Conflict of Laws: Professor Currie's Restrained and Enlightened Forum

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In advancing his bold new conflict of laws theories, Professor Currie has done far more than demonstrate the unsoundness of the presuppositions of the Restatement. He has articulated an analysis for conflicts cases that holds great promise of bringing reason, order, and justice to this confused area of the law.

I propose to test Currie's analysis against several concrete cases and to advance the following propositions: (1) Solving conflicts problems by his method, i.e., by determining the policies of the states concerned and their interests, if any, in applying those policies, will enable courts to eliminate

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false conflicts and avoid slot machine decisions that serve the policy of no state. Currie overstates his opposition to weighing state interests. His interest-analysis may be invoked to reach sound decisions when the forum refers to foreign law for a "datum point," a possibility that Currie has not yet explored.

Before discussing these ideas in detail, a brief sketch of the elements of Currie's analysis may be helpful.

I

A BRIEF SKETCH OF PROFESSOR CURRIE'S ANALYSIS

Professor Currie asserts that courts refer to foreign law for (1) "datum points," such as the marital status of a woman claiming as a "widow" under the forum's workmen's compensation law; (2) "rules of conduct," such as rules of the road applicable to a foreign accident; and (3) "rules of decision," such as negligence per se for violation of a rule of the road.

Only rules of decision are involved in "the central problem of conflict of laws," namely, "determining the appropriate rule of decision when the interests of two or more states are in conflict—in other words, of determining which interest shall yield."

Choice of law rules reflecting views concerning the "nature of law and its abstract operation in space" but "remote from mundane policies and conflicts of interest" won't work. They generate false problems and irrational solutions and operate to nullify state interests. They become encrusted with exceptions such as "local public policy," which produce uncertainty and only serve to help the ancient system totter on.

The proper approach, according to Currie, is for the forum to apply its own rule of decision as a matter of course. Once a foreign rule is put in issue, the forum examines the policy underlying its own rule and determines whether it was designed to apply to cases with foreign elements and whether local contacts are sufficient to give it an interest in applying that policy. Forum policy encompassing cases with foreign elements applies if the forum state has an interest, if both states have interests, and (when the action is not dismissed on forum non conveniens grounds) if neither state has an

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5 Currie, Notes on Methods, 1959 DUKE L.J. 171, 173.

6 Id. at 173-74.

7 See also Annot., 134 A.L.R. 1472-73 (1941).
interest. The forum yields only when it is disinterested and there is a foreign interest.

False conflicts, the renvoi, and many characterization problems would be eliminated, and legislative solutions would be promoted. The privileges and immunities clause of article IV and the equal protection clause would become more meaningful with the elimination of mechanical, though seemingly nondiscriminatory, rules. These clauses, the enlightened and moderate determination of state policies and interests, and the development of harmonizing techniques, such as looking to a “common principle,” would do much to curb a state’s “ruthless pursuit of self-interest” and would ameliorate “the ills which arise from a diversity of laws.”

Currie’s proposal that the forum apply its own policy in cases of head-on conflict may make the outcome depend on which state first hears the case. He concludes that neither federal nor state courts can do anything about it, because the “assessment of the respective values of the competing legitimate interests of two sovereign states, in order to determine which is to prevail, is a political function of a very high order... not [to] be committed to courts in a democracy.... [and] which the courts cannot perform effectively, for they lack the necessary resources.”

Realizing that it is faced with such a problem, the United States Supreme Court usually allows a state with an interest to apply its own policy. In his view, Congress should solve the true conflicts, but has not yet done so.

II

THE GREAT VIRTUE OF CURRIE'S ANALYSIS: ELIMINATION OF FALSE CONFLICTS

The usefulness of Currie’s analysis in eliminating false conflicts may be illustrated by *Auten v. Auten*, a well-received case that has become a casebook standard.

Margarite and Harold Auten were married in England in 1917. In 1931 Harold sailed for New York, leaving his wife and two children behind.

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9 Id. at 176.
10 See text following note 50 infra.

The “center of gravity” test continues to receive praise. See, e.g., Note, 14 Vand. L. Rev. 385 (1960). Currie, however, has pointed out that his test should be distinguished from “the amorphous ‘grouping of factors’ concept and other similar tests” illustrated by *Auten v. Auten*. Currie, *Governmental Interests*, 26 U. Chi. L. Rev. 9, 13 (1958).
Shortly after arriving, he obtained a mail-order Mexican divorce and "re-married." Margarite visited New York in 1933 and executed a separation agreement containing a covenant that neither party would sue the other in any action relating to their separation. Within a year Harold defaulted on the support payments due under the agreement. In 1934 Margarite petitioned an English court for separation on a charge of adultery and eventually obtained an order for temporary alimony. However, the English suit never went to trial, and Margarite realized nothing from the temporary alimony order. In 1947 she sued Harold in a New York court for the amounts due under the agreement. The trial court granted Harold a summary judgment of dismissal, the appellate division affirmed, and Margarite appealed to the New York Court of Appeals.

The basic issue in *Auten v. Auten* was whether Margarite’s English suit, which never went to trial, barred her subsequent action on the separation agreement for arrears in support payments. The possible grounds for holding that she was barred were material breach, repudiation, and election of remedies. In separation agreement cases these grounds are closely related. But the issue as framed by the New York Court of Appeals transcended those mundane grounds: Did New York or English law govern the effect on the separation agreement of Margarite’s English suit? Margarite contended that under both English and New York law she was not barred from maintaining her action on the agreement. Harold contended that New York law controlled and that New York rules of breach, repudiation, and election barred the action.

The New York Court of Appeals, applying a "grouping of contacts—center of gravity" approach, reversed the judgment of dismissal and remanded the case for the application of English law, whatever it might be. England had "all the truly significant contacts." The court thought that:

> the merit of . . . [the grouping of contacts theory] is that it gives to the place "having the most interest in the problem" paramount control over the legal issues arising out of a particular factual context, thus allowing the forum to apply the policy of the jurisdiction "most intimately concerned with the outcome of [the] particular litigation." . . . Moreover, by stressing the significant contacts, it enables the court, not only to reflect the relative interests of the several jurisdictions involved. . . , but also to give effect to the probable intention of the parties and consideration to "whether one rule or the other produces the best practical result."  

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13 Since neither New York nor England would recognize the Mexican divorce, and both would uphold reasonable support agreements, there were no conflicts on these points. Caldwell v. Caldwell, 298 N.Y. 146, 81 N.E.2d 60 (1948) (Mexican divorce); Mountbatten v. Mountbatten, [1959] 1 All E.R. 99 (P.D.A.), Notes, 22 MODERN L. REV. 318, 548 (1959) (same). Galusha v. Galusha, 116 N.Y. 635, 22 N.E. 1114 (1889) (support agreement); Besant v. Wood, [1879] 12 Ch. D. 605, 620–23 (same).

14 308 N.Y. at 161, 124 N.E.2d at 102.

15 Ibid.
Under the Currie analysis, the question at the outset would be whether New York had any policy that Harold or Margarite could reasonably contend applied to the case. Although the New York courts in many cases have announced harsh rules of election, repudiation, and breach, even in separation agreement cases, they have usually found some way to avoid barring the wife as a matter of law from subsequently suing on the agreement. New York's policy had simply not been clearly stated. The court might have stated it by holding (1) that the wife's covenants were independent, so that breaches did not prevent suits on the agreement or (2) that finding an "election is justified [only when] . . . necessary to protect the husband for a double recovery or . . . needless litigation" and when it is based on knowledge and intention. Harold would plainly derive no comfort from either of these solutions.

Had the court declared such a New York policy, there would have been no conflict with the English policy that Margarite claimed to be in point. Questions involving the scope of the policies of England and New York would have been avoided. Thus, at the very outset any possible conflict would have dissolved.

This technique of focusing on an identity of policies has been used to avoid difficult choices between state and federal law. Although it allows the court to escape the difficult question of the scope of local law as well as the no-law paradox, it does not allow the court to escape the job we

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18 Clark, Separation Agreements, 28 Rocky Mt. L. Rev. 320, 324 (1956).


20 See Cavers, The Two "Local Law" Theories, 63 Harv. L. Rev. 822, 828 (1950): "Given unanimity in the policies of the only two jurisdictions concerned, there was no true conflict of laws."

English law was probably as Margarite claimed it to be. See note 30 infra. The extent to which a court should accept a litigant's unopposed claims about the content of foreign law is a question not considered in this article.


ask courts to do every day, namely, to determine the content of the local policy. The New York court, however, did not attempt to identify the policies involved and thus did not ascertain whether there was any conflict of laws in the case. Instead, it determined that English law governed and remanded the case for the trial court to determine and apply that law even though the content of that law was fairly clear.

Of course, had the court attempted to delineate New York policy, it might have adopted a harsh rule of election, repudiation, or breach. It might have taken the even more doubtful step of applying that policy to a foreign suit that never went to trial. The question under the Currie analysis would then be whether New York's contacts with the transaction were sufficient to give it a legitimate interest in applying that policy. In addition to being the forum, New York had three contacts with the case: (1) The contract was made there. Apart from its slight bearing on the intention of the contracting parties, the place of making was irrelevant to any policy of election, as Currie's brilliant attack on the place of making rule demonstrates. (2) Harold worked in New York and lived there in a hotel room for four nights a week. For New York to apply its policy on the basis of this transiency would probably be unconstitutional under Home Ins. Co. v. Dick. (3) Payments under the agreement were to be made to a New York trustee. This contact also was wholly irrelevant to any policy of election. Indeed, applying such a policy would have been contrary to New York's interest in maintaining its trust business. In short, New York did not have a "legitimate" interest in applying a policy of election, repudiation, or breach. In fairness to the court, it should be noted that it treated Harold as a British subject and viewed contacts (1) and (3) as "entirely fortuitous."

Since New York had no interest, the court would have looked, had it used Currie's approach, for an English policy and interest. One point was quite clear: Separation agreements have had "a chequered career at [English] law." As might be expected, no English case or statute was squarely in point. The court had the benefit, however, of Margarite's and

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23 308 N.Y. at 164 n.2, 124 N.E.2d at 103 n.2. See also note 30 infra.
24 Currie, Married Women's Contracts, 25 U. Cm. L. Rev. 227 (1958). In Auten the court emphasized that the parties intended English law to govern. 308 N.Y. at 163, 124 N.E.2d at 103.
26 281 U.S. 397 (1930).
27 Currie, Notes on Methods, 1959 Duke L.J. 171, 178. If "legitimate" means more than "constitutional," the door is opened wide for interest-weighing in eliminating false conflicts.
28 308 N.Y. at 161, 124 N.E.2d at 102.
Harold's English law experts, who were of the opinion that England had no rigid policy of election and would probably have allowed Margarite to maintain the suit.\textsuperscript{30}

England's contacts with the case were strong enough to give it an interest in applying its policy against barring Margarite from suing on the agreement. Harold's obligation to support his family in England was certainly not extinguished by a divorce that neither England nor New York would recognize.\textsuperscript{31} Furthermore, he was still a British subject. The agreement was merely a substitute "for the duties and responsibilities that would otherwise attach by English law."\textsuperscript{32} Moreover, the requirements that Margarite live apart from her husband, raise the children, and refrain from suit were all to be performed in England. Clearly, England was interested in having a policy applied that would not mechanically take away the rights of an English family in favor of a deserting English husband.

Had the court used Currie's approach, it would have been compelled to declare New York policy instead of saying that policy problems "need not detain us."\textsuperscript{33} Had it articulated a fair-break policy similar to England's, the conflict would have dissolved. Had it articulated a harsh policy, it would have discovered that New York contacts were not sufficient to give New York an interest in applying that policy. Either way, a conflict would have been eliminated. Had the court used Currie's approach, it would not have ordered application of English law regardless of its content,\textsuperscript{34} and it would have avoided the faulty analogy to "centers of gravity."\textsuperscript{35} Finally, it would not have made the question-begging presupposition, railed against for years by critics of super-law, that, in the nature of things, some single, transcendentental rule, some categorical imperative, governs a transaction.

It should be apparent from the foregoing discussion that Professor Currie's analysis is particularly useful in eliminating false conflicts from cases where only one state's policy is relevant. But how valuable is it when the policies of two interested states collide head-on? The following paragraphs will examine this aspect of his system.


\textsuperscript{31} See note 13 supra.

\textsuperscript{32} 308 N.Y. at 162, 124 N.E.2d at 103.

\textsuperscript{33} Id. at 159, 124 N.E.2d at 101.

\textsuperscript{34} See Cavers, A Critique of the Choice of Law Problem, 47 Harv. L. Rev. 173 (1933).

\textsuperscript{35} Note, 40 Cornell L.Q. 772, 777 n.25 (1955): "[T]he center of gravity of a physical object may fall entirely outside the object itself, and certainly need not fall within the most massive or characteristic position."
CURRIE OVERSTATES HIS OPPOSITION TO WEIGHING STATE INTERESTS

Professor Currie has strenuously urged that courts cannot and should not weigh state interests in true conflicts cases. He has supported this conclusion with an excellent analysis showing that the United States Supreme Court usually does not weigh state interests in such cases. He also supports his ban on interest-weighing with two assertions about the judicial process. His first is that courts lack the necessary resources for weighing competing state interests. His second is that weighing state interests is a political function not to be committed to courts in a democracy; if such weighing "is not a proper function for the United States Supreme Court, it follows a fortiori that this is not a proper function for the state courts," since they might subordinate the legitimate interest of their own states to the competing interests of foreign states.

A. Why the Supreme Court Avoids Interest-Weighing in Conflicts Cases

Currie’s proscription of interest-weighing by the United States Supreme Court is fundamentally suspect because it is the Court’s responsibility to weigh interests in so many cases. To name only a few of many instances, the Court determines whether the interest of one state in taking jurisdiction of a case prevails over the similar interest of another; it adjusts the interests of states competing for water resources; it reconciles the interest of one state in safety regulations and the competing interest of the nation, other states, and carriers in unencumbered transportation; it determines that the individual’s and the community’s interest in freedom of speech and freedom of association outweigh a state’s interest in knowing the identity of a speaker, or his associates, but do not outweigh the nation’s interest in security; it holds that the nation’s interest in achieving sound

87 Id. at 75–84; Currie, Notes on Methods, 1959 DUKE L.J. 171, 176.
40 Hanson v. Denckla, 357 U.S. 235 (1958). Compare Black, J., dissenting: “True, the question whether the law of a State can be applied to a transaction is different from the question whether the courts of that State have jurisdiction to enter a judgment, but the two are often closely related and to a substantial degree depend upon similar considerations.” Id. at 258.
45 Dennis v. United States, 341 U.S. 494 (1951). Heraclitus of Ephesus said 2500 years ago: “The major problem of human society is to combine that degree of liberty without
international relations through treaty should prevail over a state's interest in regulating otherwise local affairs.\(^46\) When the Court decides whether federal law has preempted a field it engages in an "analysis of relevant interests . . . analogous to making a choice of law through the same process"\(^47\) and determines "whether state authority can practicably regulate a given area."\(^48\) Even in conflict of laws, the Court, though it has retreated somewhat, has expressly weighed the interests of the competing states:

[T]he conflict is to be resolved . . . by appraising the governmental interest of each jurisdiction, and turning the scale of decision according to their weight. . . . [O]nly if it appears that . . . the interest of Alaska is superior to that of California, is there rational basis for denying to the courts of California the right to apply the laws of their own state. . . . [California's] interest is sufficient to justify its legislation and is greater than that of Alaska, of which the employee was never a resident and to which he may never return.\(^49\)

These examples show that even though the problems involved are distinguishable from conflicts problems, they are no less difficult or less demanding of judicial creativity and judgment. The rhetoric, e.g., "legislative purpose," "clear and present danger," may vary with the context, but a demand for a policy, indeed, a "legislative" judgment may be found in nearly every case. Currie's proscription of interest-weighing seems to strike at the heart of the judicial process.\(^60\)

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Footnotes:


Although the Supreme Court is not precluded by the Constitution from weighing state interests in conflicts cases, it does not ordinarily do so. One reason is that the court must avoid the “absurd result” of pushing an undeveloped full faith and credit clause to the point that “wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own.”\(^5\) A companion reason is that the court generally works only with constitutional clauses; it does not have as much freedom to make common-law policy as a state court has. Moreover, many of the cases involve problems in such common-law fields as torts, contracts, or property for which the state courts have traditionally found solutions. These problems often do not have the national significance of other cases competing for a place on the Supreme Court’s docket. Oddly enough, even though the areas of the law into which they fall are well established, the problems are often ones of first impression. Much experimenting is often necessary before the principles for their solution are developed. Before the Supreme Court can meaningfully weigh the interests of competing states, these states must have settled on what they believe to be their interests. Even with such a mundane problem as the maximum liability of an airline, a state court may still have difficulty determining where state interests lie.\(^6\)

Of course, a problem may occasionally fall into an area where, though no federal statute is involved, a national interest should be asserted to allow one state’s interest to prevail over that of another.\(^7\) On the whole, however, most conflicts problems are not ripe for such intervention by the Supreme Court.

**B. Determination of Forum Policy Requires Weighing of Interests**

State courts weigh competing interests in common-law and statutory interpretation cases every day. A state interest in protecting employees using defective equipment purchased by their employers may compete with an interest in encouraging equipment manufacturers to continue useful business activity. The state court must determine which interest is to prevail—whether the manufacturer’s liability will be expanded or limited to fault.\(^8\) It reconciles “the manufacturer’s interest in protecting its trade name” and the “consumer’s interest in reliability of quality,” with the state’s and the commercial community’s interest in unrestrained commer-

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\(^7\) See Hill, Governmental Interest and the Conflict of Laws—A Reply to Professor Currie, 27 U. Chi. L. Rev. 463, 496–99 (1960).

cial trade,\textsuperscript{55} by imposing an equitable servitude on a chattel in a particular case.\textsuperscript{56} It applies the policy that damages should generally be limited to compensate for economic loss and denies a husband recovery for loss of consortium,\textsuperscript{57} despite the vigorous assertion that such a recovery is "justified by reason, logic, authority, the common law, and by the public policy" of the state.\textsuperscript{58} A state court in novel cases must often create a line between competing policies. It decides, for example, that the policy of protecting the expectations of a businessman who relies on the firm promise of another businessman should, under some circumstances, outweigh the promisor's reliance on conventional rules of offer and acceptance and the general policy against one-sided contract obligations.\textsuperscript{59} In view of such pervasive interest weighing one may well ask what is so sacrosanct about conflicts cases that precludes courts from weighing the interests involved.

As methods of avoiding interest weighing, Currie urges courts confronted with conflicts problems to use restraint in the determination of the content and scope of state policies, and to apply principles common to the states involved in a particular case.\textsuperscript{60} But paradoxically, the very methods that he advocates imply interest weighing.

Only after the forum court determines that there is a forum policy, that it is not limited to purely domestic cases, and that local contacts give the forum an interest in applying that policy to a case involving foreign elements, can a conflict possibly arise.\textsuperscript{61} Court decisions, however, almost never state whether rules laid down are relevant or governing in such cases, and statutes do so rarely. It is readily apparent that determination of the existence and scope of forum policy demands the weighing of many policies and interests.\textsuperscript{62}

\textsuperscript{55} See Note, 74 Harv. L. Rev. 617, 618 (1961).
\textsuperscript{57} West v. City of San Diego, 54 Cal. 2d 469, 353 P.2d 929, 6 Cal. Rptr. 289 (1960).
\textsuperscript{58} Id. at 481 (dissenting opinion).

A restrained and enlightened approach seems sounder than simply using conflicts cases as vehicles for overcoming growing pains in the law. Nevertheless, this approach may be unrealistic, if judges are timid about overruling decrepit domestic law and eager to seek refuge...
Currie and Lieberman have faced the problem in their exhaustive examination of North Carolina's so-called policy of closing the doors of its courts to actions for deficiencies on purchase-money mortgages. In addition to analyzing the language of the statute and tracing its economic history, they explored real estate texts and gathered opinions from the local bar. Forty pages of their discussion was on the domestic policy alone. Elsewhere, Currie has used a somewhat narrower approach. In his essay on incapacity and married women's surety contracts, he emphasized the policy of protection and the importance of residence as a contact. This approach may possibly have been too narrow. At least, the difference in technique suggests the difficulty of balancing the interest in efficient and inexpensive justice against the need for accurate determination of the forum policy, a difficulty that may produce mechanical escapes.

Occasionally there may be other ways to avoid balancing state interests: If the domestic policies of both states are the same, there is no true conflict of laws. The technique of emphasizing such an identity of policies has been used to avoid difficult choices between state and federal law. In connection with Auten v. Auten, it was suggested that the same technique might be used to avoid difficult choices between the laws of two states. It has already been pointed out that the court would thereby avoid the question of the scope of local law as well as the no-law paradox. In doing so it would promote efficient justice.

Some cases may possibly involve no conflict in basic principle but only in differences in detail. They attest to the difficulty of determining the forum policy, for the "detail" is often significant enough to invalidate in conflicts mystics. Compare Currie, Married Women's Contracts, 25 U. CHI. L. REV. 227, 250-51 & n.49 (1958), and Currie, Survival of Actions, 10 STAN. L. REV. 205, 230 & n.82 (1958), with Freund, Chief Justice Stone and the Conflict of Laws, 59 HARV. L. REV. 1210, 1216, 1224–25 (1946).

This article assumes that trial judges, as well as appellate judges, must be restrained and enlightened in their approach; it may be noted that conflicts cases are often of first impression. See Gordon v. Parker, 83 F. Supp. 40 (D. Mass. 1949); Frank v. Equitable Credit & Discount Co., 45 Pa. D. & C. 646 (1942); Wyzanski, A Trial Judge's Freedom and Responsibility, 65 HARV. L. REV. 1281, 1301–04 (1952).

68 See text at note 22 supra.
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a purely local transaction. Moreover, such cases raise the question whether conflicts in "detail" should even be distinguished from "basic" conflicts.

For example, when the "detail" is the rate of interest on a loan, the broad policy of upholding transactions competes with the specific policy of protecting debtors from usury.

This problem is effectively demonstrated by Kinney Loan & Finance Co. v. Sumner. In settlement of a disputed claim, a Nebraska resident executed a $2,700 installment note in Colorado in favor of a Colorado moneylender licensed under Colorado law. The note was secured by a chattel mortgage on a trailer located in Nebraska. Interest was payable at a rate of two per cent monthly on the unpaid balance, the maximum allowed by Colorado domestic law. When the debtor defaulted on the first installment, the creditor sued in Nebraska to replevy the trailer. Under Nebraska domestic law, a note bearing interest at a yearly rate in excess of nine per cent is void. The Nebraska court, however, held that the note in question was valid. A Nebraska statute declared that:

No loan made outside this state... of [1000] or less, for which a greater rate of interest... than... [9%] has been charged... shall be enforced in this state....Provided, that the foregoing shall not apply to loans legally made in any state under and in accordance with a regulatory small loan law similar in principle to this act.

The court determined that Colorado's law was similar in principle, and that the proviso was not limited to amounts of $1000 or less. The statute, in the court's view, reflected the frequent interchange of business between states and remedied the error of an earlier decision.

Currie has praised the case.

[T]here is room for restraint and enlightenment in the determination of what state policy is and where state interests lie. An excellent example is furnished by Nebraska's experience with small loan contracts... The policy of Nebraska was not to protect its residents against any exaction of interest in excess of a particular rate, but to protect them against exactions in excess of a reasonable range of rates, based upon the common principle...

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60 159 Neb. 57, 65 N.W.2d 240 (1954).
73 The earlier decision was Personal Finance Co. v. Gilinsky Fruit Co., 127 Neb. 450, 255 N.W. 558, dissent at 256 N.W. 511 (1934), cert. denied, 293 U.S. 627 (1935), criticized in Note, 13 Neb. L. Bull. 168 (1934) and Note, 39 Colum. L. Rev. 860, 863 (1939). The court had upset a small loan transaction in a suit by an Iowa creditor against a Nebraska employer on a wage assignment by an Iowa borrower.
underlying such acts. This sensible approach to the delineation of policy could find wide application.

The result may be right, but the court’s reasoning and Currie’s praise are questionable. The note represented a compromise settlement of a disputed claim. Was this a “loan” transaction? The court did not discuss the point. If a loan, surely it was not a “small loan.” The amount of the note was $2700; the small loan limit at the time was $300 in Colorado and $1000 in Nebraska. The loan plainly was not made “under and in accordance with [the Colorado] regulatory small loan law,” as required by the Nebraska statute quoted above, but rather under Colorado’s large loan law. The “common principle” underlying small loan acts was simply not involved: Higher rates are allowed on small loans to encourage legitimate lending and discourage loan sharks; loan sharks are not a force of evil outside the small loan area since they usually lend not from credit but from a limited supply of capital; small and large loans are made for different economic reasons; moreover, they are usually regulated differently. Possibly the court could have reached the same result under the general line of usury cases. Indeed, Nebraska authority would have supported such a result. The court chose instead to change the meaning of its small loan statute.

Nebraska subverted any policy it had against a higher interest rate to

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74 Currie, Notes on Methods, 1959 Duke L.J. 171, 180. See also Currie, Governmental Interests, 26 U. Chi. L. Rev. 9, 83 (1958).
78 See Note, 23 Colum. L. Rev. 484 n.6 (1923); Note, 42 Harv. L. Rev. 689 n.7 (1929).
79 See also Note, 23 Colum. L. Rev. 484 (1923); Note, 42 Harv. L. Rev. 689 (1929).
83 The proviso plainly referred to small loans. See Hubachek, Annotations on Small Loan Laws 113 (1938).
the determination of the Colorado legislature. Would it have done the same in the case of a reasonable determination by private parties? If weighing state interests is a "political" function, a decision that Colorado's interest rate fell within a "reasonable range of rates" seems no less political.

Despite these criticisms, Currie's basic idea of looking to a "common principle" may be sound. Cases involving specific statutes like Nebraska's are the easy ones; cases where no local statute guides the court are more difficult. Currie presumably would urge "restraint and enlightenment" in the hard cases as well. Suppose a small loan conflicts case similar to Kinney arises in a state that has no conflicts provision in its small loan law. The court discovers the common principle of establishing a fair small money lending system. It determines that its policy aims only at protecting residents from "exactions in excess of a reasonable range of rates" and that the foreign rate is "reasonable." It upholds the transaction, saves everyone's time and expense, and the critics praise it as "enlightened."

The court may be troubled, however, if it searches further. Suppose (after research into local authorities has not proved helpful) that it looks to statutes, particularly conflicts provisions, of other states for guidance. It will find that many states do not adopt the common principle idea. The statute may specify that rates exceeding the local rate make loans unenforceable regardless of where the loan is made. A provision may adopt the common principle idea for nonresidents but not for residents. If the court looks to California, it will find that the rate would be pared down to coincide with the California rate if a California resident is involved. The court may begin to wonder whether the "detail" of interest rate should be subverted to some common principle or supposed policy of upholding transactions. The forum may be an immigration state like California where the borrower comes to settle down. "The possibilities of foreign debts forcing these new residents on to the relief rolls is a very real one.... California has a strong interest in the welfare of its residents.... The need for commercial uniformity does not outweigh... [it] since, by the operation of... [the paring statute], the greater the disparity between the states, the greater the interest of California to be protected."

In continuing its search for guidance, the court may find an old com-

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84 Outside the regulated area, Colorado allows parties to a written agreement to fix any interest rate they please. Colo. Rev. Stat. Ann. § 73-1-3 (1953).
86 See Landis, Statutes and the Sources of Law, in Harvard Legal Essays 213 (1934).
89 Calif. Fin. Code §§ 24458, 24459 (loans under $300); §§ 22459, 22460 (loans under $5000); 32 Ops. Cal. Att'y Gen. 121 (1958) (imposes residence qualification).
mon principle provision repealed by a new consumer finance act. It will, of course, find statutory statements of policy on the other side. By this time, it should wonder just what the local policy is or should be. Tiring of the search, it may speak of a common or greater interest in security of transactions, or of "the frequent interchanges of business" between states. It might even construct an imaginary scale and "weigh" these elements opposite its interest rate. In doing so, it may create a hierarchy of policies; for example, the policy of securing transactions may take priority over the policy of protecting debtors in a particular case. The court might borrow a technique of constitutional adjudication and reason that a "detail" like an interest rate will not prevail unless that detail is plainly meant to apply to the conflicts case before it. It might also reason that interest rates are geared to the supply of local capital and that another state's adjustment of its rates deserves respect. Finally, it might cautiously invoke the common principle idea.

Let us stop for a moment to ask whether the courts "lack the necessary resources" for this weighing function. Are the resources of "logic, and history, and custom, and utility, and the accepted standards of right conduct" insufficient? If they are, the solution is to give the courts more resources, not prohibit them from using the ones they already have. Currie and Schreter have suggested a valuable judicial resource that might be put to good use by a court interested in achieving a sensible balance of state interests: "[I]t is clear that the courts of a state may properly take into account the possibility of conflict with the interests of other states in determining what domestic policy is and how far domestic interests extend." In making this determination, a court concerned with policies and interests would not be affected by a foreign court's mechanical treatment of its interest, except to the extent that mechanical treatment indicates that

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92 See Nev. Rev. Stat. § 675.310 (1959). It might even feel that upholding the transaction is necessary to deter outsiders from seeking relief in the forum.
93 See Note, 39 Colum. L. Rev. 860, 863 (1939).
95 See Note, 39 Colum. L. Rev. 860, 863 (1939).
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the foreign interest is not very strong. A further resource could be created by requiring the parties to develop the legislative facts, if any, necessary to decision. Another possible resource would be cooperation and certification of questions between courts of different states.

If the court has employed all its judicial resources, its decision upholding the transaction will most likely be correct, even though it has limited the scope of its local interest rate policy. Nevertheless, some final remarks may be in order. When courts deal with usury at the domestic level, they emphasize its evils and often invalidate transactions; at the interstate level, they usually uphold them. Quite a contrast is created by this diverse treatment. Perhaps courts should look more closely at the parties—the extremes might be a necessitous borrower and a greedy lender—as they have sometimes done in cases of adhesion contracts and consumer purchases instead of striving to uphold interstate transactions that would otherwise be usurious. Of course, if evasion of forum law is found, the court will ordinarily invalidate the loan. A statute may require this result even if the loan is good by forum law, if it is in evasion of another law. Having announced its decision, the court will feel quite judicial and not at all political. It is not likely to be disturbed by Currie’s idea that since weighing state interests “is not a proper function for the United States Supreme Court, it follows a fortiori that this is not a proper function” for a state court.

(1958) for the argument that a federal court should accept the mechanical treatment an interested state gives its choice of law rules.


101 See Karst, Legislative Facts in Constitutional Litigation, 1960 SUPREME COURT REVIEW 75.


107 See Me. REV. STAT. ANN. ch. 59, § 227 (1954).

Currie's concern about courts exercising functions they should not exercise in a democracy would seem to be a false problem. If so, the need for congressional solutions may be reduced.  

C. The Neutral and Convenient Forum Must and Should Weigh State Interests

Arguably, a general analysis for conflicts cases should be "broad and flexible enough to take care of exceptional situations as well as the more normal ones." If so, Currie's analysis may be tested by the unusual case of Forgan v. Bainbridge. Forgan was the financing mortgagee of a Cadillac sold to Tallmadge; the balance due Forgan was secured by a chattel mortgage recorded in Illinois. Without Forgan's knowledge or consent, Tallmadge drove the car to Texas, where he was soon arrested on a fugitive warrant. To raise bail, Tallmadge transferred the Cadillac to Bibb and, true to form, disappeared. Bibb sold the car to Bainbridge, who drove it into Arizona, where Forgan eventually brought suit for the car or its value, $1760. An Illinois court would protect Forgan and a Texas court would protect Bainbridge. What should the Arizona court do?

As a preliminary step, the Arizona court should ask whether the doctrine of forum non conveniens should be applied. It should answer "no"; as the state of Bainbridge's residence and as the situs of the car, it is convenient. It should also decide that situs and residence are insufficient contacts to give it an interest in applying its rule favoring mortgagees. Neither of these contacts are relevant to a policy protecting the mortgagee's transaction, though Bainbridge's residence might be relevant if Arizona had a policy favoring bona fide purchasers.

Having determined that Arizona is a convenient forum and has no interest, the court should be careful to avoid a false conflict between the policies of Illinois and Texas. It should determine whether the Texas and Illinois rules, based on their local recording acts, have been held by the courts of those states to apply to cases involving similar foreign elements and if not, whether they should apply. A federal court's responsibility for

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109 This article will not explore the possibilities of congressional solution of conflicts problems. See generally Cook, The Logical and Legal Bases of the Conflict of Laws 90–107 (1942); Jackson, Full Faith and Credit—The Lawyer's Clause of the Constitution, 45 Colum. L. Rev. 1, 21–24 (1945).


111 34 Ariz. 408, 274 Pac. 155 (1928).


determining state law under the *Erie* doctrine provides a helpful analogy.\textsuperscript{114} The court should also seek to avoid conflict by determining whether either Texas or Illinois would apply the other’s law, whether the purchaser’s bona fides accord with those required by Texas law, and whether the mortgagee’s conduct estops him under Illinois law. Should it conclude that there is a true head-on conflict between Texas and Illinois law, it must find some solution.

For Currie, the answer is easy: Give up; the task is as impossible as squaring a circle. “Conceivably, the forum might...apply the foreign law which coincides with its own—although [its] connection...with the matter is so slight that it would not justify the application of the law of the forum” if the events all took place in one foreign state.\textsuperscript{115} A mechanical rule won’t help since it produces results similar to and less economical than those achieved by flipping a coin.

I cannot agree that the forum should either give up or apply its own policy by default. Abdication is irresponsible; courts are expected to reach their decisions rationally. A choice either way can be supported by the reasons used to support the rule in the state from which it is taken.\textsuperscript{116} Moreover, there is no forum interest to subordinate, so that an important element of Currie’s “political” problem is absent.\textsuperscript{117}

The choice, however, should be discriminating. Neither the Illinois mortgagee rule nor the Texas bona fide purchaser rule adequately determines who should bear the loss. “The majority [Illinois] rule...is unfair to local purchasers who buy after the car is registered in their state. The minority [and former Texas] rule...is unfair to the finance companies in view of the ease with which local purchasers can find out about liens in other states” simply by looking to the records of the one state represented by the license plates.\textsuperscript{118}

It is submitted that the court should choose the Illinois rule and decide for Forgan, the mortgagee. In doing so it could not only reach a respon-


\textsuperscript{116} Compare Forgan v. Bainbridge, 34 Ariz. 408, 274 Pac. 155 (1928) (mortgagee wins), with Fuller v. Webster, 28 Del. 538, 95 Atl. 355 (1915) (BFP wins). Fuller was affirmed without opinion by an equally divided court after extended argument. 29 Del. 297, 99 Atl. 1069 (1916).

sible decision, but exercise its unique opportunity to promote sound rules. Forgan should be protected since the Illinois car plates should have warned Bibb, the first purchaser, to look at the Illinois records. Moreover, by the time Bainbridge purchased from Bibb, Forgan had recorded the mortgage in El Paso County, the county of purchase. Following the Illinois rule promotes interstate harmony because it is followed by the majority of states. Analogous federal statutes lean toward protection of the mortgagee. Applying the Illinois rule secures the mortgagee’s transaction and keeps the court from aiding fraud and the creation of a dumping ground for skip-state cars. Most purchasers are aware that the majority of cars are sold on an installment basis. Moreover, modern means of communication can be used by purchasers to check the records in the foreign state.

The solution suggested is by no means the only one. Several others are possible, all preferable to abdication from judicial responsibility. In the actual decision, the Arizona court invoked comity conditioned by reciprocity and decided for Forgan, the mortgagee:

We are called on merely to determine which title is entitled to priority under our laws, and, on the grounds that the Illinois title was acquired in a manner in harmony with our law, and the Texas title in one repudiated by us, and that Illinois grants to us the reciprocity which Texas denies, we think a true interpretation of the rule of comity requires that we recognize the priority of the Illinois title.

Objectionable as this reasoning is, it is better than abdication. The court free-wheeled in politics and diplomacy when it put its decision on

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119 This is an assumption, since the reports do not state the fact. Since Tallmadge was a fugitive from justice, however, it is not likely that he had either the time or the inclination to register the car in Texas.

120 On the other hand, following the lex situs conflicts rule to hold for Bainbridge might also promote interstate harmony, since it is the majority conflicts rule. Another qualification is that “majority rule” states occasionally find ways to protect purchasers. Leary, supra note 118. See also Raphael, Extraterritoriality of a Chattel Security Interest: A Plea for the Bona Fide Purchaser, 28 Fordham L. Rev. 419 (1959).

On the constitutional power of Arizona as situs to make its decision, see generally Goodrich, Conflict of Laws §§ 157, 158 (3d ed. 1949); Stumberg, Conflict of Laws 398-99 (2d ed. 1951). Cavers and Lorenzen have criticized Jitta’s suggestion that a rule may be derived from neither of two conflicting rules. See Cavers, A Critique of the Choice of Law Problem, 47 Harv. L. Rev. 173, 193 n.35 (1933); Lorenzen, Validity and Effect of Contracts in the Conflict of Laws, 30 Yale L.J. 655, 666-69 (1921).


122 34 Ariz. at 419, 274 Pac. at 159. See also id. at 412-14, 418, 274 Pac. at 157, 159 (fly-by-night mortgagors, fraud, and first in time). The reciprocity-retaliatory approach is criticized in Lenhoff, Reciprocity in Function: A Problem of Conflict of Laws, Constitutional Law, and International Law, 15 U. Pitt. L. Rev. 44, 68-72 (1953), and Hart v. Oliver Farm Equip. Sales Co., 37 N.M. 267, 21 P.2d 96 (1933).
these grounds. Why not protect the purchaser on the ground that Texas would have granted reciprocity and Illinois would have denied it? Such a result would be no more irrational and unbridled than the one chosen. The court, to borrow a phrase from Professor Freund, made the parties pawns in a game of pressure politics.

Some courts and scholars would do little better by turning to mechanical solutions: Judgment for defendant, because the law of the state of removal or the law of the situs at the time of the last transaction protects the purchaser. Judgment for plaintiff, because his title was first in time and acquired under a law similar to Arizona's. Judgment for defendant, because plaintiff did not record his mortgage in Texas within four months after the sale in Illinois. Judgment for plaintiff, because the law of his domicile protects him. Judgment for defendant, because to destroy his "valid title" would deny him due process. Judgment for plaintiff, because he did not consent to the removal. Or—to put an end to things—judgment for defendant, because full faith and credit must be given to the law of the last situs.

Another solution would seize on the particular facts: Forgan's recovery would be limited to $760 by crediting Bainbridge with a prior pledgee's interest of $1000, but no more, since recording in Texas intervened between Tallmadge's pledge to Bibb and Bibb's sale to Bainbridge. This result is essentially what the trial and dissenting judges proposed on technical title grounds. Their theory was that the transfer from Tallmadge to Bibb was only a pledge, not a sale. Therefore, Bibb could not transfer title to Bainbridge, but could only assign his pledgee interest. That interest should be given priority under Texas law.

Still another solution would involve a close scrutiny of the purchaser's bona fides. Bibb, the first "purchaser," was a pledgee who gave only $1000 on a $1760 car. Moreover, Tallmadge was a fugitive from justice and the $1000 was the bail Bibb paid as bondsman. The court does not mention

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123 Restatement (Second), Conflict of Laws § 268(1) and comment b, illustration (2) (Tent. Draft No. 5, 1959); Lalave, The Transfer of Chattels in the Conflict of Laws 182 (1955).
125 Cf. Uniform Commercial Code § 9–103(3).
127 Leflar, Constitutional Jurisdiction over Tangible Chattels, 2 Mo. L. Rev. 171, 184–88 (1937).
128 Beale, Jurisdiction over Title of Absent Owner in a Chattel, 40 Harv. L. Rev. 805 (1927).
129 Note, The Power of a State to Affect Title in a Chattel Atypically Removed to It, 47 Colum. L. Rev. 767, 781 (1947).
what Bainbridge paid Bibb, but we know that he was on notice from the intervening recording in Texas.\textsuperscript{130}

The court could conceivably reject these solutions and, by splitting the losses, do what few courts have ever done. Suppose the court finds the interests to be of equal weight. Should it divide the loss and treat each interest equally? Perhaps then it would be giving justice without law and ignoring governmental interests to focus on individual interests. But such a solution might also secure “all interests so far as possible with the least sacrifice of the totality of interests or the scheme of interests as a whole.”\textsuperscript{131} The great obstacle to its adoption is the common-law tradition of all or nothing rules.

Finally, a solution with more common-law appeal than loss splitting might lie in the doctrine of unjust enrichment.\textsuperscript{132} Should Forgan receive the difference between $1760 and what Bainbridge paid Bibb? The theory would be that Bainbridge has been enriched by this amount through Tallmadge’s wrong and that it would be unjust, on the particular facts, for him to benefit at Forgan’s expense. The injustice is graver in the interstate situation when different laws are relied on by different parties. Each party would bear the risk of recovering his respective balance from the person he dealt with: Bainbridge could sue Bibb on an implied warranty of title and Forgan could sue Tallmadge for the amounts unsatisfied.

The purpose of mentioning these possibilities is to show that a court is not at a loss for reasoned solutions when faced with conflicting state interests. Admittedly the neutral and convenient forum case is exceptional. Currie’s approach breaks down in such a case, but the breakdown is not of great practical significance. Professor Hill overemphasized the significance of the disinterested forum case when he stated:

A proposed system which simply does not take account of an important class of cases—a class moreover which is of peculiar importance in a federation such as the United States—does not commend itself as a basis for the scrapping of the more traditional methods of choice of law.\textsuperscript{133}


\textsuperscript{131} See Rheinstein, Book Review, 26 U. Chi. L. Rev. 185, 188 (1958); cf. Durst v. Daugherty, 81 Tex. 650, 654, 17 S.W. 388, 389 (1891); Leary, supra note 118, at 466 n.30.

\textsuperscript{132} Hill, Governmental Interest and the Conflict of Laws—A Reply to Professor Currie, 27 U. Chi. L. Rev. 463, 504 (1930).

\textsuperscript{133} 3 Pound, Jurisprudence § 100 at 334 (1959); cf. Restatement (Second), Agency app., Reporter’s Note to § 14D at 61 (1958) (escrow); Prosser, Torts § 53 (1955) (comparative negligence); Llewellyn, The Common Law Tradition: Deciding Appeals 231 n.232 (1960): “Is it so very hard to see common investment in the same crook with regard to the same things as a common venture and so to apply the principles of general average or of grain elevators?” See also 2 Pound, Jurisprudence § 63, at 248-50, 263-66; §§ 75, 76, 79; 3 Pound § 100; 4 Pound §§ 115, 116, at 25-28 (1959).
Hill cited no examples of this "important class of cases" and few are to be found. Such a case has real theoretical significance, however, for it illustrates that responsible courts cannot escape interest-weighing.

D. Determining the Concurrency of Forum Policy and Contacts: Another Weighing Situation

Currie's position is that an interest is "the product of (1) a governmental policy and (2) the concurrent existence of an appropriate relationship between the state having the policy and the transaction, the parties, or the litigation." Let us apply this general test to a specific case. Clay v. Sun Ins. Office, Ltd. illustrates the problem of determining the point in time at which the necessary coincidence must exist.

The suit was based on a personal property insurance policy purchased by Clay in Illinois, while he was a resident of that state. The policy provided for coverage against "all risks" of injury to his personal property, wherever located, but required that suits on disputed claims be brought within one year of discovery of the loss. Shortly after buying the policy, Clay moved to Florida and became a resident. In Florida, property covered by the policy was intentionally damaged by Clay's wife. More than two years later, Clay sued Sun in a diversity case in a Florida federal district court.

A Florida statute, enacted in 1913, long before the insurance policy was issued, declared that all contract provisions attempting to limit the time within which actions could be brought were void. Illinois' policy was not clear; it had no statute voiding limitation clauses and had previously upheld them in domestic cases. The district court entered judgment for Clay, but the court of appeals reversed on due process grounds. The Supreme Court granted certiorari. The weird nondecision it reached of vacation,
remand, certification, piecemeal disposition, and avoidance of the "constitutional" issue need not detain us from exploring Currie's theory and the basic competing precedents.

For Currie, the operative "transaction" occurred in Illinois, where the policy was purchased, rather than in Florida, where the loss occurred.\textsuperscript{137} His concern with upsetting "vested rights"\textsuperscript{138} caused him to consider as crucial the questions whether Florida would give "retroactive effect" to its statute in a purely domestic case and, if so, whether such "retroactive legislation" would be valid "under the due process and contracts clauses."\textsuperscript{139} Since the "transaction" occurred in Illinois, Florida's interest would not be legitimate unless the two retroactivity questions were decided affirmatively. For Currie, the "appropriateness" of applying Florida law was a "substantial constitutional question."\textsuperscript{140}

Neither Currie's position nor the Court's seem persuasive for the following reasons: (1) The contract clause does not help solve a conflicts case such as \textit{Clay}, (2) an analysis of the basic competing precedents clearly supports the constitutionality of applying Florida law, (3) application of Florida law would have been proper as well as constitutional.

1. \textit{The Contract Clause Does Not Help Solve a Conflicts Case Such as Clay}

In essence, Currie's position is that a case involving a 1954 loss should turn on whether a 1913 statute applies to a contract made in 1912 or earlier. Such a quest would be particularly foolish in the \textit{Clay} case, since the statute expressly provided that it did not apply to pre-existing contracts. Not only does Currie urge the courts to spend their time deciding hypothetical questions about the retroactivity of old statutes when current problems are presented, but he ignores a square holding opposing his position. \textit{Watson v. Employer's Liab. Assur. Corp.}\textsuperscript{141} involved a Louisiana statute that allowed injured persons to sue directly the insurer of the alleged tort-feasor, despite contrary provisions in the insurance contract. The Court disposed of the contract clause problem as follows:

And since the direct action provisions became effective before this insurance contract was made, there is a similar lack of substantiability in the suggestions that Louisiana has violated Art. I, sec. 10, of the United States Constitution which forbids states to impair the obligation of contracts.\textsuperscript{142}

\textsuperscript{138} Id. at 294. Compare \textit{Restatement, Conflict of Laws} § 347 (1934) ("The law of the place of contracting determines whether a promise is void").
\textsuperscript{139} Currie, \textit{supra} note 137, at 294. See generally Annot., 112 A.L.R. 1288 (1938).
\textsuperscript{140} Currie, \textit{supra} note 137, at 291.
\textsuperscript{141} 348 U.S. 66 (1954).
\textsuperscript{142} 348 U.S. at 70. The \textit{Watson} Court cited \textit{Munday v. Wisconsin Trust Co.}, 252 U.S. 499 (1920), which held that a statute making contracts by unregistered foreign corporations...
The *Watson* case is right. The due process and full faith and credit clauses are broad enough to protect reasonable contractual expectations. Moreover, invoking the contract clause when the statute involved antedates the contract only serves to confuse a conflict of domestic laws at different times with a conflict of the laws of two different states at the same time.  

At the time that Clay's insurance contract was made in Illinois, there was no conflict of laws problem. At that point, the only issue was the validity of the contractual limitation, and the only state with an interest in that issue was Illinois. But at the time of the loss there was a different issue: What was the effect of the contractual limitation on recovery by a Florida resident for a loss in Florida? There may have been a true conflict of laws on this issue. The immediate question, however, is not what the best solution would be, but whether the application of Florida law would be constitutional.

2. Precedent Clearly Supports the Constitutionality of Applying Florida Law

The precedent for holding that Florida could not "enlarge" the insurer's obligation by extending Florida law to a contract made beyond its borders was *Hartford Acc. & Indem. Co. v. Delta & Pine Land Co.* In that case, a Connecticut insurer issued a fidelity bond to a Mississippi corporation in Tennessee. Shortly thereafter, the insured shifted its principal office to Mississippi. The bond covered defalcations by employees "in any position, anywhere," but required that notice of claims be given within fifteen months after termination of the suretyship. Seventeen months after its expiration, it was discovered that the company treasurer had misappropriated funds void was validly applied to a foreign and subsequently executed conveyance of forum land by a forum corporation to the foreign corporation; "the settled doctrine is that the contract clause applies only to legislation subsequent in time to the contract alleged to have been impaired." *Id.* at 503. The language quoted from *Watson* appears to answer the question reserved in *Home Ins. Co. v. Dick*, 281 U.S. 397, 411 (1930) whether "the guarantee of the contract clause relates not to the date of enactment of a statute, but to the date of its effect on contracts."


in Mississippi during the period of the bond. The insured made its claim in the eighteenth month, and the insurer refused payment. In the ensuing action, a Mississippi court construed and applied a Mississippi statute and invalidated the notice clause. The Supreme Court reversed Mississippi’s application of its statute and decided for the insurer.

The death knell of Delta & Pine seemed to be sounded in 1954, when it was distinguished as a case in which Mississippi’s contacts were “slight” and “casual.” Currie severely and convincingly criticized it, noting that it is “thoroughly inconsistent” with his thesis. Had the dissenters in Clay prevailed, it would probably have been overruled.

The competing precedent was Watson v. Employer’s Liab. Assur. Corp., in which a person injured in Louisiana was allowed to maintain an action directly against the insurer of the alleged tort-feasor, without first obtaining a final determination against the insured as required by the foreign-executed insurance contract. As mentioned above, the Supreme Court upheld Louisiana’s direct action statute. Since the plaintiff was not a party to the contract, the case may be distinguishable from Clay, in that the Court was not annulling a provision the plaintiff himself had agreed to. However, this distinction is not persuasive: The insurer’s obligation was enlarged in both cases; nullifying a limitation a party agreed to is no more burdensome to the insurer than allowing a completely new person to sue. This is especially true when, as in Watson, the injured party could not have maintained an action against the insured in Louisiana.

The competition between these two precedents was really between the old and the new, between the vested-rights-place-of-making idea and the idea that the place of making cannot vest contracts of a multi-state business with immunity from the policies of other interested states. The trend of decision represented by Watson was clear. But instead of deciding with the trend and concluding that Florida law would constitutionally apply, or even instead of deciding with “vested rights,” the court in the Clay case reached its startling nondecision.

3. Application of Florida Law Would Have Been Proper as Well as Constitutional

Three months after the contract was made in Illinois, Clay moved to Florida. The lawsuit in a federal court in Florida concerned the loss of Florida property by a Florida resident in Florida. The insurance policy was “world-wide,” covering all risks anywhere. The insurer could not have

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147 Currie, Governmental Interests, 26 U. Chi. L. Rev. 9, 44–46 (1958).
148 See id. at 45 n.152.
reasonably relied on Illinois law to protect him from actions elsewhere demanding payment on the risks insured. Indeed, statutes similar to Florida's "exist in 31 States and the District of Columbia. They are in line with the protective safeguards that States have felt it necessary to create so as to preserve a fair opportunity for people who have bought and paid for insurance to go to court and collect it." Illinois' interest, if any remained after Clay moved himself and his property to Florida, was in having Florida meet the rather weak expectations of a British insurer still doing business in Illinois. Illinois, however, had never articulated such an interest, nor had it demonstrated great solicitude for insurers. Without a statute requiring the opposite result, Illinois simply had not upset contractual limitations in past Illinois-centered cases. Its interest was an attenuated one at best. Florida, however, had a strong interest in assuring Clay a fair opportunity to go to court and collect his insurance. Application of Florida law would have been quite proper, as well as constitutional.

The foregoing conclusion follows in part, however, from the premise that the crucial question before the lower court was not the validity of an "Illinois transaction," but the right to the benefits of the Florida statute of a Florida resident suing for a Florida loss. It should be plain that a good deal of interest-weighing goes into determining which question is "crucial" and at which time, if any, a state must have an interest.

Professor Hill has also discussed the time problem and, in intended contrast to Currie's theory of the "appropriate" or "legitimate" interest, has stated that the crucial issue is whether application of the second state's law "would unfairly defeat the reasonable expectations of the parties." Both reject the idea that there is any interest-weighing involved; each relies instead on his sturdy "neutral" principle of fairness or legitimacy. The skeptic wonders, however, how it can be determined without interest-weighing that application of Florida law would "unfairly defeat the reasonable expectations of the parties," or that Florida's interest is not "legitimate" or "appropriate."

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149 363 U.S. at 215 (dissenting opinion). (Footnote omitted.)
151 363 U.S. at 217 n.13 (dissenting opinion).
152 The search for a single all-important time may be no more worthwhile than the search for a governing single rule or center of gravity of a transaction. See Part II, supra at note 9.
153 Hill, supra note 150, at 494-96.
Hill’s emphasis on the expectations of the parties rather than a state’s interest in having these expectations upheld raises some fundamental questions about the Currie theory: Does Currie overemphasize state interests and neglect the interests of the parties? Indeed, is a state interest the crucial factor? Does he overlook a national interest in interstate harmony and uniformity, an interest made more important by the great mobility of people and the notorious crossings commercial transactions make over state lines? Only a general answer can be given, but that answer should be clear: The parties’ interests, interstate harmony, and uniformity should all be considered by the court in determining whether its state has a policy and interest pertinent to the case before it. This is what the court did, for example, before deciding the small loans case previously discussed.

The small loans case itself presents a question of the time at which a state’s interest should be measured. Suppose a creditor from the forum state and a debtor from state X enter into a loan agreement in X calling for twenty per cent interest per year. Suppose also that this transaction is valid under X law, but that under forum law the interest rate would be pared down to ten per cent per year. Debtor then moves to the forum and becomes a forum resident. Creditor sues him in the forum and debtor urges that he is entitled under the forum’s protective statute to have the interest rate cut down. The potential conflict is plain: State X is interested in having the transaction upheld; it had no protective policy for debtors and is interested in protecting the expectations of creditors doing business there. The forum is interested in protecting immigrant debtors and keeping them off the relief rolls. The California Attorney General disposed of this conflict with a refined analysis of the forum statute. He concluded that the forum statute would only apply to the “unpaid principal balance as of the time the borrower becomes a resident of California” and that the interest could not be recomputed from the inception of the loan. He reasoned that a clearer expression of purpose and a consideration of the power of the legislature to reach that purpose would be required before the statute could reach back to require recalculations of loans from their inception.

Not all cases will admit of such discriminating analysis. For example, the question of an insurer’s liability requires an all or nothing answer.

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157 See Cavers, A Critique of the Choice of Law Problem, 47 HARV. L. REV. 173 (1933), for an approach that emphasizes judicial responsibility to the parties and to laws whose contents are known.
158 See Jackson, Full Faith and Credit—The Lawyer’s Clause of the Constitution, 45 COLUM. L. REV. 1, 28 (1945).
161 32 OPs. CAL. ATT’Y GEN. 121, 122 (1958).
162 Id. at 123.
Nevertheless, the approach used by the California Attorney General is a persuasive one. The interests of both states were considered. Each state's interest was protected to a large extent. Each state's interest bowed a little to the other's. Interstate harmony was promoted by holding that the debtor, merely by switching his residency, could not completely evade the foreign law. The forum was not required to have an interest as of a particular point in time, but only to express more clearly its policy the further it wanted to go back in time. In short, the opinion reached a sound result because it weighed and balanced the interests of all the states concerned.

IV

THE "DATUM POINT"—"RULE OF DECISION" DISTINCTION: A SUGGESTION AND A WARNING

Not only can courts not escape the interest-weighing function, they should not escape the rigorous analysis that must underlie interest-weighing. Courts too often have been captivated by fuzzy phrases such as "local public policy," "center of gravity," or "place of the wrong," and too often have left the real issues unexposed. Currie's concept of "datum-points" may also have this failing.

Currie has set aside "datum point" questions, such as status, which usually arise "in the context of a primary question, such as the right to inherit." Perhaps he intends to deal with these questions in the future. So far, however, his main concern has been whether a foreign rule of decision should apply to such a primary question. Perhaps his interest-analysis can be fruitfully applied to "datum point" questions as well.


In the recent case of In re Knippel's Estate, 7 Wis. 2d 335, 96 N.W.2d 514 (1959) the question was whether Arizona or Wisconsin law governed the validity of an ante-nuptial agreement regarding Wisconsin property made in Arizona by a Wisconsin husband who had taken his property-less Arizona bride back to Wisconsin. The court invoked the place of performance rule, the "intention of the parties," and the center of gravity test and upheld the agreement under Wisconsin law. Had the court applied Currie's analysis it would have realized that the only state with any interest in the question was Wisconsin. It would therefore have avoided the considerable mumbo-jumbo it felt compelled to indulge in.


165 The discussion in the text is largely exploratory and is limited to the traditional conflicts area. It may be worth noting, however, that Professor Currie's interest-analysis has been applied in the area of federal-state relations, outside the traditional field of conflict of laws. See D. Currie, Federalism and the Admiralty: "The Devil's Own Mess," 1 Supreme Court Review 158 (1960). It might also be applied in the area of conflicts between state statutes and municipal ordinances; see Note, Conflicts between State Statutes and Municipal Ordinances, 72 Harv. L. Rev. 737 (1959), and in the area of state regulation of interstate commerce. Cf. Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945).
Take an inheritance case as an example. In *Estate of Lund*, the question was whether a son was legitimate so that he could inherit from his father who died domiciled in California. By California law, a child publicly acknowledged, received into the family, and treated by his father as legitimate "for all purposes." Acts meeting these California requirements occurred in Minnesota, where the father and the child were then domiciled, but where no statute operated to legitimate the child. Under the conventional conflicts rule that legitimation is determined by the law of the father's domicile at the time of the legitimating act, the child would not be legitimate and could not inherit.

The question, however, was succession to a California domiciliary's California property, which turned on whether this child was covered by the California statute. The statutory policy clearly favored inheritance by acknowledged children. The court emphasized that "the public policy of California disavows the common-law tenets and favors legitimation." There was no reason to exclude those not acknowledged in California. Acknowledgment, rather than place of acknowledgment, was the crucial factor. California was the only state with an interest in that question. Determining that the child was legitimate for purposes of California succession would in no way impair any interest of Minnesota or any other state. Indeed, there was absolutely no conflict of laws in the case. To deny the child the right to succeed because of a supposedly controlling Minnesota rule would defeat California policy without serving the policy of any other state.

Under the California statute, legitimation was necessary to succession; a datum point-rule of decision distinction was therefore built-in. The distinction, however, did not require California to ignore its own policy. *Estate of Lund* suggests that Currie's stress on policy, contacts, and inter-

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166 26 Cal. 2d 472, 159 P.2d 643 (1945).
167 CAL. CIV. CODE § 230.
168 26 Cal. 2d at 490, 159 P.2d at 653 ("legitimation [is] the creature of legislation").
169 Restatement, *Conflict of Laws* §§ 140, 137 (1934). Compare Restatement (Second), *Conflict of Laws* § 140 (Tent. Draft No. 4, 1957) especially comment d and Reporter's note thereto. The conventional rule is illustrated by *In re Presley's Estate*, 113 Okla. 160, 240 Pac. 89 (1925). The court denied inheritance of the Oklahoma property of an Oklahoma decedent to a child who was legitimate under Oklahoma law but not under the law of the place of acknowledgment. The court viewed this irrelevant place of acknowledgment as being of "tremendous importance." 240 Pac. at 93. See also Eddie v. Eddie, 8 N.D. 376, 79 N.W. 856 (1899).
170 26 Cal. 2d at 481, 159 P.2d at 648.
171 Compare the dissenters' remarks, 26 Cal. 2d at 498, 159 P.2d at 657: The father "made no legitimating declaration while domiciled in this state nor did the boy live with him here." The place of acknowledgment rule seems particularly harsh since a parent is likely to think that one acknowledgment is sufficient.
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est may help the court reach sound decisions in datum point cases as well as in rule of decision cases.

There may be danger, however, in separating datum point questions from rule of decision questions. Even in the problem Currie poses of a woman claiming as "widow" under the forum's workmen's compensation law, "decision" should probably turn on the purpose of the act in providing for dependents, rather than on the validity of a marriage under foreign law. When concepts such as "widow" are separated from their consequences, it is difficult to think functionally about policies and interests. The dangers are that a court might uncritically accept a "datum-point" label and overlook a substantial forum interest or fail to avoid a false conflict. Rather than undertake the difficult but necessary task of articulating forum policy and its scope, a court might invoke the "datum-point" label, as other courts have invoked "substance and procedure," "local public policy," and "place of making."

CONCLUSION

Many problems are raised by Currie's emphasis on forum policy, contacts, and interest. Their solution is more rewarding, however, than the bewildering and fruitless task of determining whether the place of making rule or the place of performance rule applies to a contractual transaction. The datum point distinction requires careful exploration with awareness of the danger that forum policy may be overlooked and weighing of interests subverted if labels are relied upon. The weighing process pervades the courts' attempts to solve conflicts problems. Whether, in the two state case, the end result is called interest-weighing, policy determination, or looking to a common principle, seems quite unimportant. It is important to remem-

172 Currie, On Displacement of the Law of the Forum, 58 Colum. L. Rev. 964, 1022-24 (1958). Currie recognizes that interpretation of forum law is crucial, but looks to foreign law on the tentative assumption that a valid marriage may be required. Possible approaches:


ber that the balancing and weighing that characterize the judicial process cannot be escaped. Professor Currie's use of policy determination and his principle that a state's interest is not "legitimate" unless it is contemporaneous with a specified transaction reveals that even he cannot escape the weighing, balancing, and occasional value judgment necessary to solve particular problems. His proposition that courts cannot weigh conflicting state interests simply breaks down in the three state case when the forum is neutral and convenient. In the two state case, when one state has no policy or "legitimate" interest, the Currie approach works brilliantly. The contrast between the breakdown and the brilliance provides one of those baffling puzzles so common in conflict of laws. Solution probably lies in not overemphasizing forum policy and in allowing other interests to be put into the scales.