compensate Y? To include the day-care provider for Y's child, someone whom Y might feel the need to replace with a less expensive provider if unable to secure compensation in the suit against the tavern? If the court's ultimate objective is to ascertain state interests in determining outcome, it is not apparent why the tavern employees and day-care provider are any less worthy of consideration than the hospital and doctor.

Unless courts are willing to devote the time and energies needed to inquire into a wide range of possible "ripple effects," the most defensible course of action therefore may be for them to exclude from consideration all of these third-party-based interests. If this seems a harsh solution, it may be useful to keep in mind not only the burden imposed on courts by these inquiries, but also the degree to which possible ripple effects tend to be concentrated in the states in which the parties reside and the extent to which third-party-based interests are therefore implicitly taken into account by recognition of party-related ones.

In short, I suggest that courts should be strongly, and perhaps exclusively, guided by party-related interests in making the initial choice of jurisdiction prescribed by my approach. With rare exception, courts should be able to identify the selected jurisdiction on the basis of the parties' states of residence.¹⁶ If the parties reside in the same state, a

16. I am not insensitive to the fact that any method for resolving choice-of-law problems that attaches great significance to the parties' states of residence invites constitutional objections under the privileges and immunities clause of article IV and perhaps the equal protection clause of the fourteenth amendment as well. Indeed, I once suggested that governmental interest analysis might well run afoul of equal protection by virtue of: its reliance on state residence; the "suspectness" of classifications based on in-state residence; and the inability of governmental interest analysis to meet the "strict scrutiny" standard by which the validity of suspect classifications is measured. *See* Simson, *supra* note 2, at 86-87. The Supreme Court subsequently has made clear that it does not regard residence classifications as suspect, *see* Martinez v. Bynum, 461 U.S. 321, 328 n.7 (1983), but its decisions in recent years establish the privileges and immunities clause as a relatively formidable constraint on residence classifications. *See, e.g.,* Supreme Court of New Hampshire v. Piper, 470 U.S. 274

court should have little hesitation identifying that state as the selected jurisdiction. If, as in Y's suit against the tavern, they reside in different states one of which is the forum, the party-related interests point to the forum state as the selected jurisdiction. If they reside in different states neither of which is the forum, these interests suggest the wisdom of making the choice of jurisdiction in favor of both nonforum states—a choice that I explain how to implement in Part II-A of this essay.

II. The Subsequent Choice of Law

As outlined in the introduction, my proposed approach makes very different recommendations for implementing the choice of jurisdiction depending on whether or not the selected jurisdiction is the forum state. If the selected jurisdiction is not the forum state, the court is advised to make the choice(s) of law that a court sitting in the foreign state and applying that state's conflicts law would make. If it is the forum state, the court is advised to apply forum law with regard to each issue in the case unless all of three specified conditions exist. Before explaining these different recommendations below, I underline an important connection between them. On its face, the proposed approach is neutral as to the form that the conflicts law of a selected foreign jurisdiction should take. It simply calls upon the court to apply the foreign conflicts law as the court finds it. Implicitly, however, in its recommendation as to the course of action that the court should follow if the forum state is the selected jurisdiction, the approach does offer an opinion as to the form that the conflicts law of a selected foreign jurisdiction ideally would take.

A. When the Forum State Is Not the Selected Jurisdiction

Under the proposed approach, if a court concludes that a foreign state has a greater interest in determining outcome than the forum state, it makes the initial choice of jurisdiction in favor of the foreign state and defers to that state's outcome-determining interest as a means of maximizing long-term enforcement of forum interests. The court decides the case as the foreign state would decide it in the hope that its deference to a superior foreign interest will be repaid in kind in cases brought in the foreign state's courts. To decide the case as the foreign state would decide it the court applies the foreign state's conflicts law as if it were sitting in that state. In effect, it puts itself in the shoes of a court in the other state much as courts wedded to the traditional rules have done

(1985); *Hicklin v. Orbeck*, 437 U.S. 518 (1978). For reasons already suggested and pursued further below, I believe that my approach avoids the type of constitutional difficulties that I ascribed to governmental interest analysis because it, unlike governmental interest analysis, serves an important goal—long-term maximization of forum interests—with a high degree of precision. For discussion and critical analysis of the Court's privileges and immunities approach, see G. SIMSON, *supra* note 9, at 405-06; Simson, *Discrimination Against Nonresidents and the Privileges and Immunities Clause of Article IV*, 128 U. PA. L. REV. 379 (1979).

when they find the occasion calls for "renvoi."¹⁷

If the need for the court to adopt this renvoi-like posture is not apparent, a simple illustration should make it so. Assume that the selected foreign jurisdiction's conflicts law calls for the application of forum law as long as such a choice of law is constitutionally permissible.¹⁸ Assume also that in the case at hand the court could choose forum law or the law of the selected jurisdiction without overstepping constitutional bounds. If the court simply applies the foreign jurisdiction's conflicts law, it will implement the directive to apply forum law whenever permissible by choosing its own state's law. A court in the selected jurisdiction, however, would implement the directive by choosing the selected jurisdiction's law. By acting as if it were a court in the selected jurisdiction, the court ensures that it indeed defers to the selected jurisdiction's interest in determining outcome by deciding the case as that jurisdiction would decide it.

Although the policy underlying the proposed choice of jurisdiction broadly dictates deference to the conflicts law of a selected foreign jurisdiction, it allows for nondeference in two types of situations. Most obviously, a court cannot be expected to defer to foreign conflicts law that fails to observe constitutional limitations. In addition, a court need not defer to the foreign conflicts law in resolving a particular issue if the court's resolution of the issue by a law other than the one indicated by the foreign conflicts law presents no material likelihood of affecting the outcome of the case. The latter exception essentially recognizes that deference to another state's outcome-determining interest leaves some

17. See *In re Annesley*, [1926] Ch. 692; *University of Chicago v. Dater*, 277 Mich. 658, 270 N.W. 175 (1936); Griswold, *Renvoi Revisited*, 51 HARV. L. REV. 1165 (1938); Lorenzen, *The Renvoi Theory and the Application of Foreign Law*, 10 COLUM. L. REV. 190 (1910).

18. The basic standard to which the Supreme Court currently adheres was initially stated in a plurality opinion in *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981), and was reiterated in an "opinion of the Court" in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985). It provides 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." By invalidating the state court's blanket application of forum law to every claim in a class action, including thousands of claims essentially unrelated to the forum state, the Court in *Phillips Petroleum* established that the possibility of violating its standard for constitutionality is not entirely theoretical. However, both the Court's approval of the choice of law in *Allstate* and its characterization in *Phillips Petroleum* of the standard as placing "modest restrictions" on a choice of forum law, 472 U.S. at 818, should leave little doubt that the standard affords states very broad latitude in choice of law. For discussion of *Allstate*, see the symposia in 10 HOFSTRA L. REV. 1, 973 (1981-82) (two parts) and 14 U.C. DAVIS L. REV. 841 (1981). On *Phillips Petroleum*, see Shreve, *Interest Analysis as Constitutional Law*, 48 OHIO ST. L.J. 51 (1987). For a proposed approach to constitutional limitations on choice of law substantially more restrictive than the Court's, see Simson, *supra* note 2.

room for forum "procedures."¹⁹ In keeping with the policy underlying the proposed choice of jurisdiction, however, the exception limits "procedural" departures from the foreign conflicts law to ones that pose no apparent threat of undermining the paramount foreign interest in determining outcome.

As noted at the end of Part I of this essay, a court adjudicating a case with nonresident parties from different states appropriately may decide that the policy behind choice of jurisdiction calls for recognition of two selected jurisdictions—the two foreign states in which the parties reside. Implementing such a choice of jurisdiction plainly is more complicated than giving effect to a choice of a single jurisdiction—and may make a forum non conveniens dismissal seem especially attractive to the disinterested forum²⁰—but the task is not insuperable. The court should begin by consulting each selected foreign jurisdiction's conflicts law to see the choice(s) of law that a court sitting in that state would make. If courts sitting in each of the two states would make the same choice(s) of law, the court has no problem deciding how to implement the choice of jurisdiction. It simply makes the choice(s) of law that both selected jurisdictions would make. Not so apparent, however, is the appropriate course of action if courts sitting in each of the two states would differ in the choice(s) of law that they would make. Ideally, in terms of the policy underlying choice of jurisdiction, the court should decide the case in a way that respects equally each foreign state's interest in determining outcome. As other commentators have suggested in an analogous context, it generally may be possible to accomplish this either by rendering a judgment that splits the difference between the amounts recoverable under the two states' different conflicts laws²¹ or by adjusting appropriately the standard of proof or burden of proof.²²

B. When the Forum State Is the Selected Jurisdiction

Under the proposed approach, if a court identifies the forum state as the selected jurisdiction, it should exercise the forum interest in determining the outcome of the case by applying forum law as to each issue in the case unless each of three conditions is satisfied: (1) the foreign elements in the case bring into play a policy that would not be materially implicated if the case were confined in its elements to the forum state; (2) such policy militates strongly in favor of a choice of nonforum law; and

19. Cf. *Hanna v. Plumer*, 380 U.S. 460, 467-69 (1965) (dictum) (discussing "substance" and "procedure" for purposes of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938)); Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 713-17 (1974) (same).

20. See generally *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981); Robertson, *Forum Non Conveniens in America and England: "A Rather Fantastic Fiction,"* 103 L.Q. REV. 398 (1987); Stewart, *Forum Non Conveniens: A Doctrine in Search of a Role*, 74 CALIF. L. REV. 1259 (1986).

21. See von Mehren, *Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology*, 88 HARV. L. REV. 347 (1974).

22. See Twerski & Mayer, *Toward a Pragmatic Solution of Choice-of-Law Problems—At the Interface of Substance and Procedure*, 74 NW. U.L. REV. 781 (1979).

(3) the policy preference expressed in the forum state's internal law is not so strong as to belie the possibility that the forum state's lawmakers could intend it to yield to another policy in a multistate case. The basic rationale behind this recommendation is two-fold. First, forum law represents the forum state's considered judgment as to the fairest or most socially beneficial way of resolving cases confined in their elements to the forum state.²³ Second, unless it is reasonably clear that the substitution of one or more out-of-state elements for intrastate ones brings into play a factor that significantly alters the policy balance struck for the intrastate case, respect for that policy balance requires that the court assume that the fairest or most socially beneficial way of resolving the multistate case at hand is by applying forum law.

1. *The Forum Law Presumption and State Interests*

The presumption in favor of forum law central to this recommendation often may lead a court to vindicate a forum state interest in determining outcome in a way that the Currie school may find anomalous. Assume, for example, that in Y's suit against the tavern, the state B court identifies state B as the selected jurisdiction and goes on to apply the state B dram-shop act on the view that the conditions for nonapplication of forum law are not satisfied. In essence, the court vindicates the forum state's interest in determining outcome—an interest predicated on the forum state's concern for the welfare of one of its residents, the tavern—by applying a law that disadvantages its resident. To Currie-style interest analysts this may appear the height of illogic. A state vindicates its interests, they may protest, by benefiting its residents, not by disadvantaging them.

I suggest that any flaw in logic that this illustration brings to the fore lies in the Currie conception of state interests. There is nothing incongruous about the notion that state B is expressing its interest in the tavern's welfare by applying its law to deny the tavern the protection from liability that the tavern desires. State B's interest in the tavern's welfare is vindicated by applying a law that state B believes deals fairly with defendants who act as the tavern did in the case at hand. In short, a state's interest in its residents' welfare is served when they are treated fairly, not necessarily when they get what they want. From a different perspective—one taking a broader and, I suggest, more realistic view of "benefit" than commonly taken by the Currie school—it may be useful to recognize that a state often benefits a resident party by denying the party what he or she wants. By applying forum law and imposing liability on the tavern, for example, the state B court may "benefit" the tavern by infusing it with a greater sense of morality or social responsibility. A

23. See Ehrenzweig, *The Lex Fori—Basic Rule in the Conflict of Laws*, 58 MICH. L. REV. 637, 637-41 (1960); Shapira, "Grasp All, Lose All": *On Restraint and Moderation in the Reformulation of Choice of Law Policy*, 77 COLUM. L. REV. 248, 255-59 (1977); Singer, *Facing Real Conflicts*, 24 CORNELL INT'L L.J. 197, 201 (1991); see also G. SIMSON, *supra* note 9, ch. 1 ("Why Not Always Apply Forum Law?").

state's interest in its residents' welfare includes an interest in making them "better" persons.

2. *Reasons for Departing from Forum Law*

In deciding whether the three specified conditions for nonapplication of forum law are met, a court probably should be especially mindful of two policies: protecting justified expectations, and serving the needs of the interstate and international systems. Although other policies may legitimate a departure from forum law, these two seem by a sizable margin those most likely to do so. It is beyond the scope of this essay to attempt to specify criteria for deciding when these policies militate strongly in favor of choosing nonforum law.²⁴ To provide some guidance, however, as to the kinds of circumstances in which nonapplication of forum law would be appropriate under my proposal, I discuss below the soundness of choices of nonforum law in two well-known cases that implicate these policies. To place my discussions of the cases in proper perspective, I underline that I selected them for purposes of illustration because of their facts, laws, and results, not because of the opinions that the courts wrote in deciding them. Although I refer in places to the courts' opinions in the cases, my concern here is not with the adequacy of the courts' express reasoning, which I do not relate in any detail. Instead, it is with the validity under my proposal of the results they reached.

a. Protecting Justified Expectations

The policy of protecting justified expectations has long been regarded as a policy basic to a fair legal order.²⁵ Though not peculiar to multistate cases, it may come into play with special force in multistate contexts.²⁶ *Intercontinental Hotels Corp. v. Golden*,²⁷ a 1964 decision of the

24. To do so with regard to the policy of protecting justified expectations would require resolving such complex questions as: What makes an expectation "justified" and thus deserving of protection? To what extent does the cogency of a justified-expectations claim turn on proof of actual, reasonable reliance? In what contexts is it particularly important to allow people to predict the legal consequences of their actions before they act?

To specify criteria as to when the policy of serving interstate and international needs militates strongly in favor of choosing nonforum law would call for answers to such questions as: How should courts go about identifying the needs of the interstate and international systems? Are there particular sources, such as the U.S. Constitution or international conventions, to which they principally or perhaps even exclusively should turn? Which of the identified needs are most apt to be materially affected by the way in which conflicts cases are resolved, and under what circumstances are they likely to be so affected?

For an attempt to probe these and related questions, see G. SIMSON, *supra* note 9, chs. 4 ("Protection of Justified Expectations") & 5 ("Recognition of Interstate and International Needs").

25. See Rheinstein, *The Place of Wrong: A Study in the Method of Case Law*, 19 TUL. L. REV. 4, 20-22 (1944), and sources cited therein.

26. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(d) & comment g (1971); Hancock, *Choice-of-Law Policies in Multiple Contact Cases*, 5 U. TORONTO L.J. 133, 135, 137-40 (1943); Kogan, *Toward a Jurisprudence of Choice of Law: The Priority of Fairness Over Comity*, 62 N.Y.U. L. REV. 651 (1987); Rheinstein, *supra* note 25.

New York Court of Appeals, offers a fact situation in which it does.

Golden, a New York resident, lost \$12,000 while gambling on credit in a government-licensed casino in Puerto Rico owned and operated by Intercontinental Hotels Corporation. Under the law of Puerto Rico, the gambling debt was validly contracted and enforceable. Under New York law, it was illegal to operate a gambling casino and any contract made with the operator of such an establishment was void. Intercontinental sued Golden in New York to recover on the gambling contract. On appeal from a judgment dismissing the complaint, the New York high court held that Puerto Rican law governed.²⁸

Under the circumstances of the case, the policy of protecting justified expectations provided cogent support for the court's ruling. On the one hand, the policy appeared to militate strongly in favor of choosing Puerto Rican law. Since the contract was entered into in Puerto Rico and covered only gambling that would take place in Puerto Rico, both parties very probably and quite reasonably expected at the time of their agreement that it would be governed by Puerto Rican law. Furthermore, in extending \$12,000 in credit to Golden, the plaintiff plainly relied to its detriment on the expectation that Puerto Rican law applied and that the contract was therefore valid and enforceable. Finally, not only was the plaintiff obviously aware that the agreement was valid and enforceable under Puerto Rican law; it is virtually inconceivable that this New York defendant, temporarily in Puerto Rico at least in part to take advantage of its government-licensed gambling facilities, was not aware of this fact as well.²⁹

On the other hand, the New York local-law policy that would be subordinated by giving priority to the protection of justified expectations and selecting Puerto Rican law was apparently not one to which New York was very strongly wedded. It was hardly implausible that the state's lawmakers could intend the policy to yield to another in a multi-state case. As the court pointed out in the course of rejecting a public policy objection to enforcing the plaintiff's action in a New York court, "[t]he legalization of pari-mutuel betting and the operation of bingo games, as well as a strong movement for legalized off-track betting, indicate that the New York public does not consider authorized gambling a violation of 'some prevalent conception of good morals, [or] some deep-rooted tradition of the common weal.'"³⁰

27. 15 N.Y.2d 9, 254 N.Y.S.2d 527, 203 N.E.2d 210 (1964).

28. The focus of Judge Burke's opinion for the Court of Appeals was whether or not the public policy doctrine required New York courts to dismiss the complaint. The court appeared to proceed on the assumption that Puerto Rican law was presumptively applicable, apparently relying implicitly on the "grouping of contacts" approach established in *Auten v. Auten*, 308 N.Y. 155, 124 N.E.2d 99 (1954), as the New York approach for contract cases.

29. The court in *Golden* did not expressly rely on the protection of justified expectations. It is not unreasonable to suppose, however, that it tacitly did so.

30. 15 N.Y.2d at 15, 254 N.Y.S.2d at 531, 203 N.E.2d at 213 (quoting *Loucks v. Standard Oil Co. of New York*, 224 N.Y. 99, 111, 120 N.E. 198, 202 (1918)).

b. Serving Interstate and International Needs

As cases transcend the boundaries of a single state, important needs of the interstate and international systems may emerge as considerations warranting serious attention.³¹ One such need is ease of interstate and international commercial intercourse,³² and *Milliken v. Pratt*,³³ an 1878 Massachusetts case immortalized by Brainerd Currie,³⁴ offers an instance in which this need warranted serious attention.

At her husband's request, Pratt, a Massachusetts resident, entered into a guaranty contract in 1870 with two partners in a Maine business. The husband, who ran a business in Massachusetts, had applied to the partners for credit, and they had conditioned granting him such credit on his securing the guaranty from his wife. Under Massachusetts law at the time the contract was made, married women lacked capacity to bind themselves by a contract of this sort. Although Massachusetts changed its law by statute in 1874 to remove this incapacity, the 1874 statute did not apply retroactively to contracts made before its enactment. The Maine legislature had removed the same type of incapacity under Maine law several years prior to the guaranty contract in question. The partners brought suit in Massachusetts on the guaranty contract, seeking payment for goods purchased on credit by the husband in 1871. Reversing a judgment below for Pratt, the Massachusetts Supreme Judicial Court held that Maine law applied.³⁵

The policy of promoting ease in interstate commercial intercourse furnished persuasive support under the circumstances for the court's choice of law. On the one hand, the policy seemed to point strongly toward a selection of Maine law. As various commentators have suggested,³⁶ ease in interstate and international commercial transactions would be significantly advanced by upholding commercial contracts as long as they are valid under the law of some state reasonably connected to the transaction. Such a principle of validation would provide valuable certainty and security for transactions crossing state lines. Applied in *Milliken v. Pratt*, it would have called for a choice of the validating law of

31. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(a) & comment d (1971); Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959, 962-64 (1952); Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 285-87 (1966); von Mehren, *Recent Trends in Choice-of-Law Methodology*, 60 CORNELL L. REV. 927, 938 (1975).

32. See sources cited *supra* note 31.

33. 125 Mass. 374 (1878).

34. See Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958), reprinted in B. CURRIE, *supra* note 6, at 77-127.

35. Chief Justice Gray's opinion for the court justified the choice of Maine law in terms of the traditional place-of-making rule. He rejected an argument for Massachusetts law based on a status characterization of the case and also refused to find that the public policy doctrine called for dismissal of the action.

36. See, e.g., G. STUMBERG, *PRINCIPLES OF CONFLICT OF LAWS* 237-39 (3d ed. 1963); R. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* § 7.4A (3d ed. 1986); Ehrenzweig, *Contracts in the Conflict of Laws*, 59 COLUM. L. REV. 973, 973-74 (1959).

Maine.³⁷

On the other hand, Massachusetts's commitment to the policy preference expressed in its local law was rather clearly not so strong as to belie the possibility that the state could intend to subordinate the policy in a multistate case. As in *Golden*, the portion of the court's opinion in *Milliken* rejecting a public policy defense is instructive in this regard. In finding "no reason of public policy which should prevent the maintenance of this action," the Massachusetts high court in *Milliken* called attention to the fact that Massachusetts by 1870 (the time of the contract at issue) had already deviated substantially from the prevalent common-law rule that "a married woman was deemed incapable of binding herself by any contract whatever."³⁸ By statute, Massachusetts by 1870 had given a married woman "a very extensive power to carry on business by herself, and to bind herself by contracts with regard to her own property, business and earnings."³⁹ In addition, the high court underlined that, by virtue of the Massachusetts statute of 1874 noted above, "the power had been extended so as to include the making of all kinds of contracts, with any person but her husband, as if she were unmarried."⁴⁰

3. *Three Reasons Best Forgotten*

Since I have left open the possibility that reasons other than the two highlighted above may justify departing from forum law, it seems appropriate to call attention here to three reasons commonly given for departing from forum law that I do not regard as cogent bases for doing so. These reasons are: nonforum law is the law identified by a traditional rule; there is a "false conflict" of governmental interests in favor of nonforum law; and nonforum law is the "better rule of law." I explain below why I view these three reasons as unpersuasive, but in keeping with the generally "affirmative" tenor that this symposium was designed to follow, I try to be brief in doing so.

37. The court in *Milliken* explicitly invoked the policy of promoting ease in interstate commercial intercourse. At least expressly, however, it did so not as a basis for applying a principle of validation, but rather as a ground for rejecting a status characterization of the case (and the accompanying place-of-domicile rule) in favor of a contract characterization (and the accompanying place-of-making rule):

In the great majority of cases, especially in this country, where it is so common to travel, or to transact business through agents, or to correspond by letter, from one state to another, it is more just, as well as more convenient, to have regard to the law of the place of the contract, as a uniform rule operating on all contracts of the same kind, and which the contracting parties may be presumed to have in contemplation when making their contracts, than to require them at their peril to know the domicil of those with whom they deal, and to ascertain the law of that domicil, however remote, which in many cases could not be done without such delay as would greatly cripple the power of contracting abroad at all.

125 Mass. at 382-83.

38. *Id.* at 383.

39. *Id.*

40. *Id.*

First, I do not regard the fact that nonforum law may be the law identified by a traditional rule as a reason for departing from forum law because, as I have indicated elsewhere,⁴¹ I regard the traditional rules as so tenuously related to any material choice-of-law objective as to verge on, if not surpass, the outer limits of constitutionality. The traditional rules have been defended as a means to achieve simplicity, predictability, and uniformity in choice of law.⁴² I seriously question, however, whether they serve these goals nearly as well as a rule that calls for applying the law of the state first in alphabetical order with some connection to the events giving rise to litigation; and I have little doubt that such an alphabetical-order rule is substantially less than satisfactory.⁴³

Second, I do not attach importance to whether or not there is a "false conflict" in favor of nonforum law because I believe that using governmental interest analysis after the choice-of-jurisdiction step of my approach is redundant at best and misleading at worst. Simply and boldly stated, my view is that my proposed choice of jurisdiction does what interest analysis is supposed to do and does it better. For reasons discussed earlier in this essay, the proposed choice of jurisdiction is a superior means of maximizing enforcement of forum interests in the long run.⁴⁴

41. See Simson, *supra* note 2, at 83; see also G. SIMSON, *supra* note 9, at 14-15, 355.

42. See, e.g., *Paul v. National Life*, 352 S.E.2d 550, 555-56 (W. Va. 1986); 3 J. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 584.1, at 1599 (1935); H. GOODRICH, HANDBOOK OF THE CONFLICT OF LAWS § 92, at 261-62 (3d ed. 1949). Proponents of the traditional rules have also defended the rules as a means of protecting vested rights, see, e.g., *Slater v. Mexican National R.R.*, 194 U.S. 120, 126 (1904); 3 J. BEALE, A SELECTION OF CASES ON THE CONFLICT OF LAWS 501, 517 (1902), but they have tended at least since the advent of governmental interest analysis to downplay or ignore this goal in favor of the more modern-sounding ones mentioned in the text. Suffice it to say that in my view this is "an end too conceptualistic, too devoid of any real content, to supply an adequate foundation for a state's choice-of-law decisions." Simson, *supra* note 2, at 83.

43. I borrow the notion of an alphabetical-order rule from Currie, who suggested it "[i]n all solemnity" for certain types of cases. See B. CURRIE, *supra* note 6, at 609.

44. There may be no particular passage in Currie's writings where he names maximizing enforcement of forum interests in the long run as the policy objective of governmental interest analysis. I believe, however, that a fair reading of his work indicates that he implicitly regarded it as such, and various commentators appear to share this view. See, e.g., Alexander, *supra* note 15, at 1079-80, 1091; Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 6-8 (1963); Kramer, *Rethinking Choice of Law*, *supra* note 5, at 311-16. Professor Sedler has argued that, although Currie may appear (due to his "overemphasis in places on the interest of the state") to take the view that I suggest, he in fact adhered to a "rationality justification" for interest analysis. According to Sedler, Currie understood interest analysis as serving the objective of "provid[ing] a rational basis for making choice-of-law decisions." See Sedler, *Professor Juenger's Challenge to the Interest Analysis Approach to Choice-of-Law: An Appreciation and a Response*, 23 U.C. DAVIS L. REV. 865, 879 & n.71 (1990). With all due respect, this "rationality justification" is hopelessly circular. Of course Currie wanted interest analysis to provide a rational means of deciding choice of law. The question, however, is why he believed it provides a rational basis—what objective he believed makes interest analysis a rational means of deciding choice of law. As discussed above, I maintain that this objective is maximizing long-term enforcement of forum interests. Sedler's "rationality justification" fails to offer a genuine alternative.

Finally, I reject "better rule of law" as a ground for nonapplication of forum law because I seriously doubt both its logic and constitutionality. In an influential article written in 1966, Professor Leflar listed "application of the better rule of law" as one of five factors that courts should consider in choice of law.⁴⁵ According to Leflar, courts have long tacitly considered whether one of the competing laws is "anachronistic, behind the times," and they should expressly acknowledge that they prefer to apply the more "realistic practical modern" law as a means of achieving justice in the individual case.⁴⁶

Leflar may well be right that "application of the better rule of law" accurately describes what many courts tacitly have done. For three reasons, however, he is almost certainly wrong in suggesting that this is something that courts ought to do. First, nonapplication of a forum state statute on the ground that the statute is "behind the times," and thus apt to produce unjust results, is incompatible with prevailing state principles of separation of powers and legislative supremacy. Under these principles, the state's legislature, not its judiciary, has paramount authority to say what laws are most apt to produce just results. There is no reason to suppose that a state's judiciary has any more authority in multistate cases to second-guess its legislature in this regard than in entirely intrastate cases. Yet, this is precisely what "better rule of law" assumes, for courts do not typically enjoy authority in intrastate cases to discard local statutes that they consider "behind the times."⁴⁷ Second, nonapplication of forum state common law on the ground that it is "behind the times," and thus apt to produce unjust results, is inherently illogical. If a court believes that local common law is apt to produce unjust results, the logical response is not simply to avoid using it in mul-

45. Leflar, *supra* note 31, at 282.

46. *Id.* at 296-300. Although Leflar is principally responsible for the fact that some courts have adopted better rule of law as an express ingredient of their choice-of-law approaches, he was not the first commentator to suggest that courts should employ a better-law type of factor in choice of law. See Cheatham & Reese, *supra* note 31, at 980; Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210, 1216 (1946).

47. Currie's response in 1958 to Leflar's better-law predecessors (see *supra* note 46) is probative in this regard. In rejecting the "high-minded, transcendent, and form-free counsels of those who tell us that the choice should be of 'the more effective or more useful law,' or of the law that fulfills the demands of justice in the particular situation," Currie explained:

[This] approach attributes to courts a freedom and a competence that they do not possess. . . .

. . . It is simply not the business of courts to substitute their judgment for that of the legislature. . . . In a conflict-of-laws case a court should have just that degree of freedom to escape the compulsion of a disagreeable law that it has in a purely domestic case, and no more. One thing seems reasonably sure: If the courts were to embark upon such a free-wheeling approach to the conflict of laws, in cases in which really important policies were embodied in the laws in question, they would be brought to heel in due course by legislative mandates that local law be applied.

B. CURRIE, *supra* note 6, at 104, 106 (footnotes omitted).

tistate cases; it is to overrule it and avoid using it altogether.⁴⁸ Third, nonapplication of forum law, whether statutory or court-made, on the basis of better rule of law gives rise to differences in treatment of doubtful validity under the fourteenth amendment's equal protection clause. As I have attempted to demonstrate elsewhere,⁴⁹ the use of better rule of law creates seemingly irrational classifications between litigants in entirely intrastate cases and ones in cases not confined in their elements to the forum state.

III. New Directions in Choice of Law

In the concluding section of his paper, Professor Singer characterizes himself as a "sympathetic critic of interest analysis."⁵⁰ Although the notion of state interests figures in my approach, I think my criticisms of interest analysis are too broad-based for me to apply a similar characterization to myself. I would not hesitate, however, to call myself a sympathetic, and even admiring, critic of Brainerd Currie. Currie was not the first to discuss governmental interests as an analytical tool in choice of law. In particular, Justice Stone had already made such interests the centerpiece of constitutional limitations on choice of law.⁵¹ Currie had the genius, however, to forge the concept of governmental interests into a full-scale approach that all but forced courts and scholars to see choice of law from a very different perspective than the one provided by the received wisdom of place of wrong, place of making, and the like. Much as I am troubled by various aspects of governmental interest analysis, I have little doubt that Currie helped move conflicts theory substantially forward by the different perspective that he offered. I am not so presumptuous as to claim that the approach proposed in this essay is sufficiently innovative to make a contribution nearly as significant. I am hopeful, however, that it adds something in the way of a new perspective that will contribute to a more rational and just system of choice of law.

48. *Cf. id.* at 106 n.49 ("... In my judgment, if a court is sufficiently convinced that a law of the forum is so obsolete that it should not be applied in a mixed case, the courage of its convictions should lead it to abrogate the law for domestic purposes as well . . .").

49. See Simson, *supra* note 2, at 85-86.

50. Singer, *supra* note 23, at 230.

51. See *Pacific Employers Ins. Co. v. Industrial Acc. Comm'n*, 306 U.S. 493 (1939); *Alaska Packers Ass'n v. Industrial Acc. Comm'n*, 294 U.S. 532 (1935); Freund, *supra* note 46.