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# Notes on Methods and Objectives in the Conflict of Laws: A Challenge

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# A CHALLENGE

# Methods and Objectives in the Conflict of Laws: A Challenge

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I believe that interest analysis is methodologically bankrupt, have said so in print,[1] and have been criticized.[2] In my view, Brainerd Currie had his own beliefs about how far statutes ought to reach in their multistate applications, and these beliefs were methodologically on a par with the maxims of the First Restatement.[3] He should have defended the substantive wisdom of these tenets on the merits. But rather than doing so directly—by empirical evidence, for instance, or by moral reasoning—he sought to camouflage his preferences as effectuation of *legislative* policy goals. He then claimed that any judge who adhered to the old territorialist norms when the interest analysis norms required a different result was operating in an undemocratic manner and invading the domain of the legislature. Further, the judge was doing so in a manner that discouraged legislative revision or reformulation.[4]

It is crucial to unmask this fallacy. The scholars who have taken up the

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1. *See, e.g.*, Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392 (1980).

2. *See, e.g.*, Sedler, *Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the 'New Critics,'* 34 MERCER L. REV. 593, 596 (1983).

3. RESTATEMENT OF CONFLICT OF LAWS (1934).

4. *See generally* B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963).

cudgel on Currie's behalf are incapable of dealing with this most elementary methodological challenge: How do we know that application of Currie's definition of 'interest' better effectuates legislative policies than application of—for example—the principles of the First Restatement? Currie simply stated this assumption baldly, and his supporters have since then accepted the assumption as proven.[5] My thesis is that the only methodological difference between his normative premises and those of the competing theorists is that Currie insisted that his breed of rabbit really was in the statutory hat all along. By doing so, he paid state legislatures a lip service the Bealeans had found unnecessary.

The interest analysts may have arguments in support of their metaphysical assumptions. If such arguments exist, it would advance the game to bring them forward. This short Article is designed to focus attention on the methodological difficulties with Currie's approach as it is most commonly practiced. The Article takes the form of a hypothetical problem followed by a set of questions. These questions concern three sets of methodological problems: constitutional law, diversity jurisdiction, and renvoi. I challenge any interest analyst—whether or not they agree with my interpretation of Currie's writing, as a historical matter—to answer this set of questions. I claim that the only explanation that can generate the results that interest analysts reach involves a highly restrictive set of normative premises which has little or no relationship to legislative policy or statutory interpretation.[6]

## I. THE HYPOTHETICAL

> Jones and Smith are Connecticut domiciliaries and both reside in New Haven. Jones proposes to Smith that they travel together in Jones' car to New York City for an evening of cultural activities. They plan to return late that same evening, but on the way home, they skid on icy pavement near Rye, New York, and collide with a tree. Jones was negligent, but not wantonly so. New York has a guest statute that would bar recovery; Connecticut does not.

This hypothetical is designed to be as clear and free from complications as conflicts hypotheticals can be. Presumably, the First Restatement would counsel application of New York law as the location of the acci-

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5. *See, e.g.*, Sedler, *supra* note 2. Clearly, there are degrees of support. Some scholars might agree with his results, but for other methodological reasons. It would be interesting to hear those reasons developed.

6. My own solution to these problems is outlined in Brilmayer, *Legitimate Interests in Multistate Problems*, 79 MICH. L. REV. 1315 (1981).

dent.[7] This is not to say that a clever judge could not find escape mechanisms to avoid that result. For simplicity of the methodological inquiry, however, we will assume a properly Neanderthal fidelity to First Restatement principles, a judge unpolluted by the all too human impulse to 'do justice.' We are concerned with Bealeanism in its purest form.

The result is equally clear under interest analysis. Absent fancy shenanigans that Currie surely would not have approved, New York, as the scene of the accident, would be found to have no 'interest.'[8] Since New York law would bar recovery, the 'blood on the streets' rationale is unavailable. Connecticut's interests, in contrast, are readily invoked on Smith's behalf. Connecticut looks out for its own.[9]

I expect that the simplicity of this example will have aroused suspicion instantly. What of the insurance company—where is it incorporated? And the car—where is it garaged? Let us stipulate that any other factors that might commend themselves to the ingenious mind all point inexorably towards recovery under Connecticut law. The object is a hypothetical in which the First Restatement, if honestly applied, requires application of one state's law while interest analysis requires the other. Surely no one doubts that such examples can be found. Let us assume that I have found one.

## II. CONSTITUTIONAL QUESTIONS

Suppose that Smith is foolish enough to bring his action in a New York court. The state court holds that the action is barred by the New York guest statute and the highest state court agrees. Believing—as do some interest analysts—that New York law cannot be applied constitutionally to this case,[10] Smith attempts an appeal to the United States Supreme Court. Does that Court have subject matter jurisdiction?

I assume that interest analysts would agree with me that the Court has jurisdiction to hear the case, if the Court is so inclined. Presumably, the Court's role includes determining whether New York has an 'interest' in

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7. RESTATEMENT OF CONFLICT OF LAWS § 377 (1963).

8. Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 177-78, *reprinted in* B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 177, 183-84 (1963) [hereinafter cited as Currie, *Methods and Objectives*]. [*Editor's Note*: Since most of Currie's articles are reprinted in SELECTED ESSAYS ON THE CONFLICT OF LAWS, a corresponding page reference to this work will appear throughout this article in brackets immediately after the citation to the appropriate page in Currie's originally published article.]

9. Although I personally feel that either state might apply its law, my view on the merits of the hypothetical is not the issue.

10. *See* Currie, *Survival of Actions: Adjudication versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205, 222, 237-39 [128, 145-46, 160-63] (1958) [hereinafter cited as Currie, *Survival of Actions*].

having its guest statute applied. In making this determination, however, is its function limited to interpretations of the New York guest statute? To 'effectuating the policy goals of the New York legislature'? If so, where is the federal question? The New York state courts have already authoritatively declared the scope of New York state policy.

Would it matter if the New York guest statute had a statutory choice of law provision stating that New York 'interests' require application to any accident occurring within the state? Surely 'statutory construction' compels the finding of an interest, if such a statutory provision exists, as do 'effectuation of legislative policy' and 'fidelity of undemocratic institutions to popularly elected legislatures'. Does it matter in this case that the people of New York, acting through their state legislature, have indicated a desire to have their law applied? What if the people of Connecticut, acting through *their* legislature, also have built a choice of law provision into *their* statute explicitly asserting that only the state of injury has an 'interest' in having its law applied? In that case, both legislatures have an expressed policy of referring to the law of the state of injury.

Clearly, in these instances it is not deference to legislative policy that motivates the Supreme Court to make its own determination of whether there is an 'interest.' Yet it does make that determination, even in cases in which there was a statutory choice of law provision.[11] Is that because the statutory choice of law provision did not invoke that magical concept, 'state interest'? Why should it matter from the Supreme Court's perspective whether the state legislature tips its hat to Brainerd Currie rather than to Joseph Beale? What happens in situations when the application of the New York rule is based upon judicially promulgated choice of law principles rather than statutory directives? Does it matter, in other words, whether the state's highest *court* cited Currie rather than Beale? What if the state court deliberately purports to 'construe the statute' as applicable to all accidents occurring within the state? Does that satisfy the Constitution? Does it divest the Court of subject matter jurisdiction? If the answer to either of these last two questions is 'yes,' are there any limits to what a state may do in defining the scope of its own interests?

## III. Subconstitutional Issues in Diversity Jurisdiction

As I have set up the problem, there will be no diversity, and, therefore, the *Erie Railroad v. Tompkins*[12]/*Klaxon Co. v. Stentor Electric Manu-*

11. *See, e.g.*, Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493, 502 (1939); Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532, 547 (1935), in which the Supreme Court ignored the statutory provisions for the purpose of identifying interests.

12. 304 U.S. 64 (1938).

*facturing Co.*[13] issue will not arise. To enable us to address that issue, we might specify that Smith is from Rhode Island, which, like Connecticut, has no guest statute. This change should not interfere with the approach of either interest analysis or of the First Restatement. Let us specify, then, that Smith has filed suit in federal district court in New York.

Now it is clear, initially, that the New York federal court is bound to apply the same conflict of laws approach as would a New York state court.[14] The Supreme Court's reasoning in *Klaxon* requires this,[15] and the Court in *Day & Zimmermann, Inc. v. Challoner*[16] stated that this is the rule even when the state law that would be applied belongs to a jurisdiction lacking an 'interest' in the Currie sense.[17] One could hardly ask for a clearer indication that, in theory, the Supreme Court's definition of the term 'interest' and the Currie school's definition do not coincide. Let us assume, however, that New York has officially adopted interest analysis as a choice of law methodology. How is the federal district court to decide whether New York has an 'interest'?

Would it be relevant, in the determination of interests, that the New York guest statute had a choice of law provision declaring that New York had an 'interest' whenever the accident occurred there? It seems that it should be. If interest analysis has anything to do with statutory interpretation or effectuation of legislative policy goals, then a legislative finding of this sort would be the most relevant evidence that, in theory, could be available. Furthermore, it should not matter whether the legislation used the magical word 'interest;' there should be an 'interest' as long as the statute clearly compels the result. This is not to say, of course, that the statutory provision necessarily answers constitutional doubts. I am referring only to the state law question of whether New York wants to see its law applied in this situation. Although the interest analysts consistently confound the state and federal questions, it is evident that they can be separated sequentially.

If it is true that a diversity court accepts a state legislature's definition of its own interests for subconstitutional purposes, then what is it to do with a state's judicial definitions? It is clear from *Klaxon* and from *Challoner* that diversity courts must follow them. But do those decisions conclusively prove the existence of an 'interest' in a state that has officially adopted interest analysis? I assume that if there is a state precedent on point that purports to interpret the guest statute to say that there is an

13. 313 U.S. 487 (1941).

14. *See id.* Obviously, it also must address the constitutional issues, but a New York state court also would do so.

15. 313 U.S. at 496.

16. 423 U.S. 3 (1975).

17. *Id.* at 4.

'interest' in cases when the accident occurred in New York, then the diversity court is as bound by that interpretation as it would be by a rule that 'interest' turns on the residence of the plaintiff. At that point, only constitutional issues would remain, and these could not depend on 'statutory construction,' for diversity courts are not empowered to contradict a state's interpretations of its own statutes.

Presumably, the same line of reasoning requires a diversity court to comply with state judicial declarations about 'interests' when the substantive rule being interpreted evolved by common law and not by statute. State court interpretations of state law are authoritative,[18] regardless of whether the choice of law decisions are judicial or legislative;[19] regardless of whether the substantive rule is judicial or legislative;[20] and regardless of whether the 'interest' terminology pervades the process of interpretation. A New York federal court engaged in ascertaining 'interests' will be bound by the state court constructions that exist. Interests, therefore, may depend upon such archaic territorialist notions as the location of the injury.

## IV. RENVOI

A third set of problems resembles renvoi,[21] for it concerns the extent to which a court will take foreign choice of law rules into account. We have already asked what considerations should influence an assessment of New York 'interests' when litigation is before the United States Supreme Court or the New York federal district courts. If suit is brought instead in a state court in Connecticut, and Connecticut uses interest analysis, would its courts find New York state to have an interest?

To my knowledge, no mainstream interest analyst would say that New York can be shown to have an 'interest' solely by virtue of the fact that, if given an opportunity, it would, in fact, apply its own law.[22] In all the stock examples, interest analysts consistently fail to ask whether the other state would apply its own law. But what if New York has a statute that says that there is a New York 'interest' whenever an accident occurred within the state? Certainly, if statutory interpretation is the method, an 'interest' exists. What if there is a New York choice of law

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18. 304 U.S. at 78.

19. 313 U.S. at 496-97.

20. 304 U.S. at 78.

21. Currie, for example, said that his theory would obviate the renvoi problem completely. Currie, *Methods and Objectives, supra* note 8, at 178-79 [184]. In ascertaining 'interests,' only the state's internal law will matter, since my inquiry about deference to choice of law rules is confined to the impact on 'interests.'

22. Some might say that a *limiting* definition of interests might be respected in order to resolve apparent conflicts.

provision, but it is not phrased in terms of 'interests'? What if there is a judicial interpretation of the New York statute holding it applicable to all intrastate accidents? Would it matter if that interpretation was phrased in terms of 'interests'?

And what about New York conflicts decisions that interpret New York rules of common law? Can they create 'interests'? To do so in the eyes of other states, must the conflicts decisions use 'interest' phrasing, explicitly purport to be 'construing' rules of substance, cite Currie's essays, or all of the above? Is not a judicially created substantive rule construed along Bealean lines the methodological equivalent, in the eyes of Connecticut courts, of a statutory substantive rule with a statutory choice of law provision? No diversity court could, after *Erie*, set out to treat them differently. For renvoi purposes, it seems that other states should bow to both or bow to neither. The 'effectuation of state policy' approach to interests suggests acknowledgement of both unless, perhaps, the courts of Connecticut are more adept at the interpretation of New York law than New York courts are.

## SUMMARY

What can we conclude from this investigation of the methods for ascertaining 'interests' in the three different contexts of Supreme Court review, diversity jurisdiction, and state assessment of other states' interests?

First, it should be clear that the context most closely resembling the interest analysts' ostensible methodology is the second—diversity jurisdiction. A diversity court deciding subconstitutional issues accepts the definition of state interests of the state in which it sits without second-guessing where the state's 'true interests' lie. The court effectuates state legislative policy as expressed in state statutes and as interpreted by the state courts, without imposing its own competing values. The Supreme Court's reasoning in *Erie* requires the diversity court to do precisely what the interest analysts purport to require in their methodology, namely, to abandon the search for 'super law' based on self-evident logic and natural justice, and cleave to state law as interpreted by the authoritative organs of state government.[23]

Constitutional review is another matter altogether. It is a matter of federal law, not of state law, and so cannot depend in the same way upon the interpretation of state statutes. It is no more desirable to merge these two inquiries than to equate, in the state law of personal jurisdiction, the question of whether a long arm statute purports to give jurisdiction with

23. 304 U.S. at 71-80.

the question of whether procedural due process permits this. What a state *wants* is not the same as what it is constitutionally *entitled to*. Besides, conflating these two inquiries would require a state to exercise jurisdiction in all cases where it was constitutionally allowed to exercise jurisdiction. Otherwise, there would still be a residual question of state law even after the constitution was satisfied, namely, whether the state wished to exercise the legislative jurisdiction the Constitution allowed it. If states need not exercise the constitutionally permissible jurisdiction, and under present law they need not,[24] then there are, of necessity, two inquiries.

Constitutional analysis is undeniably normative, with the norms drawn from the Constitution. The interest analysts err in thinking that a single usage of their term exists and that a single methodology will suffice. At least it is clear where they went wrong and what they would have to do to patch things up. They need two separate theories. The final context—state assessment of other states' interests—is more puzzling. Should a court, attempting to apply the Currie methodology, accept at face value another state's definition of where its interests lie? Or should it second guess that legislature's view of policy and the authoritative judicial interpretations that go with it? None of Currie's methodological goals explain how a Connecticut court may contradict New York's belief that New York's self-interest requires application of New York law to New York accidents. Only a normative theory of a priori maxims can account for Currie's posture on this issue—a normative posture content to override actual expressions of intended territorial scope issuing from the popularly elected voice of New York's citizenry—a normative posture designed to reflect more precisely New York's 'true' needs. The Currie methods treat this as similar to the Constitutional context—as normative—but should have treated it like diversity, if state policy is the goal.

Interest analysts inject their own normative preferences into choice of law discussions, but attempt to evade detection by masquerading these preferences as 'legislative policy.' Frequently this ruse works, because there is no obvious legislative policy. Whenever such a legislative policy does exist, however, their premises are exposed for what they are. Thus, Currie attacked proposed legislative revision of a judicial decision that reached the same result as interest analysis: legislatures were to leave these issues to courts unless they framed their choices in ways that the Currie machine found palatable.[25] More generally, the method ignores au-

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24. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952).

25. *See* his discussion of Grant v. McAuliffe, and the subsequent reaction in the California legislature, in Currie, *Survival of Actions*, *supra* note 10, at 246 [170]. *See also* his suggestion that states should not adopt interstate treaties. Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Methods*, 25 U. CHI. L. REV. 227, 263-64 [77, 121-22] (1958); Currie, *The Constitution and the Choice of Law: Governmental Interests and the*

thoritative declarations of state policy that always exist in situations in which one court looks at the local law of another legal system. Our questions reveal three such situations: Supreme Court review, diversity jurisdiction, and renvoi.

Normative premises are unavoidable in legal reasoning. Some are derived from the Constitution. Others are judicial creations for filling in the gaps in legislation. The fact that they are unavoidable does not mean that they can be disguised as 'statutory construction,' nor does it mean that they can be used to overrule or ignore actual statutes, unless, of course, they are derivable from the Constitution. Currie was as metaphysical as Beale. The interest analysts should try to justify their maxims on the merits and drop their show of methodological one-upsmanship.

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*Judicial Function*, 26 U. CHI. L. REV. 9, 11 n.5 [188, 190 n.5] (1958).