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Mark P. Gergen*

Many scholars insist that the interest-based approach to choice of law problems violates the privileges and immunities clause and the equal protection clause because it favors citizens of forum states. Scholars who support the interest-based approach deride these arguments and maintain that it is the territorial approach to choice of law—the most important alternative to an interest-based approach—that unconstitutionally discriminates against people who are injured away from their home state. While the scholarly debate has focused primarily on discrimination in choice of law, it also has addressed the advantage given citizens of forum states

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1. U.S. Const. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

2. U.S. Const. amend. XIV, § 1 ("nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws").


5. See Currie & Schreter, Privileges and Immunities, supra note 4, at 454-55 (states violate privileges and immunities clause by denying protection to residents because claim arose in another state); Currie & Schreter, Equal Protection, supra note 4, at 575-83 (no reasonable justification for denial of courts to residents harmed outside of state; violation of equal protection); R. Weintraub, COMMENTARY ON THE CONFLICT OF LAWS § 9.4, at 572 (1986); (equal protection problem arises if forum state refuses to apply own law to its own residents because decisive contact made in some other geographical location); Simson, State Autonomy in Choice of Law: A Suggested Approach, 52 S. Cal. L. Rev. 61, 84-85 (1978) (allowing less protection to party solely because claim arose in another state is unreasonable and violates equal protection). Currie also thought it impermissible for state courts to refuse to hear claims by citizens though the action arises outside the state. Currie & Schreter, Privileges and Immunities, supra note 4, at 513-15 (denial of courts to nonresident citizens violates privileges and immunities clause).
in forum non conveniens doctrine,⁶ some borrowing statutes,⁷ and rules of personal jurisdiction.⁸ These arguments take place at a time of considerable disagreement over the role of equality in constitutional law; some people argue that equality is meaningless and that we would do better without it,⁹ while others view it as one of the few legitimate models for judicial review at a time when substantive values are in doubt.¹⁰

This Article attempts to reach a better understanding of equality’s role in the conflict of laws. This, hopefully, also will tell us something about the role of equality in other contexts. Part I identifies the areas in the conflict of laws in which equality is an issue.¹¹ Part II argues that most debate today about equality in the conflict of laws is meaningless.¹² Arguments that the interest-based or territorial approach unfairly treats people unequally usually derive entirely from the author’s views on the merits of a territorial or a personal order. The debate is really over two different forms of inequality, each of which is arbitrary in its own way.

Part III explains several other ways equality is used in constitutional law and their relevance to the conflict of laws. These include the theory that equality requires nonarbitrary administration of laws,¹³ the theory that legislatures must make laws evenhandedly without naked preference for majorities or disregard for the interests of minorities,¹⁴ and the theory that equality is a right that is defeasible only if the unequal treatment of people is to the general good.¹⁵

Part III concludes that a minor aspect of certain versions of interest analysis and some borrowing statutes—extending the protection of forum laws to citizens, but not to out-of-staters with whom citizens deal—may be objectionable under both a theory of evenhandedness and a rights-based theory of equality.¹⁶ Part III also concludes that an important aspect of the interest-based approach to choice of law—states protecting citizens from injury when they go abroad—may be impermissible under a strong rights-based theory of equality because it entails discrimination against out-of-staters and arguably advances no legitimate value.¹⁷

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10. This is argued most prominently by John Ely. See ELY, DEMOCRACY AND DISTRUST 73-74, 82, 101-04 (1979) (contrasting substantive and process based review; exalting equality as embodying ideal of courts as policers of process).

11. See infra text accompanying notes 18-64.

12. See infra text accompanying notes 65-111.

13. See infra text accompanying notes 112-17.

14. See infra text accompanying notes 118-47.

15. See infra text accompanying notes 196-201.

16. See infra text accompanying notes 148-204.

17. See infra text accompanying notes 218-42.
I. Unequal Conflict of Laws Policies

We need look no further than the two most recent Supreme Court decisions on choice of law to see how an interest-based approach to choice of law favors citizens of forum states. In Allstate Insurance Co. v. Hague,18 the Court held that Minnesota could apply its law to aid a citizen who was involved in a case that arose in Wisconsin. Lavina Hague's husband died in a traffic accident. She sued in Minnesota to recover under the uninsured motorist provisions of several automobile insurance policies. Minnesota law permitted the stacking of uninsured motorist coverage; Wisconsin law did not. All the events relevant to the suit occurred in Wisconsin: the Hagues lived there at the time of the accident, they purchased the policies there, and the accident occurred there.19 A plurality found that the forum state could apply its law to the case because Lavina Hague moved there after her husband's death, because her husband had been employed there at the time of the accident, and because Allstate did business in the state.20 The plurality's opinion suggests that a "forum, to benefit a domiciliary, may impose its own substantive law on a non-domiciliary, in resolution of a controversy involving a transaction or occurrence that had no connection with the forum."21

More recently, the Court rejected a state's application of its law to claims in a class action to which no party was a citizen and that arose entirely abroad.22 Owners of natural gas leases in eleven states, who resided in all fifty states and abroad, brought a class action in Kansas against Phillips Petroleum Co. to recover interest on royalty underpayments.23 The choice of law issue concerned which state's interest rate should apply.24 The Court ruled that it would be "arbitrary and unfair" to apply Kansas' more favorable interest rate to "leases involving land and royalty owners outside of Kansas."25 Neither case mentioned equality. In combination, however, the two decisions create an environment conducive to discrimination: they endow states with nearly boundless power to use their law to their citizens' advantage and they bar states from using their law to aid out-of-staters.

This is a consequence of the Supreme Court's acceptance of an interest-based approach to choice of law. Under interest analysis, as conceived by Brainerd Currie, its most famous advocate, courts should apply the forum state's law in multistate cases when doing so advances the governmental policies underlying that law.26 Although few scholars agree

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19. See id. at 305-06 (plurality opinion).
20. See id. at 313-20 (plurality opinion).
23. See id. at 800-01.
24. See id. at 802-03.
25. Id. at 822.
26. For a summary of Currie's method, see Currie, The Constitution and Choice of Law: Governmental Interests and the Judicial Function, in B. Currie, supra note 4, at 188-89 (governmental policies include the social, economic, or administrative policy expressed by the underlying law).
with Currie that a court should apply forum law whenever it is relevant.\textsuperscript{27} Many academics and jurists follow him in favoring an instrumental or functional approach to choice of law. All look to the reason or purpose underlying a law to determine whether it should apply in a multistate case.\textsuperscript{28} The Supreme Court has adopted the rhetoric of interests in stating the due process\textsuperscript{29} and full faith and credit clause\textsuperscript{30} limits to state choice of law: it has said that states may apply their law in multistate cases whenever they have an interest.\textsuperscript{31}

This approach to choice of law disadvantages litigants from out-of-state because interest analysis assumes that protective or compensatory laws exist to protect citizens and not out-of-staters.\textsuperscript{32} Under an interest-based approach Lavina Hague may invoke the protection of Minnesota's law because she moved there; someone who lives in Wisconsin may not. Kansas leaseholders may look to Kansas law for interest owed on underpayments; people who own leases and reside elsewhere may not. This is the most obvious way interest analysis discriminates against out-of-staters—it denies them the protection of forum law.\textsuperscript{33}

The interest-based approach disadvantages out-of-staters in their dealings with citizens of forum states in a more subtle way. If the forum has an unusually protective law, a citizen is at an advantage in dealing with out-of-staters, because in suits in the forum, that law protects only the


\textsuperscript{28} For a leading treatise advocating a functional analysis, see generally R. Weintraub, supra note 5. The extent to which states actually employ such an approach is unclear. Few states seem to engage in anything like pure interest analysis. Most states instead take an eclectic approach by drawing on various theories as they converge on a common outcome. See Leflar, Choice of Law: A Well-Watered Plateau, 41 Law & Contemp. Prosbs. 10, 26 (1977); cf. Kay, Theory Into Practice: Choice of Law in the Courts, 34 Mercer L. Rev. 521, 571 (1983) (one-third of states have adopted and try to follow a single theory; six states follow hybrid approach).

\textsuperscript{29} U.S. Const. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law").

\textsuperscript{30} U.S. Const. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State.").

\textsuperscript{31} See Allstate Ins. Co. v. Hague, 449 U.S. 302, 320, 322-24, 332 (1981) (Stevens, J., concurring). Because the Court spoke of "contacts, creating state interests," id. at 308 (plurality opinion), one may read the opinion as requiring that a state have some territorial contact with a case before it may apply its law. See Mann, The Doctrine of International Jurisdiction Revisited After Twenty Years, 1984 Rec. Des Cours 9, 30-31. It has been argued that the constitutionality of proportionate responsibility generally may be tested by assessing state interests. See Weinberg, Choice of Law and Minimal Scrutiny, 49 U. Chi. L. Rev. 440, 444-47 (1982).

\textsuperscript{32} See Ely, supra note 3, at 174-75. Other examples of rules with a protective purpose include statutes saving debtors from their obligations, married women from their contracts, and negligent drivers from suits by ungrateful guests. Compensatory rules include workers compensation statutes and rules allowing a guest to recover from a negligent driver.

EQUALITY AND THE CONFLICT OF LAWS

E. The Conflict of Laws

Citizen. Consider a guest statute case. Tex and Boomer hail respectively from Texas and Oklahoma. Texas allows injured guests to sue negligent drivers and Oklahoma does not. An automobile in which they ride wrecks in Oklahoma. If Tex is the injured passenger, he may sue in Texas and recover under its law because its compensatory purpose is implicated. If Boomer is the passenger, on the other hand, a Texas court would refuse to apply its law because enriching Oklahoma citizens is not among its purposes. The court would apply Oklahoma law and dismiss Boomer's claim. No matter who drives, Tex wins and Boomer loses if the suit is brought in Texas.

The advantage to forum citizens also may be seen in Currie's classic analysis of choice of law in a married woman's contract case. He assumed that Massachusetts had a law protecting married women from their contracts and that Maine did not. In cases involving contracts between citizens of the two states, Currie concluded that Massachusetts courts should relieve Massachusetts women from contracts with Maine merchants, but should hold Maine women to contracts with Massachusetts merchants. Again, citizens of the forum always win in suits against out-of-staters.

Currie and other advocates of interest analysis propose one change to make it less uneven. Indeed, some think the change may be compelled by the privileges and immunities and equal protection clauses of the Constitution. They believe that the forum should apply its laws to protect out-of-staters so long as doing so does not defeat the interests of any state. Consider again the case of Tex and Boomer. Boomer is the passenger and Tex the driver in an accident. Boomer's home state, Oklahoma, bars suits by passengers but Texas permits them. Texas has no interest in seeing Boomer recover under its law, and Oklahoma is equally cold to the thought

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34. See Brilmayer, supra note 3, at 408-09.
35. If the accident is in Texas, a court is likely to find that the law serves a regulatory purpose and apply it to benefit Boomer. See Byrn v. American Universal Ins. Co., 548 S.W.2d 186 (Mo. Ct. App. 1977) (Iowa guest statute bars Missouri residents' claim against Iowa motorist).
36. See Currie, Married Women's Contracts: A Study in Conflict-of-Laws Method, in B. CURRIE, supra note 4, at 77, 90-91 (case 3), 93 (case 7), 956 (case 14), 98, 90 (case 2) (application of domestic law evokes interests that cause different outcomes in different forums).
37. Currie & Schreter, Privileges and Immunities, supra note 4, at 488-90, 495, 524-25. Advocates of interest analysis seem to agree that the rule of equality may compel that result. See R. Weinstein, supra note 5, § 9.4, at 568-74; Sedler, Interest Analysis and the Unprovided for Case: Reflections on Neumeier v. Kuehner, 1 Hofstra L. Rev. 125, 148-49 (1973). It is not clear how far Currie and Schreter took this. Originally they suggested that only general protective or compensatory rules should be applied to aid out-of-staters, and not special class legislation such as that protecting married women. See Currie & Schreter, Privileges and Immunities, supra note 4, at 504-06, 524-25. Later they retreated from this position as depending upon the discredited notion that some privileges are general and inhere to citizenship while others are not. Currie & Schreter, Equal Protection, supra note 4, at 568 n.174. They concluded that while a state probably was free to extend the benefit of protective or compensatory laws to out-of-staters, it might be under no constitutional obligation to do so if the laws of the out-of-stater's home offered no such protection. See id. at 569-72. Later Currie suggested that sometimes rational altruism might justify protecting outsiders, perhaps in the hope that other states someday would reciprocate. See Currie, Notes on Methods and Objectives in the Conflict of Laws, in B. CURRIE, supra note 4, at 177, 186.
of protecting Tex with its laws. According to this modification of interest analysis, if Boomer brings suit in a Texas court he should recover under its law. This is because applying Texas law defeats the interest of neither state. Presumably, the same reasoning would lead Oklahoma to protect Tex from suit should Boomer sue there. Ironically, Boomer wins away and loses at home.

This modification of the interest-based approach does not eliminate the advantage given to citizens of the forum. The interest-based approach still will favor citizens if the forum can find an interest under its laws, or the laws of another state, requiring application of the law favoring a citizen. For example, assume that Texas protects manufacturers from liability for defective design; Oklahoma imposes liability. If an Oklahoma corporation manufactures a product that injures Tex because of defective design, a Texas court might permit Tex to recover under Oklahoma law. It could reason that Texas has no interest in protecting a foreign manufacturer, but that Oklahoma does have an interest in regulating home manufacturers. On the other hand, if Boomer sues a Texas corporation for defective design, a Texas court would apply its law because the law's protective purpose is implicated. Texans always win and Oklahomans always lose on this issue in Texas courts.

The interest-based approach has not worked as unevenly in practice as its opponents feared. The cases fall in three categories. The first involves claims by out-of-staters to the benefit of forum law in cases arising within the forum. The almost universal tendency of courts in these cases is to apply forum law. Currie thought the Constitution might compel this result if the law at issue had any regulatory purpose. This gives the forum an interest in applying its law to aid an out-of-stater. Courts, though, do not seem to worry about fine distinctions between laws of regulatory, protective, and compensatory purpose. These decisions seem more expressions of a territorial instinct on the part of judges, something committed interest analysts would consider atavistic.

The second category of cases involves claims by out-of-staters to the benefit of forum law in suits arising outside the forum and involving

38. For a collection of cases applying forum law, see R. Weintraub, supra note 5, § 6.23, at 335-36 n.27. In only one of the cited cases was a concern with unconstitutional discrimination given as a reason, and then it was only as part of a longer statement taken directly from David Cavers. See Broome v. Antlers' Hunting Club, 595 F.2d 921, 925 (3d Cir. 1979) (quoting D. Cavers, THE CHOICE OF LAW PROCESS 144 (1960)).


California has an interest in applying its policy since it may incur responsibility to the person injured in the state. Of course, the injured person is a foreigner, and if California were utterly and shortsightedly selfish she might wish to discriminate against him in favor of those interested in the local estate. There would be no defensible basis for doing so, however. California has retained no subsidiary policy of protecting estates against punitive liability, but has discarded the whole punitive concept as applied to this problem. Both the Privileges and Immunities Clause and the Equal Protection Clause would present obstacles to such discrimination.

Id. at 148.

40. See Kay, supra note 28, at 551 ("interest analysis prevents the use of irrelevant factors such as ... the geographical location of various acts that are unrelated to the purposes of the laws being examined").
out-of-staters on the other side. In the rare instance in which the out-of-
state plaintiffs convince the forum to hear the case, courts invariably apply
foreign law. In Shutts, of course, the Supreme Court found that the
Constitution compelled this result. The one challenge to the unevenness
of the interest-based approach under the privileges and immunities and
equal protection clauses came in such a case. In Skahill v. Capital Airlines,
Inc., the plaintiff brought a wrongful death suit on behalf of a Massachu-
setts citizen who was killed in a Virginia air crash. The defendant was an
air carrier incorporated in Massachusetts. The plaintiff sued in New York
and argued that he was entitled to invoke New York’s laws, which allowed
unlimited recovery for wrongful death. New York courts earlier had held
that citizens could invoke the New York law to recover for deaths in foreign
crashes if the flight originated in the state. The decedent’s flight had
originated in New York, and the claim was that the court could not
constitutionally deny recovery on the ground that he was a nonresident.
The court rejected the argument summarily, stating that “the classification
here, based on contacts with or interest in the transaction from which the
litigation arose and incidentally resulting in the dissimilar treatment of
residents and non-residents of the forum state is reasonable under both the
Equal Protection and Privileges and Immunities Criteria.”

41. Often the issue of choice of law arises in the context of a defendant’s motion to dismiss
on the grounds of forum non conveniens. See, e.g., Macedo v. Boeing, 693 F.2d 683, 690 (7th
Cir. 1982); Pain v. United Technologies Corp., 637 F.2d 775, 793 (D.C. Cir. 1980); Reyno v.
42. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 822-23 (1985); see also Farens v. Deere &
Co., 819 F.2d 423, 427 (3d Cir. 1987) (applying Mississippi statute of limitations in suit by
Pennsylvania resident against a defendant incorporated in Delaware with principal place of
business in Illinois concerning Pennsylvania injury violated due process and full faith and
credit clauses).
43. 234 F. Supp. 906 (S.D.N.Y. 1964), aff’d without opinion, 353 F.2d 738 (2d Cir.), cert.
44. Skahill, 234 F. Supp. at 907.
45. Id.
46. Id. at 908.
47. Id.
48. Id.
49. Id. at 909. A few other decisions touch upon the constitutional issue. Several courts
have upheld rules denying nonresident claims against the unsatisfied judgment fund of a state.
See Holly v. Maryland Auto Ins. Fund, 29 Md. App. 498, 503, 549 A.2d 670, 675-74 (1975);
Moan v. Coombs, 47 N.J. 348, 551, 321 A.2d 10, 12 (1976); Law v. Maerklein, 292 N.W.2d
86, 90-92 (N.D. 1980); see also Ostrager v. State Board of Control, 99 Cal. App.3d 1, 4-8, 160
Cal. Rptr. 317, 319-21 (1979) (victim compensation fund), appeal dismissed, 449 U.S. 807
(1980). But the issue is different in these cases because the out-of-stater lays claim to an
exhaustible fund to which he made no contribution. The more recent decisions rest on the
unlikely reasoning that the right claimed was not a fundamental right protected by the
privileges and immunities clause. Law, 292 N.W.2d at 90-91; Ostrager, 99 Cal. App. 3rd at 6, 160
Cal. Rptr. at 320.
Several old decisions on workers’ compensation statutes allow only resident employees to
bring claims on foreign accidents when the contract of employment was entered into in the
state. State courts diverge on the validity of these statutes and the Supreme Court has never
resolved the issue. Currie considers at length Quong Ham Wah Co. v. Industrial Acc. Comm’n,
184 Cal. 26, 192 P. 1021 (1920), writ of error dismissed, 255 U.S. 445 (1921), which held such a
limitation to be invalid under the privileges and immunities clause. See Currie and Schreter,
Privileges and Immunities, supra note 4, at 583. The court essentially reasoned that the state’s
The final category of cases involves claims arising outside the forum with a citizen and an out-of-stater as parties. There are too few cases to identify a pattern of favoring citizens. Forum law often is applied to aid a citizen. But sometimes the advantage to citizens is neutralized by applying forum law as well to protect out-of-staters who deal with citizens abroad. Furthermore, some courts have refused to apply forum law to protect citizens in suits against out-of-staters in actions arising abroad because of their concern for treating out-of-staters fairly. Perhaps the most prominent instance of this is the retreat of the New York Court of Appeals from interest analysis in Neumeier v. Kuehner. The court set forth three rules to deal with guest statute cases: (1) if the passenger and driver are of common domicile, apply that state's law; (2) if the driver is from a state barring suit and the passenger is from a state allowing suit (a true conflict), apply the law of the state where the accident occurs; (3) in other cases apply the law of the state where the accident occurred, unless other factors counsel differently. The effect is to default to a territorial approach in cases involving people from recovery and nonrecovery states. Though the court did not defend the rules this way, they do ensure that people from different states who travel together are held to the same law.

Other policies in the conflict of laws treat people unequally in ways some find objectionable. Some borrowing statutes require that courts apply other states' statutes of limitations when suits are brought by nonresidents on causes of action that arise outside the forum, but do not impose the same requirement on suits brought by citizens. This arrangement offers citizens an advantage similar to that which they enjoy under interest analysis. Assume Texas has a liberal statute of limitations and a borrowing statute that applies only to actions brought by nonresidents. Oklahoma has a short statute of limitations. Tex travels to Oklahoma where he is involved in an accident with Boomer. After the Oklahoma statute has run, Tex has an advantage, for only he may choose to initiate suit in Texas courts. Suit by Boomer in Texas would be time-barred because the Oklahoma statute is

lack of interest in the welfare of out-of-staters did not justify denying them a privilege accorded citizens. See Quong Ham Wah Co., 184 Cal. at 37-38, 192 P. at 1026. For decisions of similar and of opposite effect, see Currie and Schreter, Privileges and Immunities, supra note 4, at 490-94.

50. See R. WENTRAUB, supra note 5, at 340 n.47.


53. 31 N.Y.2d 121, 126, 286 N.E.2d 454, 456, 335 N.Y.S.2d 64, 68 (1972). The court ruled that an Ontario guest could not recover under New York law in a suit against a New York driver arising from an Ontario accident. Id. at 125-26, 286 N.E.2d at 455-56, 335 N.Y.S.2d at 67-68. In a dissenting opinion, Judge Bergan argued that was impermissible discrimination. See id. at 133, 286 N.E.2d at 461, 335 N.Y.S.2d at 75 (Bergan, J., dissenting). This follows only if we assume, as Judge Bergan argued, see id. at 132, 286 N.E.2d at 460, 335 N.Y.S.2d at 74 (Bergan, J., dissenting), that the majority acted arbitrarily in defaulting to a territorial approach in cases in which the parties were from states with different recovery policies.

54. Id. at 128, 286 N.E.2d at 457-58, 335 N.Y.S.2d at 70.

55. In 1962 it was reported that eight states had such rules. See Ester, supra note 7, at 80.
borrowed; suit by Tex would not be.\textsuperscript{56}

One can find other examples of discrimination. Only residents may invoke some long-arm statutes.\textsuperscript{57} A plaintiff's non-residence is an important factor in the determination to remit a suit to another court under the discretionary doctrine of forum non conveniens.\textsuperscript{58} The Supreme Court twice has blessed this in the face of challenges under the privileges and immunities and equal protection clauses.\textsuperscript{59} Finally, the jurisdictional standards established by the Supreme Court under the due process clause contain an element of discrimination. In determining whether long-arm jurisdiction may be exercised over a nonresident defendant, one factor a court must consider is the strength of the forum's interest in the matter.\textsuperscript{60} This interest is weaker when a plaintiff is an out-of-stater than when a plaintiff is a resident of the forum.\textsuperscript{61} Thus, even the Constitution has been interpreted in ways that make it difficult for out-of-staters to use a state's courts.

To this point all we have considered is conflict of laws policies that

\textsuperscript{56} The Supreme Court twice has upheld borrowing statutes of this type. See Canadian N. Ry. v. Eggan, 252 U.S. 559 (1920); Chemung Canal Bank v. Lowery, 95 U.S. 72 (1876). The Lowery court reasoned that the law was justified by the state's interest in protecting out-of-staters from being surprised by an untimely suit in the forum and by the state's interest in upholding the other state's statute of limitations. See Lowery, 95 U.S. at 77-78; see also Currie & Shreter, Privileges and Immunities, supra note 4, at 521-22. The Eggan court reasoned that the statute "was not enacted for the purpose of creating an arbitrary or vexatious discrimination against non-residents," Eggan, 252 U.S. at 559, and said that nonresidents need only be given reasonable access to a state's courts, and not rights equal to those of citizens. Id. at 562. More recently, two state courts upheld such laws. See Miller v. Stauffer Chem. Co., 99 Idaho 299, 303-04, 581 P.2d 345, 349-50 (1978); Miller v. Lockett, 98 Ill. 2d 478, 483-86, 457 N.E.2d 14, 17-18 (1983). They reasoned that discriminatory borrowing statutes serve a legitimate state interest in checking forum shopping by nonresidents. See Stauffer Chem. Co., 99 Idaho at 304, 581 P.2d at 350 (1978); Lockett, 98 Ill. 2d at 486, 457 N.E.2d at 18 (1983).

\textsuperscript{57} See, e.g., Iowa Code Ann. § 617.3 (West 1978).

\textsuperscript{58} R. Weintraub, supra note 5, § 4.33, at 216.


\textsuperscript{61} This is apparent in the Supreme Court's most recent decision on jurisdiction. See Asahi Metal Indus. Co. v. Superior Court, 107 S. Ct. 1026 (1987). A product manufactured by a Taiwanese corporation and sold in California injured a California citizen. See id. at 1029. The injured Californian sued the Taiwanese manufacturer, which brought a suit for indemnity against a Japanese component part manufacturer. Id. at 1029-30. Eventually, the Californian and the Taiwanese corporation settled. Id. at 1030. Before the Court was the issue of California's jurisdiction over the Japanese corporation on the suit for indemnity. See id. at 1030. Jurisdiction may well have existed under the formal rule of minimum contacts (four Justices so opined, see id. at 1037-38 (opinion of Brennan, J.), and Justice Stevens said the real issue need not be decided, see id. at 1038), but eight Justices reasoned that a balance of the forum's disinterest in the matter, the burden to the parties of litigating so far from home, and the federal interest in respecting the desire of other nations to have such matters kept within their jurisdiction, all militated against taking jurisdiction. See id. at 1033-35. In explaining the result, Justice O'Connor emphasized that California's legitimate interests in the dispute had considerably diminished because no claim by a Californian was involved. Id. at 1034; cf. Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 779-80 (1984) ("But plaintiff's residence in the forum State is not a separate requirement [of minimum contacts], and lack of residence will not defeat jurisdiction established on the basis of defendant's contacts."). See also Lewis, The "Forum State Interest" Factor in Personal Jurisdiction Adjudication: Home-Court Horses Hauling Constitutional Carts, 53 Mercer L. Rev. 769 (1982).
treat forum citizens and out-of-staters unequally. Advocates of interest analysis argue that the territorial approach to choice of law unfairly treats citizens of the same state unequally. They say that a state violates the equal protection clause if it denies a citizen the benefit of its law for the irrational reason that an action involving him arose elsewhere. For example, Tex drives his friend Austin from their home in Texas to Oklahoma, where they are involved in an accident. Texas permits guest suits but Oklahoma does not. An interest analyst believes only Texas has an interest in having its law applied. This makes the application of Oklahoma's law seem, to him, irrational and a denial of equal protection.

II. The Irrelevance of Equality

Scholars who argue about the inequality of an interest-based or territorial approach to choice of law, or about other conflict of laws policies, fail to appreciate that any approach or policy will treat people unequally for reasons that may seem arbitrary to some people. It all depends on whether one thinks that state power should be ordered on a territorial or a personal basis. In a territorial order, states have power over events within their borders. In a personal order they have power over events involving their citizens. The two orders involve different forms of inequality, and, as we will see, nothing in the Constitution clearly ordains either order.

Unequal treatment of people is inevitable in the conflict of laws. The only way it could be avoided is for states to take jurisdiction and apply their laws in every case brought in their courts. This treats people equally, but at the cost of discriminating against other states. If states were to apply their law (or what their courts perceive as the better law) in every case, they would frustrate the interest of other states in having their laws applied. The full faith and credit and due process clauses preclude this, at least as they now are interpreted.

That the unequal treatment of out-of-staters under the interest-based approach to choice of law, borrowing statutes, forum non conveniens doctrine, and rules of personal jurisdiction results from states taking a personal approach in the conflict of laws is not always well recognized. Advocates of these policies often insist that they serve ends wholly unrelated to the interest of states in protecting their citizens. They defend

62. See sources cited supra note 5.
63. See R. Weintraub, supra note 5, at 294-95.
66. Applying the better law also avoids treating people unequally. It is not much different from always applying forum law because courts taking the better law approach tend to choose the law of their own state. See R. Cromton, D. Currie & H. Kay, supra note 27, at 337-41.
discriminatory borrowing statutes as a check on forum shopping. They argue that discrimination in forum non conveniens doctrine prevents "vexatious litigation." They extoll the advantage given citizens of forum states in interest analysis as a result of deferring to the right of other states to have their laws applied in suits that do not involve the interests of citizens.

At the heart of each of these policies, however, is the decision by states to reach out to protect their citizens from harm in other states. The acceptance of a regulatory interest preserves an element of territorialism in the interest-based approach to choice of law, but what Currie's approach added was the insight that a state's reason for (or interest in) protecting its citizens persists when its citizens step across the state line. Similarly, with the demise of the old territorial bounds in International Shoe Co. v. Washington and the advent of long-arm statutes that enable states to hale foreign defendants into their courts, a plaintiff's citizenship became a significant factor in determining whether a state should exert its authority. The absence of a citizen in a suit strongly suggests that a state has no business interfering. The growing use of forum non conveniens is a response to the expanding jurisdiction of states, and a desire to keep out wholly unrelated actions. The same process is at work in reverse in borrowing statutes. The statute of limitations of the forum once applied in all actions, those involving citizens and out-of-staters alike. Borrowing statutes now reverse that rule and instruct courts to apply another state's statute of limitations in actions arising abroad. Borrowing statutes that except suits by citizens, and thus discriminate against out-of-staters, result from the choice by a state to protect citizens by allowing them to avail themselves of their home state's favorable statute of limitations when they go abroad.

States must discriminate against out-of-staters in reaching to protect citizens from harm abroad. Affording out-of-staters the protection extended citizens would result in a state ruling the world. To deny out-of-staters protection of state law—or access to state courts—is not entirely an act of comity, though, because it is necessitated by the claim of power to protect citizens abroad. To say the discrimination is an act of comity is, in some respects, like trying to justify a grab for power by finding virtue in what the grabber did not—and could not—take.

Arguments about inequality in the conflict of laws often collapse back into the author's preference for a territorial or a personal order. Consider the defense of interest analysis. Discrimination against out-of-staters, we

69. See Currie & Schreter, Privileges and Immunities, supra note 4, at 515.
70. See id. at 475.
71. 326 U.S. 310 (1945).
72. For example, while most would agree that California should be able to take jurisdiction over a foreign manufacturer when a citizen is injured by its product in the state, it also seems right that the suit belongs elsewhere when it involves two foreign manufacturers disputing indemnity on a settlement with the injured citizen. See Asahi Metal Indus. Co. v. Superior Court, 107 S. Ct. 1026, 1034-35 (1987). For a discussion of Asahi Metal Indus. Co., see supra note 61.
73. See R. Weintraub, supra note 5, § 4, 33, at 213.
74. R. Weintraub, supra note 5, § 3.2C2, at 56.
are told, is required by the principle that "the legislative power of a state

derives from its legitimate sphere of interest in the welfare of its

residents." Another advocate of the interest-based approach has said that

it cannot be faulted because it recognizes that "when the defendant is a

resident the forum has a real interest in applying its law in order to

implement the policy reflected in that law, but when the defendant is a

nonresident, it does not have such an interest." Beneath these arguments

lies the assumption that the critical relation in choice of law is that between

people and their states.

The defense of the advantage given forum citizens in forum non

conveniens doctrine is similar. Brainerd Currie and Herma Kay identified

four interests justifying the dismissal of suits by out-of-staters: the absence

of a forum interest in litigating disputes in which no citizen was involved;

the forum's interest in keeping its courts clear for citizens; its interest in

preventing use of its courts "as an instrument of vexation and harassment

and generally in protecting it against the abuses of migratory litigation";

and its interest in respecting the jurisdiction of other states over foreign

matters. The interests in saving courts for citizens, or in committing

out-of-staters to their own courts, presupposes that people should look first

to the courts of their own state for relief. The point is not that this

assumption is wrong. It is, rather, that the assumption depends upon what

rights one thinks are inherent in citizenship. One might feel quite differ-

ently about the matter if she thought (as many do) that access to courts

75. Weinberg, supra note 4, at 596-97 & n.4.
76. Sedler, supra note 4, at 627.
77. Brainerd Currie and Herma Schreter's defense of his system was somewhat different.

They reasoned that the due process and full faith and credit clauses forbade a state from

applying its law when it had no interest in a case, particularly when that defeated the interest

of another state. See Currie & Schreter, Privileges and Immunities, supra note 4, at 485. The

assumption, of course, was that the only interests that might validate choice of law under those

provisions were the interests credited within the system. In particular, they assumed states only

are interested in applying protective and compensatory laws to aid their citizens. Currie and

Schreter thought the Constitution contained contradictory requirements. They reasoned that

the due process and full faith and credit clauses forbade states from applying their law to

protect out-of-staters, and that the privileges and immunities clause forbade them from

denying out-of-staters rights accorded citizens. Currie and Schreter resolved the contradiction

by reasoning that the full faith and credit and due process clauses deserve precedence because

their "operation . . . is much more clearly defined than that of the privileges and immunities

clause; if we are to have a reasonably ascertainable basis for the discussion, this is the

preferable way to proceed." Id. at 486. As sympathetic commentators have observed, "[t]he

opposite result . . . would be reached if analysis began at the other end: If citizenship is an

unreasonable basis for classification, it cannot be a violation of the full faith and credit or due

process clauses to extend a law to citizens of other states . . . . Both approaches blatantly beg

the question." R. Cramton, D. Currie & H. Kay, supra note 27, at 503.
78. Currie & Schreter, Privileges and Immunities, supra note 4, at 515-16. That the third

interest does not justify the preference was shown earlier. See supra notes 55-61 and

accompanying text.
79. By the second interest Currie and Schreter may be alluding to the proposition that a

state should be able to keep publicly funded benefits for citizens. Cf. Douglas v. New York,

New Haven & Hartford R.R., 279 U.S. 377, 387 (1929) ("There are manifest reasons for

preferring residents in access to often overcrowded Courts, both in convenience and in the fact

that broadly speaking it is they who pay for maintaining the Courts concerned."). For a

discussion of the state created goods arguments, see infra notes 215-16 and accompanying text.
80. See Simson, supra note 8, at 388-89; Morley, supra note 6, at 42; cf. Laycock, supra note

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should have nothing to do with where a person is from.

The same assumption that states exist to protect their citizens underlies arguments that the territorial approach to choice of law unfairly discriminates against citizens of a state injured elsewhere. In the guest statute case, advocates of interest analysis think that in a suit between two Texans arising from an accident in Oklahoma, it is irrational for Texas to apply Oklahoma's law barring suits by injured guests, rather than Texas' law permitting recovery. The only interest they recognize is that of Texas in protecting its citizens. That Oklahoma may have a reason to have its law applied because the accident took place there is, to them, unacceptable.

If we turn the question around, though, and ask why a territorial approach to choice of law, the answer is likely to depend just as much on one's a priori assumptions. The territorial approach is said to honor people's expectations that they will be held to the law of the state where they act and the right of states to govern events that occur within them. This assumes that a territorial order is natural—it is what people expect and what states are due. Without that assumption the interests supporting the discrimination disappear. Gerald Neuman has suggested that the interests in comity to other states or in honoring expectations are too "abstract" to withstand strict scrutiny when fundamental rights are at stake. He goes on to argue that "[a] state's exercise of territorial restraint in these circumstances should not be condemned by equal protection merely because the state had the power to reach further. If moderation in exercising prescriptive jurisdiction provokes fatal equal protection challenges, then the only safe-harbor is boundless self-assertion." Neuman's assumption that states may regulate only events within their border drives the conclusion that discrimination in refusing to protect citizens from foreign harm is reasonable.

One should expect the derivative nature of equality arguments in the conflict of laws. Equality claims, by their very nature, are derivative of other
legal or moral propositions. The point is aptly made by Peter Westen:

[E]quality is entirely circular. It tells us to treat like people alike; but when we ask who "like people" are, we are told they are "people who should be treated alike." Equality is an empty vessel with no substantive moral content of its own. Without moral standards, equality remains meaningless, a formula that can have nothing to say about how we should act. With such standards, equality becomes superfluous, a formula that can do nothing but repeat what we already know.87

Thus, one can judge whether it is fair to hold people to different laws on the basis of where they act only by deciding whether to follow a territorial approach. Once one chooses to reject a territorial approach for a personal one, however, the principle of equality is not needed to determine that denying citizens the protection of state law because they are injured outside the state is unfair.

The Constitution neither requires nor forbids either a territorial or a personal approach in the conflict of laws. Those who favor a territorial approach have a stronger argument that theirs is the one constitutionally proper way. Many provisions assume that states are territorial entities.88 Moreover, the personal approach seems inconsistent with the privileges and immunities clause. It literally violates the clause89 if the protection of law or access to courts is classed as a privilege or immunity of the citizens of the several states. States must extend such privileges and immunities to out-of-staters on the same terms as they are extended to citizens. The personal approach also may violate the spirit of the provision, which, it often has been said, is to promote a sense of common nationality among the citizens of the separate states.90 Indeed, the Supreme Court has said that

87. Westen, supra note 9, at 547 (citation omitted).

88. The provisions regarding interstate commerce in article I assume states are territorial entities to and from which commerce can flow. See U.S. Const. art. I. § 8, cl. 3; § 9, cl. 1; § 9, cl. 5; § 9, cl. 6. Article III requires that crimes be tried in the states where they are committed. See id. art. III, § 2, cl. 2. Article IV treats as fugitives people who flee from one state to another. See id. art. IV, § 2, cl. 2. And it prohibits the formation of new states within the jurisdiction of old without their consent. See id. at § 3, cl. 1. The fourteenth amendment makes people citizens of the state where they reside. See id. amend. XIV, § 1. And the twenty-first amendment empowers states to regulate the transportation "or use therein of intoxicating liquors." Id. amend. XXI, § 2. Cf. Regan, Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine: (II) Extraterritorial State Legislation, 85 Mich. L. Rev. 1865, 1887-95 (1987) (principle that states may not regulate extraterritorially is not located in one provision of the constitution, it underpins many).

89. For the exact wording of the privileges and immunities clause, see supra note 1.

90. As John Ely stated:

[I]n't there something somehow out of accord with at least our "small c constitution"—out of accord in particular with the reasons we as a nation decided to supercede the Articles of Confederation—in adopting what amounts to a system of "personal law" wherein people carry their home states' legal regimes around with them?

Ely, supra note 3, at 192. Gerald Neuman also makes this argument:

Reference to the law of a nonresident's domicile can also frustrate the broader purpose of the privileges and immunities clause: to fuse the states into a single nation by eliminating differential treatment of citizens of other states. . . . [T]he solution the Framers chose was integration of visitors into the local system, not extraterritorially.
unequal treatment of out-of-staters by states must be for "valid independent reasons" apart from "the mere fact that they are citizens of other States." The Court further has stated that discrimination in favor of citizens cannot proceed from the parochial interest in favoring citizens over out-of-staters. The personal approach violates these tenets, since it rests on the premise that states may favor their own in choice of law or access to courts because of the special relationship of citizenship.

But many aspects of our constitutional tradition support a personal approach in the conflict of laws. Ours is a union of states in which being a citizen means a great deal. Citizenship counts negatively in subjecting people to the legislative, taxing, and adjudicative authority of their home states wherever they may go. And it counts affirmatively in allowing citizens to participate in the public life of states, share in public services, and even share in some natural resources. In addressing these issues, the Court has recognized that sometimes states may act to secure the welfare of citizens to the exclusion of out-of-staters. The Court stated this most clearly in a decision holding that states may restrict public schools for citizens.

The Court credited the "substantial state interest in assuring that services provided for its residents are enjoyed only by residents." The Supreme Court upheld a personal approach in Connor v. Elliott, a case upholding a traditional domiciliary choice of law rule. Conner, supra note 3, at 323 (citation omitted).

3. In republican ideology, the state is conceived of as a community as much as a place. See Kaden, Politics, Money, and State Sovereignty: The Judicial Role, 79 Colum. L. Rev. 847, 851 (1979). Early judicial decisions contain traces of this. For example, in an 1896 case, the Court stated that the "primary conception" of the nature of a state "is that of a people or community. The people, in whatever territory dwelling, either temporarily or permanently, and whether organized under a regular government, or united by looser and less definite relations, constitute the state." See Texas v. White, 74 U.S. (7 Wall.) 700, 720 (1869); see also Penhallow v. Doane's, 3 U.S. (7 Dall.) 54, 93-94 (1795) (in Republican theory citizens compose the states).

4. States may punish citizens for criminal acts done outside the state. See Skiriotes v. Florida, 313 U.S. 69, 77 (1941) (Florida may apply criminal law to resident taking sponges outside state territorial waters). States also have jurisdiction to determine the marital status and obligations of absent domiciliary spouses. See, e.g., Williams v. North Carolina, 317 U.S. 287, 298-99 (1942). The only decision calling into question the extraterritorial authority of states over citizens is Bigelow v. Virginia, 421 U.S. 809 (1975), in which the Court suggested that states may not prevent citizens from procuring abortions while abroad. See id. at 824.


somewhat ironically, was its first decision applying the privileges and immunities clause. At issue was a Louisiana law extending rights of community property in Louisiana property to people married outside the state if they later became residents. The Court explained that the statute did not discriminate against citizens of other states; instead it discriminated against marital contracts made in other states. This reasoning, however, ignores the fact that under the statute people married outside Louisiana were treated differently on the basis of whether they later moved to the state. More to the point are the Court's observations that Louisiana could regulate the property rights of couples who moved to the state and that the state should not be faulted for not interfering in the relations of people married and living outside the state. This is explicit recognition of a state's particular interest in regulating and protecting its citizens, and of its right to deny out-of-staters similar protection.

That the Constitution clearly requires neither a territorial nor a personal order is not surprising. States (and nations) are both places and communities, and territorial and personal conflict of laws rules reflecting their dual character have coexisted since conflict of laws problems first were conceived. Indeed, no clear line can be maintained between the two approaches. Today's more personal order arguably evolved from the old territorial order. The power to regulate events within the state was transformed into a power to regulate foreign events on the basis of their local effects, and that in turn has come to suggest a power to protect citizens from foreign injuries on the basis of their local impact.
connection between the two approaches is clear in the fourteenth amendment, which defines as the citizens of a state people who reside in its territory. The hazy boundary between the two approaches will undermine any effort to establish one as uniquely ordained by the Constitution.

III. A Role for Equality?

Perhaps our inquiry into the role of equality in the conflict of laws is best ended on this note. We have seen that arguments about equality in the conflict of laws are largely beside the point. Equality has been used as a foil in fights over the fairness of the territorial and interest-based approaches to choice of law and other matters. The fight, however, is really over two different forms of inequality, and, as we have just seen, nothing in the Constitution clearly requires one over the other. But equality is too important a fixture in constitutional law to discard that quickly. This section considers three theories in which the concept of equality plays a significant part and their bearing on the problems before us.

We saw in Part II that the mere fact that a conflict of laws policy treats people unequally cannot tell us whether it is good or bad. Equality may be used in a coherent fashion in the theories explored in this section because it does not stand by itself. The first theory requires equality in the administration of an existing body of rules. The second theory uses equality to identify laws that are a product of naked preference or disregard for a group's interests. The third theory requires that laws that treat people unequally be of utility.

A. Equality as Nonarbitrariness

At the very least we require equality in the administration of the laws. Equality means at least this much: People are entitled to equal treatment under the law (whatever it may be), and to a principled explanation of why


111. See U.S. Const. amend. XIV, § 1.
the law is changed in cases affecting them. It is a minimal guard against arbitrary exercises of power.

This theory has two implications for the conflict of laws. First, established conflict of laws policies must be respected. States may not, for example, switch arbitrarily back and forth between an interest-based and a territorial approach to choice of law.\(^{112}\) Second, we may insist, as some have proposed, that a state not be allowed to "favor itself, its law or its residents without advancing a principled basis for doing so."\(^{113}\)

This is precious little to ask of states. Arbitrary decisions obviously should be condemned. But, while this rule may provide some intellectual comfort by ensuring a sort of equality in the conflict of laws and giving some meaning to the equality provisions of the Constitution, it is almost entirely toothless. Under this standard, states may do whatever they want so long as they act consistently and give a principled reason for what they do. This standard would force us to concede, for example, that "instrumental approaches" such as interest analysis "have arrived at a sufficiently settled conclusion" that states may apply protective or compensatory rules to benefit only their own.\(^{114}\) Consistent discrimination is not arbitrary.

It is suggested that we might reject under this standard automatic preferences for forum law, as when a court chooses "its own law solely on the ground that it finds its law easier to apply or that it regards its own law as better law simply because it is its own law."\(^{115}\) The point, however, is either trivial or wrong. It is wrong if it assumes that there is no principled reason for favoring forum law or the better law. Traditionally, courts presumed that forum law was applicable unless a party could establish a good reason for applying the law of another state, and there are plausible reasons for that presumption.\(^{116}\) Choice of the "better" rule of law also is advocated by some for respectable reasons—it describes what courts do and it advances the cause of justice.\(^{117}\) If the objection is only to an automatic preference for forum law as better, it is trivial. A court can respond with any plausible explanation of why it believes its law is better. Only completely unreasoned decisions can be challenged.

112. See R. Weintraub, supra note 5, § 9.4, at 570.
114. Id. at 52-53.
115. Id. at 49-50 and n.50. von Mehren and Trautman are concerned with equal treatment of state legal orders rather than equal treatment of persons.
116. See Currie, On the Displacement of the Law of the Forum, in B. Currie, supra note 4, at 7-10, 46-58; cf. Allstate Ins. Co. v. Hague, 499 U.S. 302, 326 (1991) (Stevens, J., concurring) (“I question whether a judge’s decision to apply the law of his own State could ever be described as wholly irrational. For judges are presumably familiar with their own state law and may find it difficult and time consuming to discover and apply correctly the law of another State.”).
B. Equality as Evenhandedness

1. Two Theories of Evenhandedness

It is often observed that the Supreme Court uses equality to protect minorities—or out-of-staters—from majorities. This principle is at the core of the Carolene Products theory (actually theories). To the extent legislation bears unevenly on the under- or unrepresented it cannot be trusted, according to the Carolene Products theory, for the interests of the unrepresented will not be taken into account. And, as a product of a defective political process, it is fit for judicial scrutiny in a way that other laws are not. Scholars have advanced theories of this sort to explain the concern with equality manifested under the commerce and the privileges and immunities clauses, as well as representation-reinforcing aspects of the entire body of modern constitutional law.

Some scholars think that the Court invokes equality to prevent groups from using government power for selfish ends. Cass Sunstein explains that equality, with much of the rest of the Constitution, is a check on the vice of factionalism, or efforts by politically powerful groups to enrich themselves at the expense of the powerless. He finds that the Constitution is "united by a common theme and focused on a single underlying evil: the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want." Akin to this view is Donald Regan's explanation of decisions under the commerce clause invalidating state laws. Regan explains that the Court strikes down, and argues that it should strike down, laws adopted by states with a protectionist purpose—a purpose to enrich local commercial interests at the expense of out-of-state interests. Both scholars condemn the use of government power for selfish ends. Sunstein

118. J. Ely, supra note 10, at 74-75, 83-84.
119. The reference, of course, is to footnote four of United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).
120. Ackerman, Beyond Carolene Products, 98 Harv. L. Rev. 713, 715-17 (1985).
123. See id. at 384-85.
126. Sunstein, Naked Preferences, supra note 125, at 1689. In the interstate context this means that a state may not prefer its own citizens over out-of-staters simply because it values their welfare more highly. Id. at 1706.
127. See Regan, The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause, 84 Mich. L. Rev. 1091 (1986). It may seem a bit strange to include a work on the commerce clause in a discussion of equality. However, many of the measures Regan studies are of special concern because they treat citizens and out-of-staters (or local and interstate commerce) unequally. What is unique about the commerce clause is the Court's balancing of state and national interests in passing upon challenged regulations; in contrast, Regan proposes theories concerned with the inequality or unevenness of commercial regulations as an alternative to balancing. Id. at 1101.
128. Id. at 1094-95.
objects to selfishness generally; Regan objects to a particular form of selfishness in the interstate context, protectionism.

The concept of equality plays an evidentiary role under both theories. The unequal treatment of a group is taken as evidence that the law's purpose is to take advantage of the mistreated group, under Sustein's and Regan's theory, and as evidence that the law's enactment resulted from disregard for the mistreated group's interests, under the Carolene Products theory. These inferences are rebuttable by a showing that the lawmakers' motives are good, or by a showing that the law does sufficient good to warrant the loss to the mistreated group. Sunstein says of the rationality version of equal protection, for example, that "its function is to ensure that classifications rest on something other than a naked preference for one person or group over another." For Regan, a law's explicit discrimination against out-of-staters is relevant only as evidence—albeit strong evidence—of protectionist purpose. And, under most versions of the Carolene Products theory, the facial unevenness of a law is taken as evidence of bad motive, or as a cause for closer judicial scrutiny of the law's merit.

The two theories differ radically in some fundamental respects. They differ in what they protect outsiders from. The motive-based theory of Sunstein and Regan protects outsiders from purposeful mistreatment—from laws enacted by majorities with a conscious desire to take advantage of them. The incidence-based Carolene Products theory has a broader sweep—it protects outsiders from laws that neglect their interests without regard to motive. The two theories may reflect different visions of legislative processes. Sunstein views legislative processes as deliberative—he assumes that legislators conceive of, debate, and enact legislation on the basis of its purpose. The Carolene Products theory assumes legislators respond to pressures from interest groups, and that legislation is the product of conflict and compromise among interest groups. Ultimately, the two theories may reflect different views on whether some things are intrinsically good. Sunstein thinks that some values are more important than others and that honest inquiry may reveal them to us. If legislators can "escape private interests and engage in pursuit of the public good," he observes hopefully, "debate and discussion [will] help to reveal that some values are superior to others." The Carolene Products theory is more cynical. It assumes no values beyond people's subjective preferences, and it

129. Sunstein, Naked Preferences, supra note 125, at 1713.
130. See Regan, supra note 127, at 1134-35.
131. See Tushnet, supra note 122, at 130-41; O'Fallon, supra note 122, at 412-13.
132. See Eule, supra note 121, at 461-63.
133. The term "outsiders" is used in this context to refer both to out-of-staters and to those without effective representation in states.
134. See Sunstein, Naked Preferences, supra note 125, at 1708, 1710; Regan, supra note 127, at 1095.
135. See Regan, supra note 127, at 1162; O'Fallon, supra note 122, at 412 ("The other frequent cause of discrimination is the simple failure to consider the interests of some affected people.").
136. See Sunstein, Naked Preferences, supra note 125, at 1694-95. Regan seems also to assume legislation will have an ascertainable motive. See Regan, supra note 127, at 1158-60.
137. See Ackerman, supra note 120, at 719-20.
138. Sunstein, Interest Groups, supra note 125, at 32.
judges legislative processes only on how well they satisfy those preferences.\textsuperscript{139}

The difference between the two theories in practice is not so great. Each theory must incorporate elements of the other. Advocates of a motive-based theory pay attention to the incidence of laws to assess motive in cases where it is unclear, or to deal with injuries states inflict on outsiders incidentally to accomplishing other goals. Imagine that a state adopts a law prohibiting the disposal of out-of-state wastes at local sites; the only legislative intent that can be demonstrated is to protect the environment.\textsuperscript{140}

A court undoubtedly would strike down the law though no invidious motive could be shown, most likely by assuming that the state legislature could not have been blind to the advantage given to in-state interests.\textsuperscript{141}

Advocates of an incidence-based theory similarly care about motive. Most versions of the theory require the identification of a purpose, apart from enriching citizens, for laws bearing unevenly on out-of-staters, and then test the validity of that purpose by asking whether there is a more evenhanded way to accomplish it.\textsuperscript{142}

The two theories differ in result in cases involving state laws of doubtful value that bear inordinately on outsiders. An example is a case involving a Maryland law that forbade gas producers and refiners from owning service stations.\textsuperscript{143} The law was suspect because virtually all the firms burdened were foreign.\textsuperscript{144} Regan (and Sunstein presumably) would strike it down only on a showing of bad purpose. "[A] prohibition stated in terms of protectionist purpose," as Regan observes, "does not interfere with the state legislatures' freedom to value the ordinary goals of legislation as

\textsuperscript{139} It is well understood that the \textit{Carolene Products} theory provides no substantive values against which state policies may be measured. The theory treats values as subjective, defining the right policy only as the policy that would have been chosen had the legislature represented all interests in proper weight. \textit{See} Regan, supra note 127, at 1161.

\textsuperscript{140} The example is from Regan, supra note 127, at 1119-23. \textit{Cf.} Philadelphia v. New Jersey, 437 U.S. 617, 626-27 (1978) (regardless of state purpose, law may not differentiate based on origin).

\textsuperscript{141} Regan would analyze the law by focusing on its discriminatory element—the choice to conserve resources by barring foreign wastes—and strike it down because its purpose must be bad. \textit{See} Regan, supra note 127, at 1120-21. Regan also suggests that he simply would hold the legislature to knowledge of the consequences of its actions. \textit{See id.} at 1122-23. That his treatment of the conservation embargo entails more searching scrutiny into state action than an inquiry into motive can be seen from how this might change the outcome in Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981). Minnesota banned the sale of milk in plastic nonreturnable bottles for reasons of conservation. \textit{See id.} at 458-59. It did not prohibit the sale of milk in nonreturnable cardboard cartons, saving the state's considerable paper industry from the law's effect. \textit{See id.} at 460. Regan does not object to the Court's decision upholding the law, apparently because he buys the ostensible conservation purpose. \textit{See} Regan, supra note 127, at 1239-41. The law, however, might be struck down if we examined it in the same way Regan scrutinizes the conservation embargo. If we hold the legislature to the consequences of its actions, the measure seems protectionist, for it provided local paper manufacturers a clear advantage. And what reason can there be for discriminating between paper and plastic other than protectionism? Regan disguises the problem of imputing motive from incidence by addressing easy cases in which it seems inconceivable that the uneven incidence of the measure did not taint legislative deliberations. \textit{See id.} at 1122. The issue cannot be so easily finessed in cases like \textit{Clover Leaf Creamery}.

\textsuperscript{142} \textit{See} Eule, supra note 121, at 455-74.

\textsuperscript{143} \textit{See} Exxon Corp. v. Maryland, 437 U.S. 117, 119 (1978).

\textsuperscript{144} \textit{See id.} at 197 (Blackmun, J., dissenting).
they will . . . . Let the state avoid this improper goal, and it can do what it wants . . . ."\textsuperscript{145} Most versions of the Carolene Products theory go further, and would permit some inquiry into whether the local interest served warranted the burden on outsiders.\textsuperscript{146}

The theories strike different balances between two irreconcilable goals. We want to preserve the autonomy of states (or communities) to set their policies without fear of judicial second guessing, but we also want courts to protect outsiders from gains won at their expense. While an incidence-based approach perhaps gives courts too much power, a motive-based approach provides outsiders too little protection from majorities. The best approach probably lies between the two. Courts should look first to motive. If, however, seemingly well-intentioned laws are grossly uneven, and a court feels reasonably certain that the interests they serve are weak, they should be struck down. This may be anti-democratic, but a judge is stepping in to protect those without a voice.\textsuperscript{147}

2. Evenhandedness in the Conflict of Laws

How do state conflict of laws policies measure up under these theories? Some scholars say that we cannot trust states to be evenhanded in formulating conflict of laws policies.\textsuperscript{148} Taking a page from the Carolene Products theory, they argue that state conflict of laws policies inherently are suspect in a way that domestic policies are not. With domestic policies it is at least conceivable that state policy-makers account for all affected interests as within their constituency. With conflict of laws policies that is rarely the case. The need for conflict of laws policies arises only in cases with a foreign element—a party is from another state or events occurred elsewhere—which, presumably, create out-of-state interests that the policy-maker will not feel compelled to consider. Conflict of laws policies are, in this respect, less deserving of our trust.\textsuperscript{149}

\textsuperscript{145} Regan, supra note 127, at 1145.
\textsuperscript{146} For criticism of the Court’s decision upholding the law in Exxon, see Eule, supra note 121, at 444-46, 465-66. Regan comments that, despite what the majority said in Exxon, its analysis turned on the lack of an evident bad purpose. See Regan, supra note 127, at 1239. He concludes that the Court may have been mistaken in that assessment. See id.
\textsuperscript{149} Though this concern would warrant close federal scrutiny of all state conflict of laws policies, Professor Brilmayer addresses a more limited problem. Her concern is that states that follow an interest-based approach may apply forum law in particular cases by concocting interests. See id. at 1922. To prevent this, she proposes that states may assert an interest as a reason for applying a law in a case only if that interest was articulated earlier as a justification for the law in an entirely domestic setting. For example, in Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981), she would not permit Minnesota to rely on Ralph Hague’s employment in the state at the time of his fatal accident as a justification for the application of its law on stacking. She comes to this conclusion because there is no sign in Minnesota statutes or cases that the stacking rule is related to the regulation of the employment relation, nor any evidence that the state’s social welfare laws are drawn to protect people employed in the state.
Federal courts have no reason to distrust state conflict of laws policies as much as this argument suggests they should. The claim that states will disregard out-of-state interests in making conflict of laws policies is wrong. It corresponds neither with how state legislatures and courts actually behave, nor with how we would expect them to behave.

The record of states in the conflict of laws is commendable. Legislative choice of law policies tend not to be self-aggrandizing. Choice of law rules adopted by legislatures are usually territorial: legislatures do not always—or even usually—adopt rules to protect citizens without regard for out-of-state interests. Only a minority of states have borrowing statutes that provide an advantage to citizens by excepting their claims arising abroad from the statute's effect. As we have seen, even when courts adopt the interest-based approach to choice of law they temper it to treat out-of-staters fairly. The history of long-arm statutes also evidences a tendency toward evenhandedness. A number of states originally adopted long-arm statutes to permit service only in actions brought by citizens. Many states have since amended their statutes to eliminate the discrimination against out-of-staters, and where these statutes have not been amended, courts construe the class of persons entitled to relief under the statute broadly to encompass people who move to the state after their action arises, or to encompass out-of-state corporations doing business within the state.

Several factors limit the risk that conflict of laws policies will be tainted by parochialism. Much less pressure is on state legislatures to adopt parochial conflict of laws policies than is on them to adopt taxes or commercial laws taking advantage of out-of-staters. Legislatures face enormous pressure to enact taxes weighing most heavily on out-of-staters because of the need to fund government at the least cost to constituents. In-state merchants will push for laws disadvantaging their out-of-state competitors. No similar interest groups are likely to push for pro-citizen conflict of laws policies. People are oblivious to conflict of laws issues until lightning strikes and they are embroiled in a suit in which such an issue arises. Perhaps state bars have an interest in promoting pro-citizen (actually

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See id. at 1342-47.

The proposal is unsound. How often states choose law on pretextual interests is unclear. Hague may be one of the few cases where the existence of a state interest can be questioned because it is hard to see what interest Minnesota has in a Wisconsin automobile accident from the involvement of a Minnesota employee. If we make Ralph Hague a Minnesota citizen, the more likely case, the proposed test runs into trouble. For Minnesota to claim an interest in protecting its citizens hardly seems pretextual. We may not want to concede Minnesota that power, but it is disingenuous to insist that we are doing this because we believe Minnesota does not really care about its citizens. The proposal also arbitrarily conditions the right of states to vindicate what seem to be natural enough interests on their having been articulated in contexts in which they may not be relevant. Many laws are stated as general propositions that "If A does X to B, then B may recover from him," without regard to who A and B are or where X occurs. The question whether the rule is drawn to regulate X, or to protect citizen B, or both, will not be posed until a multistate case (in which at least one element, A, B, or X is foreign) arises.

150. See Brilmayer, supra note 3, at 424-29; see also Davies, A Legislator's Look at Hague and Choice of Law, 10 Horvau L. Rev. 171, 174-76 (1981).

151. See Ester, supra note 7, at 80-81 (twelve of thirty-seven statutes in 1962 had an exception favoring resident plaintiffs).

152. See supra notes 38-53 and accompanying text.

153. See R. Weintraub, supra note 5, § 4.15, at 166-68.
pro-plaintiff) conflict of laws policies because they attract litigation and enhance the possibility of recovery. But suits involving significant multistate elements will be only a small part of a lawyer's trade; indeed, most lawyers, like the public, probably are oblivious to conflict of laws issues.

The private nature of conflict of laws disputes also makes it unlikely that decisions will be motivated by parochial sentiments or a naked preference for citizens. Judges face real people who will appeal to their sympathies in ways more significant than common citizenship. A judge who is usually sympathetic to plaintiffs is likely to feel no less sympathy because the wretch before her lives elsewhere. Indeed, the real effect of an interest-based approach has been to favor plaintiffs. In part, this is for structural reasons; plaintiffs may pick a forum with favorable substantive and choice of law policies. But some judges also seem to favor pro-recovery choice of law. A judge may sympathize with an out-of-stater surprised by the application of forum law because she can imagine herself in the same position someday.

There is, in the long run, no advantage to states in pursuing parochial conflict of laws policies. States that opt for policies to aid their citizens know that any gains to their citizens will be offset by losses if other states pursue similar policies. If states adopt the interest-based approach, for example, gains to citizen plaintiffs will be offset by losses to citizen defendants in other cases. If states close their courthouse doors to out-of-staters, they know their citizens will face similar barriers elsewhere.

Of course, states that try to take advantage of their sisters always face the risk of retaliation, and a purpose of the privileges and immunities clause is to forestall such squabbling between states. But some give and take between the states is tolerated: the most striking example is reciprocal laws, which condition a benefit to out-of-staters (a professional license or a low tax rate, for example) on the receipt by citizens of a similar benefit in the out-of-stater's home state. The give and take of reciprocal laws is

154. See Weinberg, supra note 31, at 463-64.
155. Conklin v. Horner, 38 Wis. 2d 468, 157 N.W.2d 579 (1968), is a striking example. A court following the interest-based approach ruled that an Illinois guest could recover in a suit against an Illinois host arising from a Wisconsin accident. See id. at 485, 157 N.W.2d at 587. Illinois law barred such claims. See id. at 476, 157 N.W.2d at 582. The decision has been called a "classic example of interest fabrication." Weintraub, A Defense of Interest Analysis in the Conflict of Laws and the Use of that Analysis in Products Liability Cases, 46 Ohio St. L.J. 495, 499 (1985).
tolerable—perhaps it is even desirable—because states may be able to settle upon a scheme of professional licensing or taxing that satisfies their mutual interests better than could a scheme ordained by federal courts.158

The area of conflict of laws is particularly suitable for allowing states similar freedom to define their interests in competition with their sisters. Saul Levmore has observed that while federal courts should be quick to intervene when states exploit unusual advantages in commerce, manufacturing, or resources, intervention is less necessary when states regulate or tax trade or resources over which they have no monopoly.159 Some of the reasons he identifies are unique to trade regulation,160 but one is relevant to the issues before us. Exploitations, as he calls them, are not self-limiting because states face less risk of successful retaliation; interferences are self-limiting because states will realize there is no advantage in selfishness.161 No state has an advantage it can exploit in the conflict of laws: all have citizens who will come before the courts of other states. And, retaliation—if it can be called that—is a natural consequence of courts or legislatures looking to the practice in other states to decide what approach to take in the conflict of laws.

Even if we doubted that states weigh out-of-state interests in making conflict of laws policies, federal courts have compelling reasons for taking a deferential, or hands-off, approach. Federal courts cannot play a large role in formulating conflict of laws policies. Because conflict of laws policies usually are made by state courts in particular cases, and not by legislation, they can be challenged only by appeal to the Supreme Court. The Court does not have the capacity to handle more than an occasional case. Lower federal courts could critique state conflict of laws policies (or develop policies on their own) in diversity cases, but that would increase an already overwhelming workload and would result in a two-track system of conflict

648 (1981), upholding a retaliatory tax that was imposed to coerce other states to lower their tax rates. See id. at 668. The significance of the decision is not so clear. It considered only equal protection objections to the tax; the commerce and privileges and immunities clauses were not at issue because it was a tax on corporations in the trade of insurance. See id. at 655-56.

158. Consider retaliatory taxes, which are permitted in the area of insurance. See Western & S. Life Ins. Co., 451 U.S. at 668-74. Retaliatory taxes make it possible to exact from states some toll for the external costs of their own taxes, and should encourage them to mind the interests of others in setting a rate. Though messy and fractious, this process may offer a better chance for relief from onerous taxes on interstate commerce than suit in the Supreme Court, for the Court is unwilling (for good reason) to enter that thicket. How well retaliatory taxes work is not clear. There is evidence that they have depressed tax rates on insurance and have discouraged discrimination, but those effects are not statistically verifiable. See Bodily, The Effects of Retaliation on the State Taxation of Life Insurers, 44 j. of Risk & Ins. 21, 27-32 (1977). In Western & Southern the Court concluded that this evidence was enough to support the rationality of a state’s decision to adopt such a tax. See Western & S. Life Ins. Co., 451 U.S. at 672; Sporhose v. Nebraska, 458 U.S. 941, 957-58 (1982) (reciprocity requirement in water-export statute violates commerce clause).


160. He suggests that exploitations are most likely to limit output, and that states are likely to bear most the cost of interferences because the absence of an advantage (or monopoly power) makes it impossible to pass the cost on to out-of-staters. See id. at 571-72.

161. See id. at 572.
of laws justice. The pre-Erie experience with the federal common law should caution us against pursuing this path in the conflict of laws.

A deferential approach is desirable also because of the confusion in the conflict of laws. No consensus exists on what values conflict of laws policies should serve. Some believe we should design conflict of law policies to vindicate the rights of the injured, others think justice lies in applying the "best" possible law, others want to apply the law most in accord with modern standards of justice, others think protecting peoples' expectations is important, and others want to make the rule of law more determinate. As we have seen, some people appear to conceive of a territorial or an interest-based approach as meritorious in themselves because they are intrinsic to the character of the state (as a territorial or communal entity), or because they are intrinsic to human personality. Given this confusion, any position the Supreme Court might take would be either hopelessly vague or enormously controversial.

The effect of these arguments is cumulative. All point to the conclusion that state conflict of laws policies deserve at least the same, and perhaps greater, deference from federal courts than other state laws are accorded. Therefore, courts should test conflict of laws policies as they test laws regulating commerce, on the basis of their motive and incidence. If a conflict of law policy is well motivated, and its incidence is not too uneven, it should not be upset by federal courts. With this general point in mind we now can turn to consider the merit of specific policies.

3. Neutral Policies

In trying to identify conflict of laws policies that are most likely a product of naked preference or disregard of a group's interests, it is useful to focus on who the policies enrich. Neutral policies that do not enrich citizens, or any predictable group within a state, should pass muster under a theory of evenhandedness because we have no reason to suspect that they are a product of naked preference.

Many conflict of laws policies do not advantage or disadvantage any

163. See id. at 74-78 (condemning "injustice and confusion" incident to the doctrine of Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842)).
164. See Weinberg, supra note 31, at 464-68.
166. See Juenger, supra note 108, at 458-60.
169. See Neuman, supra note 3, at 317-18.
170. See Weinberg, supra note 4, at 596-97 & n.4; Sedler, supra note 4, at 627.
group in a predictable way. Consider territorial choice of law rules. Everyone has a roughly equal chance of losing or winning under a territorial approach. Only those who imagine that they never will travel elsewhere are safe from a foreign state's laws. Furthermore, until we know whether local or forum law is favorable, it is impossible to tell whether the stay-at-home or the traveling litigant will lose under the approach. Legislators and courts that apply the territorial approach to choice of law are about as close to a position of neutrality as is imaginable.\footnote{172}

One may say the same for traditional domiciliary choice of law rules.\footnote{173} The first decision by the Supreme Court under the privileges and immunities clause upheld such a rule—a Louisiana law that extended community property rights to persons residing in the state.\footnote{174} The Court declined to offer a general theory to justify the decision,\footnote{175} but we now may see its contours. The unequal treatment of out-of-staters is untroubling because it does not enrich citizens at the expense of out-of-staters. Because husband and wife generally have a common domicile, a rule defining when a state will regulate marital property rights by domicile will be distributionally neutral as between citizens and outsiders. This is also true of domiciliary choice of law rules in the area of wills and estates. In a contest of a will or a dispute regarding intestate distribution involving parties from different states, the rule requires application of the law of the decedent's domicile without regard to the citizenship of the prevailing party.\footnote{176} The rule is neutral as between citizen and out-of-state parties.

4. Policies Enriching Citizens

The policies that figured importantly in Parts I and II—the interest-based approach to choice of law and the preferences for forum citizens in forum non conveniens doctrine, borrowing statutes, and rules of personal jurisdiction—are more troublesome because they tend to enrich citizens of forum states at the expense of out-of-staters. Under an interest-based approach each state applies its laws to protect or compensate its citizens, usually in suits against out-of-staters. Borrowing statutes that except suits brought by citizens on claims arising abroad enrich them by preserving

\footnote{172. One has to look long and hard for a decision in which a rule of this character was held to violate the equal protection clause. Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), is close. At issue was an Illinois rule requiring dismissal of fair employment practice claims when an administrative hearing to consider the employee's charge was not convened within 120 days. \textit{See id.} at 424-26. An employee whose claim was defeated because the commission mistakenly scheduled the hearing commission five days after the end of the 120 day period brought a claim alleging the denial of due process and equal protection. The Court found the rule to violate the due process clause, \textit{see id.} at 457-58, and four Justices opined that it was so irrational as also to violate the equal protection clause. \textit{See id.} at 458 (Blackmun, J., concurring, joined by Brennan, Marshall, and O'Connor, JJ.). The rule in \textit{Logan} was close to being utterly without reason, and in the opinions there is a palpable sense of the injustice in frustrating a claim for administrative actions entirely outside the claimant's control.}


\footnote{175. \textit{See id.} at 593.}

\footnote{176. \textit{See R. Weintraub, \textit{supra} note 5, § 2.12B, at 31.}}
claims that otherwise would be time-barred. Long-arm statutes and the jurisdictional preferences make it possible for citizens to sue outsiders at home. This probably saves them litigation costs at the expense of foreign defendants, and it may offer them additional advantages in choice of forum. In due process analysis, the problem of shifting litigation costs may not be so bad since the convenience to the plaintiff of suing at home is balanced against the inconvenience to the defendant. But in forum non conveniens doctrine analysis, the preference sometimes is automatic (or nearly so); no matter what the other costs, citizen plaintiffs may sue at home.  

That these policies enrich citizens of forum states at the expense of out-of-staters is troubling. That they do this while openly discriminating against out-of-staters—denying them the protection of the laws of states or access to their courts—would, under most versions of the theory of evenhandedness, result in an almost conclusive presumption that the policies are a product of naked preference for citizens or disregard for the welfare of outsiders. Regan, for example, says that he favors a "virtual per se" rule against laws that enrich citizens and that explicitly discriminate against out-of-staters, because "[e]xplicitness . . . is very strong evidence for protectionist purpose." Eule says that laws that on their face burden out-of-staters disproportionately warrant little or no judicial deference.179 Uneven conflict of laws policies, however, are in two critical respects unlike the uneven regulatory and tax laws usually condemned under the theories of evenhandedness. First, though they enrich citizens of forum states by discriminating against out-of-staters, the discriminatory element of many of these policies is not a product of naked preference. Second, even in the case of openly selfish policies, particularly Currien interest analysis, we might feel very different about the policies because they are well-intentioned.

The discrimination against out-of-staters under these policies results from two choices made by a state. The first is the choice by states to reach out to protect citizens from harm abroad. The second is the choice to deny out-of-staters similar protection. While either choice could be a product of naked preference, it is quite likely that neither is.

The choice of states to protect citizens abroad could be selfish. When Texas reaches out to protect Tex in a suit against Boomer, it could be because its courts simply prefer that Boomer, and not Tex, bear the cost of being held to foreign laws and being forced to litigate in a foreign court. There are, however, unselfish explanations for the action. Texas may do this not because it wants Tex to win in the particular suit (or Texans to win in similar suits), but because it thinks all people should be able to look to their states for protection.180 Texas policy-makers might conclude that it is

177. See id., § 4.33, at 216 n.78.
178. Regan, supra note 127, at 1134.
179. See Eule, supra note 121, at 461.
180. See Ely, supra note 3, at 185 (the policy of the interest-based approach is "not simply that Californians receive the protection of California's protective policy and everyone else be denied them, but rather that everyone receive the benefit of the protective policies his or her own state has seen fit to legislate").
consistent with fundamental principles of democracy and federalism to hold people to the laws of the state where they vote. Or they might adopt the policy because of its pro-plaintiff (or pro-recovery) distributional effects. Under a theory of evenhandedness we need not agree with the substantive merit of these reasons to validate the policy of protecting citizens. It is sufficient that we find them unselfish.

The other aspect of the policy is the refusal to protect out-of-staters abroad. Again, one might see it as a product of selfishness. A selfish interest in keeping the courts of states free for citizens and, in Texas, even an interest in encouraging immigration by people who want to avail themselves of the state's favorable statutes of limitation, has been said to justify borrowing statutes that hold out-of-staters (but not citizens) to foreign statutes of limitation in actions arising abroad. But motives of comity also could explain the action. States may refuse to apply their law and take jurisdiction in wholly foreign suits—suits between out-of-staters arising abroad—out of a belief that other states have a greater interest in adjudicating causes of action that arise within their borders and involve their citizens. It also may be done to check forum shopping and other strategic behavior by plaintiffs.

These policies are analogous to a law imposing a durational residency requirement as a condition for seeking divorce in a state, or a law raising the drinking age for youths from states with high drinking ages. These laws could be called a product of naked preference. It seems that the state has decided that only its citizens are entitled to the benefit of its liberal divorce or drinking laws. But they more likely result from two benign motives: a desire that citizens should enjoy the benefit of the liberal policies and a desire to deny those benefits to out-of-staters out of comity to the divorce or drinking policies of other states.

A minor aspect of some versions of interest analysis and some borrowing statutes may be impermissibly uneven, though. This is the practice of extending the protection of forum laws to citizens, but not outsiders with whom they deal. As noted earlier, under some versions of the interest-based approach, if Tex and Boomer are involved in an accident, Texas courts will apply their law permitting recovery only if Tex is the passenger and not if Boomer is the injured party. Borrowing statutes that except claims by citizens arising abroad, but not claims against citizens,

181. See infra notes 224-42 and accompanying text.
182. See infra notes 238-40 and accompanying text.
183. Ester, supra note 7, at 41 (citing Snotty v. Cage, 5 Tex. 106, 114 (1849)).
184. The Supreme Court has said of a borrowing statute that it “was not enacted for the purpose of creating an arbitrary or vexatious discrimination against non-residents.” Canadian N. Ry. v. Eggen, 252 U.S. 553, 559 (1920).
185. These interests do not require denying citizens the protection of state law or access to state courts. Their affiliation with the state lessens our concern that they are suing them to take advantage of favorable laws or to inconvenience the defendant.
187. The example is from Regan, supra note 127, at 1127.
188. See supra notes 34-35 and accompanying text.
This is objectionable because states have no good, or unselfish, reason to do this. Consider an extreme case: would we permit states to deny out-of-staters the protections of their laws or access to their courts when they visit the state? States have no reason to pursue such policies other than a parochial desire to keep courts for citizens, or a belief that their laws are enacted only to protect their citizens. It is not done out of comity to other states, as out-of-staters would be held to forum law if it was to their disadvantage. Nor does it discourage forum shopping or strategic behavior by plaintiffs. The forum connection allays concerns that plaintiffs are trying to forum shop or otherwise gain an unwarranted advantage by bringing suit in the defendant's home state. Nor can it be justified by the arguments made for enlarging the protective power of states. It is not consistent with democratic values, for instead of holding people to their state's laws, it frees people from the law's requirements when it is to their convenience. It also is not consistent with pro-plaintiff distributional policies. The effect of such a policy would be to frustrate claims by out-of-staters against citizens of the forum. These policies also are undesirable because they may impose real costs on the nation. They may discourage interstate commerce by making it more costly (or even impossible) for people who deal with citizens of other states to obtain legal relief and by forcing them to do business at a legal disadvantage.

Policies that protect citizens abroad, but not out-of-staters who deal with citizens abroad, seem not so bad because the benefit they afford citizens is probably the result of an oversight. In adopting a borrowing statute, for example, a legislature may consider suits arising.

189. See text accompanying note 33. This problem is not posed by forum non conveniens or jurisdictional policies. The doctrine of forum non conveniens usually is directed to the dismissal of actions arising outside the forum, in which it is inconvenient to the parties and the witnesses to proceed. See R. WENTRAUB, supra note 5, §4.33, at 215-17. Rarely is it invoked to dismiss a case when a citizen is the defendant. See R. CRAWFORD, D. CURRIE & H. KAY, supra note 27, at 524. The due process issue disappears if the defendant hails from a state since the court will have general jurisdiction. See von Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 Harv. L. Rev. 1121, 1136-37 (1966).

190. Currie once advocated this as a choice of law policy. He advised, for example, that Massachusetts courts hold Maine women to contracts they enter into in Massachusetts with merchants from that state, denying them the protection of Massachusetts's married women's law. See Currie, supra note 36, at 77, 90-91, 93, 96, 98, 107-08. Currie later retreated from that position and suggested that a regulatory interest might compel extending the benefit of protective or compensatory rules to outsiders in matters arising within the state. See Currie, supra note 39, at 148. He also said that a state may have an altruistic interest in extending its protective or compensatory rules to outsiders in unprovided for cases—cases in which no interest justified a different result. See Currie & Schreter, Privileges and Immunities, supra note 4, at 488-90.

191. The Supreme Court has recognized the right of citizens of one state to sue in the courts of another. See Chambers v. Baltimore & Ohio R.R., 207 U.S. 142, 148 (1907); Cole v. Cunningham, 133 U.S. 107, 113-14 (1890); Ward v. Maryland, 79 U.S. (12 Wall.) 418, 430 (1870). Currie concluded that the privileges and immunities clause prohibited states from denying out-of-staters access to courts when they bring claims against citizens. See Currie & Schreter, Privileges and Immunities, supra note 4, at 516-17.

192. See supra notes 180-82 and accompanying text.

193. This Article suggests below that a reason we dislike parochial and protectionist laws is that they are likely to be of disutility. See infra notes 198-201 and accompanying text.
abroad and entirely foreign suits (by out-of-staters against out-of-staters). As we have seen, different borrowing policies are justifiable in those cases.\(^\text{194}\) The legislature may fail to consider claims by out-of-staters against citizens arising abroad. Thus, it will not realize that in excepting only claims by citizens it affords them an advantage in dealing with out-of-staters.

This difference might be critical if our only concern was the actual motive of a law. But we should not (and cannot) so limit the inquiry. To do this would leave out-of-staters unprotected from injuries inflicted out of disregard for their interests. That there is no noninvidious reason for this aspect of the interest-based approach and discriminatory borrowing statutes should be sufficient to condemn them. States that reach abroad to protect citizens should be required to extend similar protection to out-of-staters.\(^\text{195}\)

At a more fundamental level it is possible to argue that even openly selfish conflict of laws policies are not objectionable in the same way as are selfish regulatory and tax laws. It is best to focus on the interest-based approach to choice of law as it was conceived by Brainerd Currie, for its parochial quality is clearest. Currie openly counseled for:

> the rational, moderate, and controlled pursuit of self-interest . . . . Under conventional conflict-of-laws doctrine, legal scholars, and to a lesser degree the courts under their influence, because of the compulsion of internationalist and altruist ideals, have guiltily suppressed the natural instincts of community self-interest . . . . To free ourselves of this neurotic condition, we need a “new sort of conscience, one which demands a more accurate and yet more scrupulous self-centeredness.”\(^\text{196}\)

He seems to be encouraging exactly the sort of behavior that Sunstein and Regan condemn.

It is an unusual form of selfishness, though. The policy is selfish—states are encouraged to watch out for their own—but it is not the product of selfishness. States are encouraged to be selfish in choice of law in the belief that it will make for a better system of choice of law for everyone. Currie favored his approach out of an honest belief that it was preferable to the alternatives and not out of sentimental attachment to a particular state and its citizens.

Well-intentioned policies of selfishness are not harmful in the same way purely parochial laws are.\(^\text{197}\) We dislike parochial or protectionist legislation for two reasons. One is a concern that laws made selfishly or with

\(^{194}\) See supra text accompanying notes 180-87.

\(^{195}\) This was done in Labree v. Major, 111 R.I. 657, 672, 306 A.2d 808, 815-18 (1973). For an example of a borrowing statute that avoids imbalance by borrowing only in actions between nonresidents, see Or. Rev. Stat. § 12.260 (1983).

\(^{196}\) Currie & Schreter, Privileges and Immunities, supra note 4, at 525.

\(^{197}\) Regan alludes to this difference in analyzing anti-takeover laws. See Regan, supra note 88, at 1871-72. He suggests that while an anti-takeover law should be struck down if a state adopted it to protect local jobs at the expense of foreign workers, it should be upheld if it “was motivated by a general belief that takeovers leading to corporate removals are unacceptably disruptive of established economic relations.” Id. at 1872.
disregard for some people's interests are likely to be of disutility. We hope that eliminating selfishness from the deliberative process will improve the quality of outcomes. If people can put aside their private interest “debate and discussion [will] help to reveal that some values are superior to others.” And we may well suspect that if a state enacts a law simply to enrich local merchants (or for some other selfish reason), and it can offer no “colorable cost-based justification” for its action, the law probably will not be to the good. We also dislike laws that bear heavily on out-of-state interests because we suspect that those interests are not considered in weighing a law's costs and benefits. If New Jersey bans the disposal of foreign wastes, for example, we suspect it did not consider the cost to waste-generators of its law. If it regulates domestic and foreign waste alike we are more confident that lawmakers considered the full range of the law's costs and benefits.

If this is why we care about evenhandedness, then well-intentioned policies of selfishness are not that objectionable. It is the policy-maker's intentions that matter, and not the form of the policy, for it is her selfishness or disregard for some interests that makes us suspect the utility of the policy. For example, a person may advocate that states keep schools and other state-created goods for citizens because she believes that will encourage the efficient provision of such goods. The policy advocated is one of selfishness, but the good intentions of the policy-maker give us no reason to suspect that the policy is not to the general good.

Selfishness may also be disliked for itself. Perhaps we simply will not tolerate people using government to take advantage of each other. Or, we might be concerned that the use of government for selfish ends encourages resentment and retaliation. In the domestic context it may embitter the political process; in the interstate it may weaken the union.

Even if we think that the evil lies in acting selfishly (or without regard

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198. Most of the state laws the Court has struck down interfere in interstate trade and impose significant costs to the nation in the misallocation of goods and services. See Anson & Schenkkan, Federalism, the Dormant Commerce Clause, and State-Owned Resources, 59 Tex. L. Rev. 71, 90-91 (1980); Regan, supra note 127, at 1015; Levmore, supra note 159, at 570-72.

199. Sunstein, Interest Groups, supra note 125, at 32.

200. See Regan, supra note 127, at 1117.

201. It is hard to justify the Carolene Products theory other than in these utilitarian terms. Its rhetoric sometimes suggests a concern with the quality of legislative process rather than the quality of result. The objection is to excluding certain voices from the process and not to the effect of that exclusion on the quality of legislation. But the theory cannot work if the values it is to serve are those of process. If the defect is in process the remedy is to empower the excluded, which is an absurdity when we speak of discrimination by states against citizens of other states. See Brilmayer, Carolene, Conflicts, and the Fate of the “Inside- Outsider,” 134 U. Pa. L. Rev. 1291, 1313 (1986); Regan, supra note 127, at 1164-65. Further, a pure theory of process cannot account for cases in which discrimination against outsiders is appropriate, for the evil would seem to lie in the very act of injuring the unrepresented. A theory figured solely in terms of values of process is incapable of explaining, in the intrastate context, why measures that penalize criminals (truly a discrete and insular minority) are acceptable. See Brilmayer, supra, at 1306-07.


203. It seems plain in the interstate context that we do not tolerate parochial laws though their welfare consequences are neutral. We do not tolerate taxes imposed on out-of-staters to enrich citizens though their effect may be purely redistributive.
for the interests of others), and not in the likely disutility of the action, well-intentioned policies of selfishness are not as contemptible as purely parochial laws. Compare these two statements:

I win and you lose because I control the game and my interests are dearer to me than yours.

I win and you lose because I think (and have been advised by others) that it is best for both of us that whoever controls the game wins.

The second statement is less offensive—less morally blameworthy—because my victory is rationalized as being to our mutual benefit. The second statement also should be less irritating to you. Your hurt from losing is assuaged by the knowledge that the act was not done out of hostility or disregard for your interests.

This may explain why the interest-based approach to choice of law does not trouble us in the same way more straightforwardly parochial or protectionist laws do. Because it is well-intentioned, the unevenness of the interest-based approach gives us no cause to suspect its utility. And it is not as morally blameworthy—or as likely to incite resentment—as self-aggrandizing policies pursued for selfish reasons.

Still, it is strange to justify selfish behavior on the ground that it is well-motivated because the argument depends upon the lawmaker not realizing an aspect of what she is doing. What would we do, for example, if a judge adopted the interest-based approach because she liked its parochial quality, and not for honorable reasons? And it is really possible to distinguish well-intentioned and self-serving parochial interests? At the very least, the selfish element should make us suspect the state's intentions. Further, that there is a difference only suggests that interest analysis is not as bad as purely protectionist or parochial laws. This hardly constitutes a ringing defense of the parochial quality of interest analysis.

But even if the selfishness at the heart of Curriean interest analysis makes it intolerable, that is not a reason to reject many of the reforms accomplished through an interest-based approach. There are plausible, nonselfish reasons why a state might protect its citizens when they go abroad while refusing to intervene in entirely foreign matters. What should not be tolerated, even under a weak theory of equality concerned with evenhandedness, is a policy of protecting citizens but not out-of-staters with whom citizens deal. There is no plausible nonselfish reason for such a policy.

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204. See id. at 1155-57. Regan suggests that he would hold her decision unconstitutional. Though a law is upheld when adopted with good intentions, Regan intimates that he would strike it down should someone adopt the same law with bad motives. But it is hard to imagine the Supreme Court doing this. Once the Court has blessed a law or policy it is unlikely to revisit the question though other lawmakers pursue the same course with bad intent. As a theoretical matter, it may be unnecessary to invalidate the actions of lawmakers who do for bad reasons what most everyone else does for good. If our concern is the utility of the policy (and not punishing bad acts), then the good intentions of most of those who pursue the policy should suffice to establish its merit. If a lawmaker does the right thing for the wrong reason, her action is, nevertheless, of utility.
C. Equality as a Right

We turn to the theory that some people (or groups) have a right to be treated the same by state government as other people are treated. Problems of intrastate discrimination in conflict of laws do not lend themselves to rights-based arguments. Some groups within a state—blacks, for example—have a right to be treated no worse than others. The strict (one might say impassable) scrutiny of laws treating blacks unequally may be because we think the fourteenth amendment forbids racial discrimination, or because we think such classifications are intrinsically harmful. Conflict of laws policies that discriminate between citizens of forum states, such as the territorial approach to choice of law, do not affect groups with a strong claim to equal treatment. People involved in litigation that arises out-of-state are not a suspect or protected class. If they have a right to equal treatment it is only a weak right not to be treated irrationally or arbitrarily. The territorial approach to choice of law is not irrational or arbitrary, unless, as noted earlier, we assume that the only rational way a state may choose law is under the interest-based approach.

Rights-based arguments are more telling when conflict of laws policies that discriminate against out-of-staters are concerned. The privileges and immunities clause of article IV arguably confers on out-of-staters a right to the same benefits from states that citizens enjoy. A right to equal treatment also may be justified pragmatically on the ground that discrimination against out-of-staters encourages feelings of separateness and resentment, and sometimes encourages acts of retaliation, to the harm of the union.

The problem lies in defining the scope of the right. Out-of-staters plainly are not entitled to equal treatment in all things. As noted earlier, states may restrict to citizens voting, public office, certain state-created goods, and perhaps some natural resources. To this list we might add reciprocal laws and traditional domiciliary choice of law rules. No one seems to think they are constitutionally objectionable.

One explanation for the exceptions to the rule of interstate equality is that states may treat out-of-staters unequally when it is to the good of the nation as a whole. Our qualms about inequality seem to give way to

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205. See Sunstein, Naked Preferences, supra note 125, at 1712.
206. See supra notes 83-85 and accompanying text.
207. See supra note 9, at 554-55; Laycock, supra note 3, at 439-40.
208. The pragmatic argument is not very convincing. As Regan observes, out-of-staters more likely are concerned that states not take advantage of them than that states treat them the same as citizens. See Regan, supra note 127, at 1133. Illinois residents, he notes, should not be offended by a Wisconsin law excluding Illinois nineteen-year-olds from Wisconsin bars if they realize the motive of the law is comity. See id. Homilies on the destabilizing effect on the union of unequal treatment of out-of-staters in the conflict of laws are particularly unpersuasive. Most people do not notice, much less care about, the penny-ante parochialism of the interest-based approach or borrowing statutes. See Ely, supra note 3, at 189.
209. See supra notes 97-101 and accompanying text.
210. See supra notes 157-58 and accompanying text.
211. See supra notes 102-07 and accompanying text.
utilitarian concerns\textsuperscript{212}—utility\textsuperscript{213} trumps the right to equality.\textsuperscript{214}

This explains why states may restrict state-created goods to citizens: limiting state-created goods to citizens avoids free-rider problems and encourages their efficient provision.\textsuperscript{215} It explains why we tolerate quarantines barring the import of infected goods.\textsuperscript{216} Quarantines are hard to distinguish from embargos in other respects: they discriminate against out-of-state goods; they are adopted to enhance local welfare by barring foreign goods from the state; and the local benefit is gained at significant foreign expense. The difference lies in their effect on general welfare. The local benefit from embargos will be largely at foreign expense—local income is raised (and foreign income reduced) by redirecting local purchases to local goods. Quarantines may provide social gain over and above the foreign loss by preventing the spread of disease to new populations.

There is an important difference between a rights-based theory of equality that allows discriminations of utility and a version of the theory of evenhandedness that condemns selfish or uneven laws because of their likely disutility.\textsuperscript{217} A rights-based theory values equality itself; a theory of evenhandedness cares about inequality because it is evidence that laws are products of naked preference. As a consequence, a rights-based theory requires closer consideration of the substantive merit of discriminatory laws. Under a theory of evenhandedness we generally look for defects in the law-making process—bad motive or disregard for some groups' interests—that suggest laws are of disutility. Because it disvalues inequality, a rights-based theory tolerates laws that treat people unequally only if they can be shown to be efficient or to advance important values. Another way of expressing this is that the presumption runs a different way under the two theories. Under a rights-based theory laws that treat out-of-staters unequally are presumed bad. The burden is on proponents of discriminatory laws to show that they are of utility. Under a theory of evenhandedness discrimination may be evidence of process defects, but unless the origin or incidence of laws gives us reason to believe they are products of naked preference (and so are likely to be of disutility), courts will not strike them down. The theory of evenhandedness is a weak theory of equality, this is a strong theory of equality.

The utility of some conflict of laws policies that discriminate against out-of-staters is demonstrable. Consider laws that require nonresidents to post special security for costs in taking appeals or seeking injunctions,\textsuperscript{218} or laws that make it easier to attach property of nonresident debtors when suit

\textsuperscript{212} See Bedau, \textit{Egalitarianism and the Idea of Equality}, in IX NO\textsc{mos} 23-24 (1967).

\textsuperscript{213} The concept of utility is used broadly to refer not just to notions of pleasure or efficiency but also to other values. This expanded version of utility has been called "ideal" utilitarianism. \textit{See Dictionary of Philosophy} 343 (D. Runes ed. 1983). Thus, discrimination might be tolerated if it is efficient or if it advances other values important to us.

\textsuperscript{214} Cf. Laycock, \textit{The Ultimate Unity of Rights and Utilities}, 64 Tex. L. Rev. 407, 409-10 (1985) ("rights are a component of the good, to be weighed along with other components of the good").

\textsuperscript{215} See Gergen, supra note 99, at 1112.


\textsuperscript{217} \textit{See supra} notes 197-204 and accompanying text.

is brought.219 The utility of these laws is apparent. Because out-of-staters are less likely to have assets within states, these laws provide needed security to litigants. The laws reduce the number of frivolous claims brought and increase the number of judgments collected.

An important aspect of many of the conflict of laws policies that we have examined to this point is difficult to justify under a rights-based theory of equality. This is the reaching out by states to protect citizens abroad and the concomitant denial of protection to out-of-staters. Four points are worth noting. First, conflict of laws policies limiting the protection of state laws and access to state courts to citizens cannot be justified in the same way laws limiting public schools, public housing, and public assistance to citizens are justified. Second, at their heart these policies raise the question of which of two parties will bear the loss of being held to the laws and sued in the courts of the other party's state. They raise a distributional issue that cannot be resolved from a conventional utilitarian perspective. Third, the other grounds on which we might judge these policies—administrative efficiency, imposing costs on the responsible party, and fealty with other distributional goals—do not provide compelling justifications for them. Finally, if you really care about interstate equality as a right, then you should oppose this aspect of these policies; all other factors being equal, you should prefer conflict of laws polices that do not discriminate.

The first point should be the least controversial. Policies limiting the protection of state laws to citizens cannot be justified by a concern with free-rider effects. Laws—unlike state funded schools, health care, or housing—are not exhaustible goods. Extending the protection of law to out-of-staters does not increase its cost to citizens. It should not prevent states from pursuing whatever legal policies their citizens think desirable.

Gerald Ratner has analogized claims in private litigation to claims on public services. He observes that the quasi-public institution of insurance pays most claims, and argues that allowing outsiders to recover against citizens defeats the effort by states to optimize welfare under these “contribution/compensation” policies by requiring the expenditure of resources on out-of-staters who do not pay insurance premiums to support the policies.220 Ratner's argument depends upon the shaky empirical premise that insurance rates vary from state to state in response to compensatory rules, such as allowing a guest to sue a driver. But under prevailing actuarial practices any such variation is likely to be infinitesimal.221 Furthermore, a logical implication of the argument is that courts should not hold out-of-staters to the forum's compensatory laws. Collecting from out-of-staters externalizes the costs of state compensatory

219. See Campbell v. Morris, 3 H. & McH. 537-39 (Md. 1797); cf. Canadian N. Ry. Co. v. Eggen, 252 U.S. 553, 561 (1920) (“From very early in our history, . . . security for costs has very generally been required of a non-resident, but not of a resident citizen, and a non-resident's property in many States may be attached under conditions which would not justify the attaching of a resident citizen's property.”).


policies and, under Ratner's theory of how states optimize contribution or compensation goals in their rules, may result in states being overly protective. If we accept his premises, Ratner's argument cuts against a central tenet of the interest-based approach that states should protect citizens in dealings with out-of-staters.

The state-created goods arguments, perhaps, are more relevant with regard to policies restricting state court access to citizens. Courts are similar to other state-created goods (schools, public housing, and public health care, for example) that may be denied to out-of-staters to avoid free-rider problems, or to ensure that goods are funded at an optimal level. But the rule that states may keep state-created goods for citizens has an important exception. States may not deny out-of-staters access to services that are essential to the functioning of markets (roads, public markets, and police protection, for example). In the case of these services, our interest in facilitating the operation of states as goods-creating entities is outweighed by our interest in promoting interstate commerce. Courts should come within this exception. To bar out-of-staters from the courts of states when they seek relief on claims arising from business transacted with citizens or within the state would discourage interstate commerce. The cost of litigation would increase to out-of-staters if witnesses were to be deposed outside the forum or brought from abroad, or if additional proceedings had to be brought in defendants' home states to enforce judgments. In some cases, it might be impossible to obtain jurisdiction over the defendants elsewhere.

The second point is that discriminatory conflict of laws policies resolve what is in essence a distributional issue. Recall that the discrimination results from states reaching out to protect their citizens from harm in other states; usually harm inflicted by out-of-staters. In these cases one party might bear the cost of being held to the laws of the other party. One party also must bear the cost of litigating in the courts of the other party's state. By reaching out to protect a citizen, a state chooses to impose these costs on the out-of-stater. Under the interest-based approach to choice of law the citizen gets the benefit of forum law. And by taking jurisdiction over an

223. Other scholars have made this point. See Kozyris, Interest Analysis Facing Its Critics—And, Incidentally, What Should be Done About Choice of Law for Products Liability?, 46 Ohio St. L.J. 569, 574 (1985). Currie recognized this in his own way. In cases involving citizens of different states, each claiming the protection of their laws, he observed that “no satisfactory result, in terms of the conflicting interests involved, is possible.” See Currie, supra note 36, at 109. His conclusion was that the only “sensible and clearly constitutional thing for any court to do, confronted with a true conflict of interests, is to apply its own law.” Id. at 119. Currie tried to justify the preference for forum law by saying courts must defer to state legislative policies. See Currie, Notes on Methods and Objectives in the Conflict of Laws, in B. Currie, supra note 4, at 182. Why obedience by state courts to state legislatures should be a relevant value in determining the constitutional limits to state power is not clear. Further, as Lea Brilmayer has shown; the interest-based approach pays no heed to legislative desires. It considers only the substantive purpose of laws (e.g., to protect citizens) and does not consider legislative desires on choice of law. In particular, it assumes—probably wrongly—that legislatures do not want protective laws to be limited territorially in scope. See Brilmayer, supra note 3, at 424-29.
Currie later retreated from this position. In his last article he suggested that a court faced with a true conflict reconsider its interest in a “moderate and restrained” fashion. See Currie, The Disinterested Third State, 28 LAW & CONTEMP. PROBS. 754, 757 (1965).
out-of-stater, a state imposes on him the cost of litigating away from home.

This is why the interest-based approach cannot be justified by the argument that it is consistent with democracy or federalism to hold people to the law of their home state.\(^2\) While such arguments may be relevant in cases where the parties are of common citizenship,\(^2\) or in cases where an outsider claims the benefit of forum law,\(^2\) they cannot justify applying forum law against an outsider to protect a forum citizen. When the parties each claim the protection of their own state law, or seek a hearing in their home court, values of democracy and federalism are irrelevant because someone's interest in home rule will be vanquished.

This brings us to the third point. Other reasons do not strongly justify allowing states to protect citizens from foreign harm. One could reason that we should choose conflict of laws policies that have the least administrative


This interest rests on a wide variety of political, philosophical and practical grounds, including the idea of government by consent of the governed, principles of representative and participatory democracy, and the presumable consonance of each state's laws with local conditions and with communally shared goals, values, moral standards and conceptions of social and economic justice. At its core is the notion of a social contract, whereby one assents to cast his lot with others in accepting the burdens as well as the benefits of identification with a particular community, and—of especial relevance to the choice-of-law problem—cedes to its lawmaking agencies the authority to make judgments, such as are reflected in guest statutes and other tort loss-distribution rules, striking the balance between his private substantive interests and competing ones of other members of the community.

Korn, The Choice-of-Law Revolution: A Critique, 83 COLUM. L. REV. 772, 799 (1983). One might also argue that the interest-based approach ensures that persons will realize the benefit of their state's laws, and so promotes what may be desirable interstate competition. Credit card companies will be more likely to locate in Delaware, for example, if they can be assured its liberal laws on interest will apply no matter who uses their credit or where it is used. Sometimes the argument is made as a matter of fairness: an out-of-stater cannot complain because he is no worse off than he is under his own law. See Currie, Conflict, Crisis and Confusion in New York, in B. CURRIE, supra note 4, at 720; Weinberg, supra note 4, at 597.

225. Some who are critical of the interest-based approach think Currie is right in advocating the application of forum law in suits involving citizens that arise abroad. See Ely, supra note 3, at 208-11; Korn, supra note 224, at 797-801. Others disagree. See Twerski, supra note 171, at 161-62.

226. The argument is that the forum does no justice to the outsider by denying him recovery under forum laws because in doing so it only holds him to the laws of his own state. If the outsider does not like his own law he may change it. See Ely, supra note 3, at 190-91; Tushnet, supra note 224, at 421. People cannot complain because they are sent packing to their own courts (assuming that they have jurisdiction over the defendant).

It is disingenuous, however, to pretend that the forum is doing the outsider a favor in such a case. When they send him packing to his own courts they deny his forum preference. When they hold him to foreign law they do so only because he loses under that law. Or, as Lea Brillmayer has observed, "[t]he nonresident is held to state's law when it imposes a burden, but cannot recover under that law when he attempts to reap its benefits in a suit against a forum resident." Brillmayer, supra note 3, at 415. Gerald Neuman observes the inequity may be compounded if courts engage in depecage: choosing elements of forum law and foreign law on the basis of their favorability to citizens. See Neuman, supra note 3, at 323. Thus, a court might choose a favorable forum statute of limitations to protect a citizen-plaintiff, and then disregard a forum cap on damages to award a higher amount available under foreign law.

Indeed, if fairness lies in treating the out-of-stater as he would be treated at home, then why not insist upon following his state's choice of law policies?
Conflict of laws issues are preliminary to reaching the merits of a dispute and our goal should be to dispose of them as quickly as possible. Doubt in this area is particularly costly because if a court errs in these matters, the effort of litigating a case has been wasted.

At the time Currie wrote, this seemed a reason to prefer interest analysis over the traditional territorial approach. The traditional approach was thoroughly discredited by the 1950s. Currie and others had a great time proving its illogic: it was hard, for example, to justify choice of law in contract cases by the empty fact that a contract was executed in a state. It was indeterminate: people could—and did—quibble endlessly about where a contract was formed or where the last act constituting a tort was committed. It was susceptible to manipulation: courts would use escape devices such as renvoi and recharacterization of the subject matter of a dispute to reach desired results. Currie cut like a knife through this fog.

Coming to “a field of sophism, mystery, and frustration,” he advocated an orderly process of choice of law based on the ordinary tenets of statutory construction.

Nevertheless, today, choice of law is more confused than ever. In part this is because of a proliferation of methods, but it is also due to problems inherent to the interest-based approach. What interests are, how to resolve undecided cases, and how to resolve cases of true conflict have been subjects of heated debate. And if courts manipulated the territorial approach to avoid undesired results, now they seem to manipulate interest analysis.

Furthermore, ease of administration alone cannot be enough to justify a choice of law policy; it must serve some ultimate value. The easiest conflict of laws rule to administer would be one directing that states take jurisdiction and apply their laws in all cases filed in their courts. Presumably we would not tolerate this rule out of concern that it would encourage forum shopping or other undesired strategic behavior. Nor would we choose the proposal Currie made in jest that neutral forums resolve conflicts between the laws of other states by flip of the coin or by choosing the law of the state that came first in the alphabet.

Another way to resolve the distributional problem is to impose the cost on the party responsible for the interstate nature of litigation. This could be done either on the theory that the responsible party is the best cost avoider, or because we think it just in a fundamental sense. But this does not offer an argument for the interest-based approach. When Tex travels to Okla-

227. See Kozyris, supra note 223, at 580.
228. For the most important critiques of territorialism, see generally E. Lorenzen, Selected Articles on the Conflict of Laws (1947); W. Cook, The Logical and Legal Bases of the Conflict of Laws (1942); Cavers, A Critique of the Choice-of-Law Problem, 47 Harv. L. Rev. 173 (1933).
229. See Currie, supra note 36, at 87-88.
230. See id. at 87.
231. See id. at 98-99.
232. Currie, The Verdict of Quiescent Years, in B. Cure, supra note 4, at 584, 585.
233. See Kay, supra note 28, at 585 (ten different methods now in use).
235. See Currie, supra note 232, at 608-09.
toma and is injured by Boomer, most of us would think that Tex is the
party responsible for creating the choice of law issue. He is the one who left
home and initiated the contact with Boomer.\textsuperscript{236} Of course, this assumes a
territorial perspective on the problem. We might reason that Boomer is
responsible for becoming involved with a traveling Texan. But the territo-
rial perspective is likely to conform with most peoples’ intuition. And if our
concern is to impose the cost on the party best able to avoid it (or best able
to structure his conduct in light of the risk), then Tex—the traveler—seems
the more likely candidate because he will be more sensitive to the risk of
being subject to the authority of another state.\textsuperscript{237}

If there is a justification for the interest-based approach and other
conflict of laws policies enlarging the protective powers of states it lies in the
realm of distributional policies. Some might prefer the interest-based
approach because they believe that in most cases it shifts conflict of laws
costs from consumer plaintiffs to corporate defendants. Arguably, corpo-
rate defendants can adjust better than consumers to the risk of being held
to the laws (or dragged into the courts) of foreign states. Some might prefer
favoring plaintiffs because they believe that corporate defendants can spread losses better.\textsuperscript{238} In this vein are arguments that conflict of laws
policies should conform to the distributional policies underlying areas of
the substantive law. Thus, some scholars justify the advantage to plaintiffs
under the interest-based approach as consistent with a general plaintiff bias
in tort law.\textsuperscript{239}

There are two obvious difficulties with this argument for the interest-
based approach and other policies extending the protection states afford
citizens. One is that, with a few exceptions, it is not how scholars and courts
have justified these policies. We have to wonder whether most people
would agree with these distributional policies if they were brought out into
the open. Second, formulating conflict of laws policies on pro-recovery or
pro-plaintiff grounds, or on grounds of any other substantive policy, biases
the system against states that do not accept those policies. Consider the
implications of the interest-based approach to choice of law for states that
pursue tort reform. It maximizes the costs of tort reform to in-staters and
minimizes the benefits. In-state manufacturers will be denied the benefits
of reform laws when sued by out-of-state consumers in states with liberal
tort laws. But in-state consumers may be held to the reform laws when they
sue out-of-state manufacturers.\textsuperscript{240}

\textsuperscript{236} See Brilmayer, supra note 8, at 88-94.
\textsuperscript{237} Interestingly, a principle of imposing the cost on the responsible party goes a long way
towards explaining current jurisdictional policy. If defendants injure plaintiffs from afar (by
shipping defective products or shooting guns into the forum, for example) they will be subject
to the forum’s jurisdiction. See supra note 109. If, however, plaintiffs go to the defendants’
home states, are injured there, and then return home, jurisdiction will not lie. See supra note
110. Plaintiff-created contacts, as Professor Brilmayer has said, do not count. See Brilmayer,
supra note 8, at 93-94.
\textsuperscript{238} See Kozyris, supra note 223, at 574.
\textsuperscript{239} See Weinberg, supra note 31, at 463-68.
\textsuperscript{240} They may not. Because no state has an interest in having its law applied, under some
versions of interest analysis, courts of the manufacturers’ home states would be required to
apply their laws to benefit citizens from tort reform states. See supra note 37 and accompanying
text.
In sum, there seems to be no good reason for preferring the solution of the interest-based approach to the problem of deciding which of the parties from separate states should be held to the laws of the other's state. This brings us to the final point. If we value interstate equality we should prefer the territorial approach over the interest-based approach to choice of law. All other factors being, at best, equal or irrelevant, you should prefer the approach that does not involve discriminating against out-of-staters. More concretely, there are two ways to decide who wins in a suit between Tex and Boomer. One is on the basis of where their accident occurred. The other, under an interest-based approach, is on the basis of home court advantage. Each solution may be arbitrary, but at least the first does not entail discrimination on the basis of citizenship.

This does not prove that the interest-based approach to choice of law (or other policies expanding the power of states to protect citizens) is unconstitutional. It is not clear that the analysis should take this path. First, the interest-based approach assumes that interstate equality is a right or is something valuable in itself. We may care about inequality only because it is a badge of naked preference or disregard for some group's interests, or because of a concern with arbitrariness. As we have seen, most aspects of the interest-based approach cannot be condemned under such a weak theory of equality. Second, the approach assumes that pro-plaintiff distributional policies should be irrelevant to how we solve conflict of laws problems. The interest-based approach to choice of law can be justified on the basis of those policies if we think them relevant.

It is also important to remember that the argument in this subpart is critical only of certain aspects of the interest-based approach to choice of law. The conclusion is that under a strong theory of equality, nothing justifies states applying their law or taking jurisdiction in cases brought by citizens against out-of-staters that arise outside the state. Other results under an interest-based approach may be justifiable even under a strong theory of equality. We have seen, for example, that many believe states should be able to adjudicate out-of-state controversies in which all parties are citizens. Arguably, when citizens are injured at home because of events out-of-staters put into motion abroad, states should be able to protect them. The argument is that the out-of-stater should bear the cost of being held to foreign law and being sued in a foreign court because he is responsible for creating an interstate dispute. Nothing said here contradicts either argument.

IV. Conclusion

The discussion of the substantive merit of the interest-based approach to choice of law (and analogous policies) in the last subpart may be read as a case study demonstrating the merit of asking only whether the reasons supporting a law are noninvidious. It is presumptuous to catalogue the reasons for a policy, much less to critique their merit. To do it well for interest analysis we would have to immerse ourselves in a debate that has
been raging for over thirty years. And, once we fully inform ourselves of all the arguments, we probably would conclude that it is all a matter of what values one thinks are important. So, in our abbreviated analysis we found that the case for the interest-based approach may turn on controversial distributional policies. All of this is a reason to favor the theory of evenhandedness. Under that theory all we need ask is whether the policy seems a product of naked preference or disregard for a group's interests. Because interest analysis, with the exception of one minor aspect, withstands the inquiry, it passes constitutional muster.