

## THEORY WARS IN THE CONFLICT OF LAWS

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THE AMERICAN CHOICE-OF-LAW REVOLUTION IN THE COURTS: TODAY AND TOMORROW. By Symeon C. Symeonides. Leiden/Boston: Martinus Nuhoff Publishers. Forthcoming 2005.<sup>1</sup>

### INTRODUCTION

Fifty years ago, at the height of modernism in all things, there was a great revolution in American choice-of-law theory. You cannot understand what is going on in the field of conflict of laws today without coming to grips with this central fact. With this revolution the old formalistic way of choosing law was dethroned, and has occupied a humble position on the sidelines ever since. Yet there has been no lasting peace. The American conflicts revolution is still happening, and poor results are still frustrating good intentions.

Now comes Dean Symeon Symeonides,<sup>2</sup> the author of the choice-of-law code of Louisiana,<sup>3</sup> with an intriguing monograph, *The American Choice-of-Law Revolution in the Courts*. There is nothing in the field quite like it.

**103 Mich. L. Rev. 1632** Symeonides has given us a brilliant contribution to legal theory, an impressive, original, one-of-a-kind book, in which a good deal of valuable empirical research is the subject of thoughtful analysis, and in which the reader is offered, and sees in action, an original way of thinking about how to fashion rules for choosing law.

No one else could have written this book. Symeonides speaks to us personally on every page. Nor could it have been written by anyone without Symeonides' intimate familiarity with current American conflicts cases. Over a span of seventeen years he has given generously of his

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1. THE AMERICAN CHOICE-OF-LAW REVOLUTION will be made more generally available in a freestanding treatise edition in 2005. I am reviewing it here in a limited 2003 printing available only to libraries. This 2003 printing, in turn, is an unabridged offprint of the same title published as volume 298 of the series RECUEIL DES COURS [Collected Courses] (Hague Academy of International Law 2002).

2. Dean and Professor of Law, Willamette University College of Law. Dean Symeonides has authored or edited fifteen books and some sixty articles in the fields of comparative and American conflicts law.

3. See Book IV of Louisiana's Civil Code, 1991 La. Acts 923. Dean Symeonides has also drafted a proposed choice-of-law code for Puerto Rico, presently before Puerto Rico's legislature. He now chairs the committee drafting conflicts legislation for Oregon, the contracts provisions of which have been enacted. OR. REV. STAT. §§ 81.100 to 81.135 (2003), and the torts provision of which is the subject of the committee's current work. See Symeon C. Symeonides, *Codifying Choice of Law for Contracts: The Oregon Experience*, 67 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 726 (2003); Symeon C. Symeonides, *Private International Law Codification in a Mixed Jurisdiction: The Louisiana Experience*, 57 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 460 (1993); Symeon C. Symeonides, *Revising Puerto Rico's Conflicts Law: A Preview*, 28 COLUM. J. TRANSNAT'L L. 413 (1990).

time, as he still does, to the service, at once humble and invaluable, of producing annual surveys of conflicts cases in American courts.<sup>4</sup> It was in this steady mining that he struck the mother-lode of material that enriches this book. Symeonides has come through years of work on his codifications of state conflicts rules, and through years of commentary on American decisions in the lower courts, and has emerged confident in his own outlook: conservative, traditional, deferent to the concerns of other countries and the needs of defendants, yet also humane about the needs of plaintiffs; writing with conviction, yet reasonable in argument. To all of this Dean Symeonides brings a formidable erudition. He is enviably conversant with emerging European as well as American theory, debate, problems, attempted solutions — and he reads his foreign sources in the original languages. But if *The American Conflicts Revolution* is a very personal book, often magnetic, a page-turner, it is because it is the honest record of an inner struggle, the culminating and central work of Symeonides' life.

In Part I below I set out an intellectual history of modern conflicts theory and the controversies still plaguing it. This also serves to introduce the reader to the power of modern choice-of-law analysis. In Part II I take a brief look at the politics of the controversy. I note, in Part III, a recent empirical turn in the literature, of which Symeonides' work is a superior example. In Part IV, using interest-analytic methods, I begin to dig into Symeonides' treatment of irrationality in choices of law. I consider the advisability, in Part V, of a return to the law of the forum for intractable cases, and, in Part VI, Symeonides' view that forum law, and other features of modern methods, can disserve the higher values of the law. Here I evaluate Symeonides' analysis of a recent products case, *Kelly v. Ford Motor Co.* In Part VII, I discuss Symeonides' reluctant subordination of the ideal of **103 Mich. L. Rev. 1633** substantive justice to the ideal of neutrality, which he holds in highest esteem, and in Part VIII I argue that neutrality is a false value in the context in which Symeonides struggles to maintain it. These interesting differences in viewpoint do not, however, lessen my admiration for this engrossing new book.

## I. AN INTELLECTUAL HISTORY

### A. *The American Legal Realists*

We can trace the intellectual history of the American conflicts revolution along four overlapping tracks. The opening salvo was fired in academia, when American legal realist writers of the 1920s and 1930s began aiming some of their most penetrating critiques at the field of conflict of laws. The realists deplored the sort of mechanical, formalistic legal methods of which the *First Restatement* of 1934 would be the embarrassing embodiment.<sup>5</sup> The realists tore the polite veil of disinterestedness from the judicial process. They made us see that, disingenuously or deludedly, judges only professed to be complying with the command of inexorable bright-line rules. And choice-of-law rules seemed very bright-line indeed: “The law

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4. See, most recently, Symeon C. Symeonides, *Choice of Law in the American Courts in 2003: Seventeenth Annual Survey*, 52 AM. J. COMP. L. 9 (2004). There is no substitute for these surveys. It should be noted that Symeonides' surveys are hardly bare reports. His typology of the cases is very personal to him, and his commentary reflects the thinking which has culminated in *The American Conflicts Revolution*. At the 1999 Annual Meeting of the Association of American Law Schools, its Section on Conflict of Laws passed a resolution of appreciation for Symeonides' annual surveys project.

5. Restatement of the Law of Conflict of Laws (1934).

of the place of injury governs a tort.” “The law of the place of contracting governs a contract.” The American legal realists revealed to us that behind the curtain there was no magical wizard, no “mystic over-law,”<sup>6</sup> no rules cut in stone, but only a fallible human being — a judge trying to do the right thing. Inevitably, judges were manipulating the seemingly fixed rules to produce desired results, and in this way obscuring to themselves and others the “inarticulate major premises” of their decisions.<sup>7</sup> Pre-realist commentators would (rightly) praise as a sound application of law a result they deemed just, and condemn one they deemed unjust; but in so doing they were replicating the *hidden thinking* that was deciding the cases.

Probably the most influential among the American legal realists working with the example of choice-of-law method was Walter Wheeler Cook.<sup>8</sup> Cook argued that, whatever law a court said it was choosing, however much a court seemed to be subordinating its own law, a court always, in fact, applied its own local law and policy. **103 Mich. L. Rev. 1634** Otherwise it would not have chosen the law that it *did* choose. Cook saw that a *departure* from local law was as much an expression of actual local policy as an *application* of local law. He saw that a departure from the law of the forum on ostensible choice-of-law grounds is really a change in the forum’s substantive policy. He saw how the change becomes apparent to the bench and bar in later cases, as lawyers begin to argue that the supposed law of the forum has become an inaccurate reflection of true forum policy — as evidenced by the forum’s recent departure from its own law. This was Cook’s “local law” theory.<sup>9</sup>

Cook came to such thinking by looking beyond the lifeless abstractions of the traditional choice-of-law method to its results. He saw that legal formalisms, unless manipulated instrumentally, are all too likely to produce arbitrary and irrational decisions. The more principled the application, the more arbitrary the result. Cook and the other American legal realists disparaged the alleged virtues of mechanical jurisprudence — neutrality, predictability, uniformity. Their concern, rather, was with the flesh-and-blood men and women for whom too often the casualty of abstraction is justice.

### B. *The Supreme Court*

We have to look to the Supreme Court for the second strand in this intellectual history. In a series of otherwise uninteresting cases in the 1930s, the Court began to test choices of law as it does today, under the Due Process Clause. The question for the Court was whether a particular choice of law was so arbitrary and irrational as to deprive the parties of the process that is due. In the now-classic *Home Insurance Co. v. Dick*, the Court held in 1930, in an opinion by Justice Brandeis, that the law of a state without any relevant connection with a case could not rationally,

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6. *Cf.* *The Western Maid*, 257 U.S. 419, 432 (1922) (Holmes, J.).

7. *Cf.* *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting): “The decision will depend on a judgment or intuition more subtle than any articulate major premise.”

8. *See generally* WALTER WHEELER COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* (1942); Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 *YALE L. J.* 457 (1924).

9. *See* David F. Cavers, *The Two “Local Law” Theories*, 63 *HARV. L. REV.* 822 (1950).

and therefore could not constitutionally, govern that case.<sup>10</sup> To exercise lawmaking power, a state should have some nexus, some physical *contact*, with the case its law is supposed to govern.

As this idea developed, the Court began to see that a mere physical contact, by itself, might not be sufficient. Rather, the fact of a state's physical contact with a case was important only because it lay a basis for a more salient question: Did the state, by virtue of its physical contact with a case, have a *rational basis* for the application of its law? In other words, was the contact *significant*, for purposes of establishing constitutional power? Might the state's physical contact with a case **103 Mich. L. Rev. 1635** reasonably be thought to give rise to some legitimate *interest* in governing it? The place of injury seemed a significant contact in a tort case. The place where the lawyers resided did not.<sup>11</sup>

Of course there are at least two putatively concerned states in every conflicts case. The concern of each is suggested by some physical contact between the case and the state. This being so, the Supreme Court began to see that *both* states might have constitutional power. For example, the law chosen in a multistate case of tort, when there was a contractual relation between the parties, could be *either* the law of the place of injury *or* the law of the place of contracting — as the Court specifically held, by Justice Stone, in 1939.<sup>12</sup> The foundation for this insight had been laid in an earlier opinion, also by Justice Stone,<sup>13</sup> when, in 1935, the Supreme Court decided the watershed case of *Alaska Packers v. Industrial Accident Commission*.<sup>14</sup> In *Alaska Packers*, the Court began the long process of weaning the bar from its conviction (still an article of faith with some lawyers today) that in a two-state case, American courts are required by the Full Faith and Credit Clause to defer to the law of the other state. In fact, there is no obligation of full faith and credit to a sister state's laws — as opposed to a sister state's judgments<sup>15</sup> — and in *Alaska Packers* Justice Stone **103 Mich. L. Rev. 1636** was at some pains

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10. *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930). For the continuing controversy over Mr. Dick's connections with the forum or lack thereof, see, e.g., Jeffrey L. Rensberger, *Who Was Dick? Constitutional Limitations on State Choice of Law*, 1998 UTAH L. REV. 37.

11. *But see* *Haag v. Barnes*, 175 N.E.2d 441, 444 (N.Y. 1961) (listing a lawyer's domicile as among the "contacts" which, in the aggregate, were held to support a departure from forum law).

12. *Pac. Employers Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493 (1939) (Stone, J.).

13. For Justice Stone's contributions to the field of conflict of laws, see generally Paul A. Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210 (1946), reprinted in PAUL A. FREUND, ON LAW AND JUSTICE 183 (1968).

14. *Alaska Packers Ass'n v. Indus. Accident Comm'n*, 294 U.S. 532 (1935).

15. *Id.* at 547. With a single modern exception not relevant here, it is only with respect to state judgments that Congress has exercised its power, U.S. CONST. art. IV, § 1, to require full faith and credit. Act of May 26, 1790, ch. 11, 1 Stat. 122, codified as amended at 28 U.S.C. § 1738: "And the said records and judicial proceedings authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken." Under this statute, the forum must give the same scope to a state judgment that the judgment-rendering state would. See also § 1738(a) (requiring full faith and credit to custody decrees). See also *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373 (1985) (O'Connor, J.) (requiring federal courts, even in federal-question cases, to measure the scope of a state judgment as the judgment-rendering state would, at least in the first instance. Only after ascertaining whether the state judgment, so construed, would conflict with federal law should a federal court consider whether an exception should be made). The modern statutory exception to the rule that full faith and credit applies only to judgments appears in the Defense of Marriage Act, Act of Sept. 21, 1996, Pub. L. No. 104-199, 110 Stat. 2419, codified in pertinent part at 28 U.S.C. § 1738(c). Disregarding the historical difference between judgments and laws,

to explain that there could be no such obligation. If the obligation of full faith and credit attached to laws, we would have what Stone called an “absurd” result. In cases in which the laws of two states were in conflict, the forum would have to apply the laws of the other state, but would be disabled from applying its own.<sup>16</sup> Perhaps Stone saw this result as “absurd” because it would obliterate the common law of choice of law. Or perhaps it was absurd to him because it would flout the will of the legislature at the forum in every two-state case. Or perhaps because it would strip a court of power to enforce the substantive law of its own state. I suspect, though, that Justice Stone thought it “absurd” simply because of the oddity of the crisscross arrangement, by which each of the two states would have to rely on the *other* to furnish law for a case. I am reminded of the old story, intended to be uplifting, of the villagers suddenly afflicted with a malady of which the only symptom is stiff arms. Unable to feed themselves, they are about to perish from starvation, when they are saved by the inspired realization that they can feed each other. Fortunately, after *Alaska Packers*, it has become clear that the obligation of full faith and credit requires no such contortions. Full faith and credit has to do with a sister state’s judgments, not its laws.

The Court still has occasion to reiterate this lesson, as it did in 2003 in *Franchise Tax Board v. Hyatt*.<sup>17</sup> There, Justice O’Connor, writing for the Court, pointed out that the Court’s body of precedent “differentiates the credit owed to laws . . . and to judgments.”<sup>18</sup> To be sure, some constitutional conflicts cases are still argued under the Full Faith and Credit Clause. But the Supreme Court treats such cases as if argued under the Due Process Clause. In *Hyatt*, California’s lawyers did rely on the Full Faith and Credit Clause, possibly out of concern that the state and its tax board might not be “persons” entitled to due process of law.<sup>19</sup> The *Hyatt* Court accordingly confined its opinion to **103 Mich. L. Rev. 1637** the question California raised under the Full Faith and Credit Clause. Nevertheless, the Court referred throughout to due process cases.

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Professor Maltz proposes that we view the problem of recognition of sister-state judgments merely as a conflict of laws, specifically a conflict of “procedural” rules. Earl M. Maltz, *The Full Faith and Credit Clause and the First Restatement: The Place of Baker v. General Motors Corp. in Choice of Law Theory*, 73 TUL. L. REV. 305 (1998). He argues that since procedure is traditionally governed by forum law, forum law should govern the validity of a sister-state judgment. It is the least of this proposal’s disadvantages that it would require repeal of the Act of 1790, *supra*. More fundamentally, the proposal would *deny* full faith and credit to the sister-state judgment, whittling it down or puffing it up to match the forum’s ideas. This would be subversive of the intention of the Full Faith and Credit Clause, to unite American courts, short of nationalizing them, as a single juridical entity.

16. “A rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own.” *Alaska Packers*, 294 U.S. at 547 (Stone, J.).

17. 538 U.S. 488 (2003).

18. *Id.* at 494.

19. I am indebted to Marty Lederman for pointing out that in *South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966), the Court stated, “The word ‘person’ in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and to our knowledge this has never been done by any court.” It would indeed seem rather odd to construe the “person” protected by the Fourteenth Amendment as embracing a state, since the Amendment protects persons *against* the state. Nevertheless it would seem at least equally odd that a state as litigant should not be entitled to ordinary due process in either set of courts. The remark in *Katzenbach* seems doubtful vis-à-vis the process due the litigating state.

The innovative Supreme Court cases of the 1930s taught that in a two-state case in tort, the law chosen did not *have* to be the law of the place of injury, nor, in a contract case, did it *have* to be the law of the place of contracting — nor, indeed, any other *single* place. In cases combining tort and contract elements, *both* places would have constitutional power. This liberating insight in interstate cases carried over to the ordinary common-law sphere of the Court’s own choice-of-law method in *federal*, transnational cases. Thus, in dealing with international choices of law in admiralty, a later Supreme Court, in *Lauritzen v. Larsen*, as a matter of federal common law, jettisoned tradition and enumerated *various* contacts between countries and a case that might be significant for choice-of-law purposes.<sup>20</sup> Today the leading modern due process cases are *Allstate Insurance Co. v. Hague*<sup>21</sup> and *Phillips Petroleum Co. v. Shutts*.<sup>22</sup> Under these cases the Court requires that the law chosen to govern an issue be the law of a state having sufficient “contacts” with an issue to generate state “interests” in governance of that issue. These interests must be sufficient to ensure that application of the chosen law will be neither “arbitrary” nor “fundamentally unfair.”<sup>23</sup>

For a deeper understanding we now need to turn to the third strand in the story.

### C. *The Advent of Interest Analysis*

Nothing in the intellectual history of the American conflicts revolution was of greater moment than the publication of a law review article some still consider the greatest law review article ever written, Brainerd Currie’s *Married Women’s Contracts*.<sup>24</sup> In the American **103 Mich. L. Rev. 1638** conflicts revolution, this would become the shot heard round the world.

Currie began modestly enough by stating a case — a familiar American classic of the field, the 1873 case of *Millikin v. Pratt*.<sup>25</sup> In that case, Mr. Pratt of Massachusetts, trying to embark on a new business venture involving goods shipped from Maine, prevailed on his wife to guarantee his payments to his Maine supplier, the Milliken company. Mr. Pratt, putting his wife’s separate property at risk, posted her complaisantly signed guarantee in a mailbox in Massachusetts. Times were hard and Pratt’s new venture went awry. When the Pratts failed to pay, Milliken came down to Massachusetts to sue Mrs. Pratt on her guarantee. The Pratts defended on the ground that, under the law of Massachusetts in effect when Mrs. Pratt signed that piece of paper (repealed shortly thereafter), married women had no capacity to contract. Under the law of Maine, however, Mrs. Pratt’s guarantee was good. Maine had long ago disembarassed itself of a rule denying married women the capacity to contract.

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20. 345 U.S. 571, 581-93 (1953). *Lauritzen*, although a great advance for its time, is less helpful today. It survives in admiralty.

21. 449 U.S. 302, 312-13 (1981).

22. 472 U.S. 797, 818 (1985), quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981).

23. *Hague*, 449 U.S. at 312-13 (Brennan, J.): “[F]or a State’s substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.”

24. Brainerd Currie, *Married Women’s Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958), reprinted in BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 77 (1963).

25. *Milliken v. Pratt*, 125 Mass. 374 (1878) (holding that the law of the place of contracting determines the validity of a contract even on the issue of capacity to contract, an issue that had been supposed governed by the law of the domicile).

The Supreme Judicial Court of Massachusetts famously held for the Maine creditor. Chief Justice Gray decided that the law of the place of contracting must govern a contract case in its entirety, even on the issue of capacity. He rejected the law of the domicile to govern the capacity of its domiciliaries, although that was a standard choice at the time. But where *was* the place of contracting? Gray manipulatively identified the place of contracting as Maine, thus validating the interstate agreement and holding Mrs. Pratt to her promise. In other words, Massachusetts' highest court denied a Massachusetts resident the protections of Massachusetts law, invalidating a Massachusetts married woman's contract signed by her in Massachusetts, in order to allow a nonresident creditor to collect.

Much has been written on all sides of this troubling but admired case. Dispute still rages between territorialists and modernists; between equalizing feminists and protecting feminists; between those who think the mailbox rule for formation of contracts should determine the place of contracting for choice-of-law purposes and those who do not see why it should; between those who think Massachusetts' intervening repeal probably made the difference and those who think, if so, the court was wrong to let it affect the case retroactively; between proponents of *lex domicilii* and proponents of *lex loci contractus*; between advocates of the issue-by-issue approach<sup>26</sup> 103 Mich. L. Rev. 1639 and advocates of one law for the whole case; and between champions of forum law and defenders of interstate commerce.<sup>27</sup> But Currie had bigger fish to fry.

The tack Currie took was simply to chart all sixteen possible permutations of *Milliken v. Pratt* by allocating either to Maine or Massachusetts each of the four main "contacts" in the case (Mrs. Pratt's domicile, Milliken's place of incorporation, the place of trial, and the place of contracting). He then charted the traditional *outcomes* to be expected in all these possible *Millikens* — outcomes, in other words, under the law of the place of contracting. Then, in two tables, Currie compared those outcomes with identifiable policies of the concerned states. With these simple materials, building on the great American legal realist writings in the field, and under the influence, as he freely acknowledged, of the Supreme Court cases of the 1930s, Currie showed us astonishing truths about conflicts cases, things which had not previously been understood.

The Supreme Court had helped us to see that the law of a state having no connection with a case was an irrational choice; and that the law of the place of injury in a tort case, or of the place of contracting in a contract case, were not necessarily the *only* rational choices. *Married Women's Contracts* showed us that the laws of states with even those traditional connections with a case were not necessarily rational choices at all. The law of the place of contracting might not be rationally applicable in a particular contract case. The law of the place of injury might not be rationally applicable in a particular case of tort. In other words, a state's physical contact with a case might not matter. A state's contact with a case needed to be *significant*. It would not be

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26. The rational breakdown of whole "cases" into "issues" — the technique of so-called *dépêçage* — was a somewhat later development, itself controversial, and one that occurred only gradually in the interplay between courts and writers. *Dépêçage* was at the heart of the question presented by *Milliken v. Pratt*, since the capacity of a married woman to contract was arguably a question more appropriately addressed to her domicile than to the place of contracting. In *Milliken*, Chief Justice Gray declined to break out the issue of capacity. This had the effect of furthering his instrumentalist purpose of validating the interstate contract.

27. For my views on *Milliken v. Pratt*, see Louise Weinberg, *A Structural Revision of the Conflicts Restatement*, 75 IND. L. J. 475, 494-96 (2000).

significant, Currie argued, unless the relevant policies and interests of that state would be advanced by application of its actual law to the actual facts of the particular case.

Devising a revolutionary mode of analysis, Currie was able convincingly to determine the significance of a physical contact. Currie called his new method “governmental interest analysis.” He thought this analysis implicit in the Supreme Court cases of the 1930s. Readers familiar with constitutional litigation will also see the further analogy between the interest analysis the Supreme Court uses in interstate conflicts cases under the Due Process Clause and the interest analysis the Court uses in substantive constitutional cases. In both settings, a burden falls on one of the parties to show that the state has some **103 Mich. L. Rev. 1640** rational basis for the application of its laws — a *legitimate governmental interest*. (In constitutional cases warranting heightened scrutiny of state action, the burden becomes one of showing a compelling governmental interest, but the principle is the same.) Interestingly, as in the conflicts cases, these burdens in the substantive cases also trace to the 1930s, also to an opinion by Justice Stone. The case, of course, was *Carolene Products*.<sup>28</sup>

By trying to identify a legitimate governmental interest at the place of contracting for each of his charted variants of *Milliken v. Pratt*, Currie demonstrated that the one physical contact between a state and a lawsuit that courts took most seriously in choosing law — the place of the underlying events — was a place that in a large fraction of conflicts cases had no interest at all in having its law applied. Even such interests as might rationally be attributable to the state of transaction or occurrence were at best only very general. The obvious implication of this demonstration was that a court’s choice, for example, of the law of the place of injury to govern a tort, however conventional, however traditional, however reassuring, however hallowed by time and confident usage, was likely to be as irrational a choice as the law of a state having nothing to do with the case at all.

This was a startling conclusion. How did interest analysis yield such counterintuitive ideas? Concerning cases of personal injury, for example, Currie reasoned that the interests of all states as potential places of injury lay in maintaining safety. A state would tend to be focused on deterring accidents and maintaining the safety of its territory, having no interest in maintaining an unsafe territory. Accidents are costly, calling on state resources for expenditures exceeding those entailed in maintaining safety. A state would have a general interest, therefore, in deterring torts within its borders. Moreover, a state would not want to discourage commercial or other visitors by maintaining unsafe conditions on its territory, and would want to encourage such visitors by protecting them. The state, therefore, would have general interests in compensating anyone injured within its borders, residents and visitors alike. *Only if its law was defendant-detering or plaintiff-favoring, then, could the law of the place of injury, qua place of injury, rationally apply in a case of personal injuries.* Of course legislatures do enact defendant-protecting laws, and, of course, courts do fashion defendant-protecting rules. The place of injury might well have general defendant-protecting law, or **103 Mich. L. Rev. 1641** specific enterprise-protecting law. And, of course, such law would have its rational applications, exceptions to the state’s more general safety concerns. But those rational applications would be

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28. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) (Stone, J.) (sustaining an act of Congress regulating imitation milk on the ground that Congress need only have some rational basis for enacting ordinary economic legislation); *id.* at 152 n.4 (reserving a power of heightened scrutiny for cases of failure of the political process, violations of fundamental rights, or discriminations against discrete and insular minorities). I argue the link between governmental interest analysis and rational-basis review in Louise Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. CHI. L. REV. 440 (1982).



limited to cases in which the place of injury was also the place where the defendant resided, or where the enterprise was located or the relevant acts were performed or relevant products were being made. In other words, the state's interest in protecting tort defendants would not arise from the fact that the injury occurred there, but rather from the fact that the defendant was based there or conducting relevant activities there.

Similarly, all states have general interests in maintaining the validity of legitimate business transactions within their borders. A place where an agreement is formed,<sup>29</sup> assuming no other contact with a case, can have no interest in discrediting the transaction unless it is a violation of public policy. A state would tend, rather, to be focused on encouraging business within its borders. The state, therefore, would have a general interest in sustaining the validity of a contract formed there, and thus in compensating any creditor who suffered a loss on account of a breach of a contract formed there. *Only if its law was validating or plaintiff-favoring (that is, creditor-favoring), then, could the law of the place of contracting, qua place of contracting, rationally apply in a case of breach.* Of course, legislatures do enact debtor-protecting laws, and, of course, courts do fashion debtor-protecting rules. The place of contracting might well have debtor-protecting, contract-invalidating law. And, of course, such law would have its rational applications, exceptions to the state's more general validating concerns. But those rational applications would be limited to cases in which the place of contracting was also a place relevant to such an application, like the place where the debtor resided. In other words, the state's interest in protecting contract defendants did not arise from the fact that the contract was formed there, but rather from the fact that the defendant was based there or conducting valuable activities there.

Interest analysis is an imperishable contribution to the rational application of law. Yet interest analysis, as Currie insisted, was only, at bottom, ordinary statutory construction and ordinary interpretation of case law. One learns in the first year of law school that law has no application beyond the limits of its own likely purposes — that rules have no force beyond the scope of the reasons for them.<sup>30</sup> **103 Mich. L. Rev. 1642** So lawyers tend to look for the reasons for a rule — to argue purposively, functionally. But somehow lawyers had not made ordinary construction and interpretation a part of the choice-of-law process. While lawyers, judges, and commentators were accustomed to analyzing substantive issues by inquiring into the reason for a law, they were also accustomed to rigid, territorial, formalistic *choices* of law — choices made without regard to law's reason, based on fixed traditional rules of the sort set down in the *First Restatement*. They were not unaware of the realist critique of the traditional way of choosing law, but it still seemed to them that, rational or not, the traditional rules were better than a stab in the dark. However manipulable the traditional rules were proving to be, at least they gave the illusion of providing neutral, certain, predictable, and uniform choices. *Married Women's Contracts* met this seductive thinking head on. Currie knew that the supposedly fixed rules could be putty in judicial hands. He doubted that the traditional rules were capable of uniform application. But even supposing that they were, Currie argued that the price of uniformity was

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29. For the limited purposes of the present discussion, I have refrained from considering the traditional alternative to the place of contracting, the place of performance.

30. *Cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (Marshall, C.J.) (“Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.”); *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798) (Chase, J.) (“The nature, and ends of legislative power will limit the exercise of it.”).

too high.<sup>31</sup> Under careful interest analysis, Currie conclusively demonstrated that a principled application of the old territorial rules would chronically thwart the policy of one of the two states without advancing any policy of the other.

Pressing on, Currie then demonstrated something even more unexpected, something that could not have been understood without interest analysis. Suddenly it was revealed to his astonished readers that a large number of the possible *Millikens* on the chart in which the laws of the two states were in conflict were what Currie called “false conflicts.” In these cases, notwithstanding that the laws of the two states did seem to conflict, only one of the two states was an “interested” one. Only one of the two had law that could rationally govern the particular situation. These were cases of false conflict because only one of the two states had a dog in the fight. This identification of false conflicts was a revelation, a major discovery.<sup>32</sup>

Currie topped this with another major discovery, equally obvious, yet something we had not seen because we had not recognized false conflicts before *Married Women’s Contracts*. The obvious solution of a false conflict is to *apply the law of the only interested state*. This alone, Currie pointed out, would solve a large fraction of conflicts cases. **103 Mich. L. Rev. 1643** Today, regardless of the choice methods adopted, a fair number of American courts try to identify and eliminate false conflicts to obviate any necessity for a more complex choice-of-law process.

Using interest analysis, Currie also was able to identify “true conflicts.” These were cases like the real *Milliken v. Pratt*, in which each of the two states was an “interested” one, in the sense that either state’s laws could rationally (and constitutionally) apply. And in other early work he would also identify the “unprovided-for case,” the case in which neither state has a legitimate governmental interest.<sup>33</sup>

Currie had shown how to identify and resolve false conflicts. But his true conflicts and unprovided-for cases presented problems he believed could not be solved. For both these intractable kinds of conflicts he suggested as a default position that the forum fall back on its own law. No doubt it helped, in reaching this conclusion for true conflict cases, that *Alaska Packers* had held the forum to be under no obligation of full faith and credit to apply the other state’s law. As for unprovided-for cases, the forum, having jurisdiction over the case and the parties, would have sufficient administrative interest by virtue of those facts to make its law available as residual law, a more clearly constitutional choice, Currie thought, than a choice of the other state’s law.

#### D. *The State Courts*

Meanwhile, concurrent with the interest-analysis revolution, there was a fourth development in this intellectual history: the state courts were jumping in. The courts began to contribute creatively to the demolition of the past and to proposals for modern approaches. Chief Judge

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31. Currie, *Married Women’s Contracts*, supra note 24, at 101.

32. The mistaken belief persists that the technical term “false conflict” is intended to describe cases in which there is no conflict because the laws of both concerned states are the same. See, for a typical example, *Brenner v. Oppenheimer & Co.*, 44 P.3d 364, 373 (Kan. 2002), as later edited citing *Lucker Mfg. v. Home Ins. Co.*, 23 F.3d 808, 813 (3d Cir. 1994).

33. See Brainerd Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205 (1958). Currie used the word “unprovided” without the added “-for.”

Stanley H. Fuld in New York chased the chimera of a discernible “center of gravity” of a case,<sup>34</sup> and Chief Justice Roger Traynor in California began to use analyses of the policies and interests of the concerned states.<sup>35</sup> Traynor brought a characteristic accommodationist perspective to his conflicts cases. In cases of true conflict, he typically wound up subordinating California’s interests to those of sister states, or of the interstate system itself, as Massachusetts’ Chief Justice Gray had famously done in *Milliken v. Pratt*.<sup>36</sup> Eventually Traynor would propose an influential “comparative impairment” model for resolution of true conflicts.<sup>37</sup>

## II. THE POLITICS OF CONFLICTS

Anticlimactically, now that the dust has settled, it appears that modernism has not won out after all. Although Brainerd Currie’s work will always stand at some pinnacle of legal thought, in these postmodern times the American conflicts revolution churns on unendingly, like the war in George Orwell’s *1984*.

The *Second Restatement*, triumphantly displacing the discredited *First Restatement* in 1971,<sup>38</sup> and now adopted in the great majority of American jurisdictions, has turned out to be a disappointment.<sup>39</sup> To be sure, the *Second Restatement* presents a somewhat progressive façade. It appears to abandon the place of injury, the place of contracting, and so forth, relying instead upon the place of “most significant contact.”<sup>40</sup> It is also true that its key overarching section affords courts an opportunity to consider the policies and interests of the concerned states.<sup>41</sup> But it surrenders much of this ground in the specific provisions it makes for different areas of substantive law. These specific sections make presumptive choices of the old, rigid, territorialist, formalistic rules. Dishearteningly, the law of the place of injury still presumptively governs a tort; the law of the place of contracting still presumptively governs a contract.<sup>42</sup> These are **103**

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34. See *Haag v. Barnes*, 175 N.E.2d 441, 444 (N.Y. 1961); *Auten v. Auten*, 124 N.E.2d 99, 101 (N.Y. 1954).

35. See, e.g., *Grant v. McAuliffe*, 264 P.2d 944 (Cal. 1953) (en banc).

36. See, e.g., *Bernkrant v. Fowler*, 360 P.2d 906 (1961) (en banc). For my analysis of *Bernkrant*, see Louise Weinberg, *On Departing from Forum Law*, 35 MERCER L. REV. 595, 609-12 (1984).

37. See Herma Hill Kay, *The Use of Comparative Impairment To Resolve True Conflicts: An Evaluation of the California Experience*, 68 CAL. L. REV. 577 (1980); William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963).

38. See *Restatement (Second) of Conflict of Laws* (1971).

39. On the vices and virtues of *Restatement (Second)*, see, for example, Friedrich K. Juenger, *A Third Conflicts Restatement?*, 75 IND. L. J. 403 (2000); Symeon C. Symeonides, *The Judicial Acceptance of the Second Conflicts Restatement: A Mixed Blessing*, 56 MD. L. REV. 1248 (1997); Weinberg, *A Structural Revision*, *supra* note 27; Russell J. Weintraub, *“At Least, To Do No Harm”*: *Does the Second Restatement of Conflicts Meet the Hippocratic Standard?*, 56 MD. L. REV. 1284 (1997); see also William L. Reynolds, *The Silver Anniversary of the Second Conflicts Restatement*, 56 MD. L. REV. 1193 (1997).

40. Currie did not think it possible to rank-order contacts. To him, the word “most” in the phrase “most significant contact” would have been puzzling. After one has read enough cases, one has to agree with Currie on this. Courts leap to a conclusion about “the place of most significant contact” by piling up “contacts,” or by creative use of the all-purpose judicial term, “We think.”

41. The reference is to the list of general guidelines found in section 6 of *Restatement (Second)*.

42. For an intellectual history of *Restatement (Second)*, reconstructing the likely intentions of Willis Reese, its distinguished Reporter, see Weinberg, *A Structural Revision*, *supra* note 27.

**Mich. L. Rev. 1645** presumed to be the places of “most significant contact,” although by now everyone who has read *Married Women’s Contracts* knows that these places are likely to be of no more significance, and probably less, than the respective residences of the parties.

Meanwhile, modern conflicts theory has become ensnarled in unending, heated debate between traditionalists and modernists, those who favor rules and those who favor “approaches,” and between the vociferous critics of interest analysis and its defenders. There also lingers a methodological debate over how to solve the problems Currie was unable to solve. The courts went through a period of these kinds of debate as well, but, just as the academic debate has not produced a decisive triumph of reason, the judicial debate has not produced a decisive triumph of justice. By now, most state courts, and virtually all federal courts, have opted for the *Second Restatement*, with a predictably large quotient of arbitrary and unjust results.

To make matters worse, the contending academic factions have become increasingly politicized. In conflicts of tort law, methods that tend to yield plaintiff-favoring law are thought to be favored by liberals, methods that tend to yield defendant-protecting law by conservatives. Nobody likes to *say* this, but there it is. Choices that yield forum law are considered parochial, and because the plaintiff chooses the forum, choices of forum law are decried as plaintiff-oriented. Choices that extend comity to the (usually) defendant-favoring law of a sister state<sup>43</sup> are considered illiberal, unjust, and defense-oriented. Because traditional territorialist methods are at least superficially “neutral,” striking with even-handed ferocity now at plaintiffs, now at defendants (and because, by nature, conservatives are comfortable with things familiar), conservatives tend to favor “rules.” Liberals, on the other hand, are unnerved by the mere contemplation of ferocity, evenhanded or not. They tend to feel more comfortable with “approaches.” The interest analysts’ typical preoccupation with the states in which the parties are based is considered unprincipled by conservatives; and the forum preference characteristic of interest analysis is thought unacceptably indulgent to the plaintiff and the parochial, selfish state.

### III. AN EMPIRICAL TURN

Dean Symeonides is one of the more tolerant and patient voices in these ongoing controversies. Whether he is explaining the ways **103 Mich. L. Rev. 1646** of Europeans to Americans,<sup>44</sup> or, as here, explaining the ways of Americans to Europeans, or simply thinking about American conflicts law, he has played a fundamentally optimistic and healing part. He is adept in modern methods, and at the same time a hopeful advocate for a return to rule-based choices. His codifications, for all that they are codifications, bear the impress of modern thinking. Other great writers in the field, the late Robert Lefflar, Elliot Cheatham, Willis Reese, and David Cavers, struggled to find sets of general “principles” as guidelines to choosing law, as has my esteemed colleague, Russell Weintraub. But none of these writers sought to go *back* to the future. Nor were any of them interested in the retrograde project of detailed codification. All were realists, not formalists. Symeonides is much more conservative than those writers. But he is more respectful of counter-arguments than other conservatives. In this way, he has become something of an enigma — a man of mystery. Where does he stand? Is he in the defendants’

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43. Non-forum law tends to be defendant-favoring because the plaintiff has the choice of forum.

44. See, e.g., Symeon C. Symeonides, *The Mixed Legal System of the Republic of Cyprus*, 78 TUL. L. REV. 441 (2003).

corner, with the other conservatives? Does his acknowledgement of the advances made by the interest analysts push him into the plaintiffs' corner, with the modernists and liberals? Does his concern for justice do so? Or, like David Cavers, his avowed idol, is he seeking the elusive holy grail of conflicts neutrality? Perhaps the greatest pleasure the reader will take in *The American Choice-of-Law Revolution* will derive from the access it affords to Symeonides' innermost thinking. For although his book opens as a simple descriptive record organized along standard familiar lines, it quickly leaves the familiar behind and becomes an extended internal dialogue.

This may seem all the more surprising because Symeonides is, first and foremost, a phenomenologist. The reader unfamiliar with his other recent work will be struck by the turn toward empiricism manifest in *The American Choice-of-Law Revolution* on virtually every page. Writers in the field have been calling for an "empirical turn,"<sup>45</sup> and, whether or not they were influenced by Symeonides' earlier work, Symeonides has taken that turn here. By this I mean much more than that he has consulted cases in the usual commentator's way. *The American Choice-of-Law Revolution* is veritably lit up with charts, diagrams and tables; and it is not simply illumined by these materials, but argued closely from them.

**103 Mich. L. Rev. 1647** One thinks at once of Brainerd Currie's powerful tabular representations of conflicts cases, their variants and outcomes. But Currie needed to provide only a very few tables to make his points, and to make Currie's points casebooks today need use only two or three of those tables, edited to weed out Currie's occasional mistakes. Others have also made useful contributions through visual representations. William Richman, for example, working in Ohio, built on interest analysis to devise a novel technique of analyzing conflicts cases through diagramming them.<sup>46</sup> Richman's analytic diagrams have been remarkably successful in conveying to successor generations the interest-analytic way of thinking. But these sorts of materials are visualizations of abstract legal theory. Dean Symeonides' tables perform quite different functions.

The tables in *The American Choice-of-Law Revolution* are far more concerned with actual cases in the courts than with theoretical abstractions. Symeonides limits his field of observation to cases of tort, the setting for most choice-of-law litigation. To these cases he brings an overarching, almost sociological perspective, with something like a political scientist's interest in discerning patterns. How *is* the outcome of a tort case related to the choice-of-law method employed? How does this relationship fare for different case patterns? Symeonides separates joint-domicile cases from split-domicile cases. He tabulates cases in which the forum has one, then two, then three significant contacts with a case. He plots cases in which a state has defendant-affiliating contacts against cases in which a state has plaintiff-affiliating contacts. He charts these sorts of things for true conflicts, false conflicts, and unprovided-for cases, noting, in an interest-analytic way, which of the two parties the particular law favors. He looks at different substantive fields of tort law, cases in which "conduct-regulating" rules are at issue and cases in which "loss-allocating rules" are at issue. His rich graphical resources, then, are deployed to

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45. See, e.g., William M. Richman & William L. Reynolds, Prolegomenon — to an Empirical Restatement of Conflicts, 75 IND. L. J. 417 (2000). See also, e.g., Ralph U. Whitten, U.S. Conflict-of-Laws Doctrine and Forum Shopping, International and Domestic (Revisited), 37 TEX. INT'L L. J. 559 (2002); Patrick J. Borchers, The Choice-of-law Revolution: An Empirical Study, 49 WASH. & LEE L. REV. 350 (1992).

46. See William M. Richman, *Graphic Forms in Conflict of Laws*, 27 U. TOL. L. REV. 631 (1996); William M. Richman, *Diagramming Conflicts*, 43 OHIO ST. L. J. 317 (1982).

capture and put within our grasp the results of important and multidimensional empirical inquiries.

All this is in aid of a most interesting mission. As might be expected from a codifier of conflicts law, Symeonides remains strongly predisposed toward the relative security of rules. In his persuasive, characteristically evenhanded way, he argues the case forcefully for well-considered choice rules. He is not overly concerned to describe or defend the rules he has enshrined in the Louisiana Code. His references to them are for the most part couched in generalities. His concern throughout this book, rather, is in the empirical question: How are conflicts cases actually playing out in the courts? He offers **103 Mich. L. Rev. 1648** more than analysis or commentary; he offers *synthesis*. He is not so much interested in inventing solutions and then proposing and advocating them — the usual path of conflicts theorists — as he is in changing our minds about the *sources* of rule-based solutions. He is not interested in *devising* rules. Rather, he wants to *derive* them.

This, he tells us, was the method he employed in authoring the Louisiana conflicts code. All the charts, tables, diagrams — and the thinking that went into them and is gleaned from them — are there to furnish the raw material of rules of choice of tort law. Dean Symeonides deals with commonplace cases, a good many of them, remarkably current cases, a collection of well-realized materials more interesting and varied than can be found elsewhere. His ambition is to put in rule form what courts actually *do*. The American Law Institute's *Restatements* purport to do something of the sort; but they tend, in the end, to be both discriminating and reforming. Moreover, no massive phenomenological inquiries go into a *Restatement*. Typically, a few leading cases appear as supporting references in a Reporter's Notes. But Dean Symeonides acts on the principle that what courts do, and their measure of agreement in what they do, are phenomena to be taken very seriously indeed. Symeonides has the strong conviction that to glean truth from reality one has to handle a great deal of reality, and to do so with utmost care.

Nor is Symeonides' idea that of most other writers, to *change* what courts are doing. Like the late Professor Albert Ehrenzweig, he has come to feel instead that — whatever courts say they are doing — they will tend to gravitate toward established patterns of choice of law. These, Ehrenzweig thought, were the “true rules.”<sup>47</sup> Of course, the task of gleaning principles from cases is familiar to every student of the common law. But Symeonides' work, like Ehrenzweig's, stands as something of a reproach to the rest of us. We have been so concerned with abstract “rules” and formal “approaches” that we have not been doing the common lawyer's job. We have been so busy teaching the judges that we have not been *learning* from them. As for those whose writing has also taken an empirical turn, Symeonides' work may suggest to them that their samples have been too small, their categories too careless, the number of their categories too limited, their inquiries too scattershot and disorganized. No legal realist could shrug off Dean Symeonides' “rules” as mere abstractions. Concededly, the kinds of rules he is proposing would be too complex, layered, many-sided, to be true rules themselves, and, concededly, they would **103 Mich. L. Rev. 1649** be tempered by some sensitive modernist tweaking. But they would *build* on true rules. *The American Choice-of-Law Revolution* argues that the choice-of-law process needs rules, but the rules it is talking about would give the courts the guidance, as seen in an improving mirror, of *their own reflection*.

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47. See Albert A. Ehrenzweig, A TREATISE OF THE CONFLICT OF LAWS 465 (1962); Albert A. Ehrenzweig, *Choice of Law: Current Doctrine and “True Rules,”* 49 CAL. L. REV. 240 (1961). Ehrenzweig argued, for example, that in choosing law to determine the validity of contracts, the “true rule” manifest in judicial opinions was not “the law of the place of contracting,” but rather a “rule of validation.” Ehrenzweig, TREATISE, *supra*, at 465.

This mirror for magistrates would, indeed, be an improving one. It is a notable feature of the book, accounting for not a little of its depth and dimensionality, that Symeonides, conservative as he is, is also confessedly and not ungratefully dependent on the basic insights and concepts of the interest analysts. To be sure, this kind of pragmatic, matured traditionalism is not unique to Symeonides. Interest analysis has been incorporated into all the modern methods in some degree. With few exceptions, even the least temperate of its critics no longer resists thinking and speaking interest-analytically. In short, interest analysis is the very language of contemporary conflicts theory, and although few courts can be said to have adopted it in any formal way, it often furnishes the language of courts that have formally adopted some other technique. Dean Symeonides, too, resorts to the vocabulary and methods of interest analysis, not only in wrestling with the contending modern theories, or in surveying fields of case law, but even when advocating a return to choice rules. Unhindered by ideological wrath in a very politicized field, Symeonides accepts and is content with the modern American framework for debate.

#### IV. IRRATIONAL AND DISCRIMINATORY CHOICES

From his empirical inquiries Symeonides discovers some rather surprising facts. We learn that consideration of policies and interests is *not* producing the disproportionate plaintiff victories that critics of interest analysis predicted — perhaps because a good number of judges never did get the hang of interest analysis. Nor do decisions that *are* interest-analytic exhibit the forum bias that Brainerd Currie thought made the best sense and that so exasperates his critics. As for the *Second Restatement*, although Dean Symeonides adjudges it at best a “mixed blessing,”<sup>48</sup> it has not led to disproportionate plaintiff victories either.

Findings of this kind can be riveting. They are especially so in the lectures displaying how American courts are handling false conflicts, true conflicts, and unprovided-for cases. Symeonides discovers, for example, that in fully two thirds of the unprovided-for cases surveyed by him, the court applied the defendant-protecting law of an uninterested state. *Fully two thirds*. Symeonides points out that these **103 Mich. L. Rev. 1650** appalling results were achieved through the *Second Restatement* or other approaches that led judges to believe that they were not authorized to analyze governmental interests.<sup>49</sup> He notes that, even when the defendant-favoring law was forum law, forum law was applied not as residual law, as Currie recommended, but — in the absence of significant contacts at the forum — on the basis of *insignificant* contacts. Sometimes the law of the uninterested place of injury was chosen to protect the tortfeasor — a thoroughly irrational result, since, as we have seen, the general public policy of a place of injury would undoubtedly be better served by application of the remedial law available at the forum. Intriguingly, Symeonides reports these sorts of findings with full comprehension, but *without dismay*.

Dean Symeonides might regret such results — we do not know whether he does or not — as falling short of what he would call “material justice.” But I read him as *satisfied* by such results — that to him they are examples of what he would call, with the late David Cavers, “conflicts

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48. See also Symeon C. Symeonides, The Need for a Third Conflicts Restatement (And a Proposal for Tort Conflicts), 75 IND. L. J. 437 (2000).

49. For the misleading mechanics of *Restatement (Second)*, see Weinberg, *A Structural Revision*, *supra* note 27, at 477-82.

justice.”<sup>50</sup> In his thinking, such results may well be hopeful signs that principle can prevail over mere sympathy. The forum, in his view, must be neutral, not “selfish” and “unilateral.” These cautionary ideas become even more imperative, in his view, when the forum is an uninterested one. Indeed, an aggregation of contacts, albeit insignificant contacts, in Symeonides’ view, is useful in otherwise unprovided-for cases. Even insignificant contacts can serve as neutral tie-breakers, leading courts away from the “selfish” and “unilateral” law of the forum in half the cases. It is the clincher to an argument of this kind that in fact courts do seem to be acting under the impress of such ideas. As Symeonides’ charts suggest, courts seem to be deciding conflicts cases of all kinds more by unreasoned contact-counting than anything else. But Symeonides is not in the business of criticizing these cases. To him, they speak volumes. These cases, just or unjust, rational or not, are *authority*.

Of course, as Symeonides is fully aware, application of the defendant-protecting law of an uninterested state in a case of tort is irrational and unjust. Such a result is obviously a denial of material justice. But I part company with Symeonides when he does not find such a result too irrational to fit his idea of *conflicts* justice. Courts must presume the truth of a complaint in hearing argument on a choice-of-law issue bearing on ultimate liability. So when a court **103 Mich. L. Rev. 1651** chooses the defendant-protecting law of an uninterested state, a presumptively meritorious claim is defeated *for no reason*. The best that can be said of a tort case applying the defendant-protecting law of an uninterested state is that at least the defense was good under *some* state’s law, and at least the defendant with this plausible though irrelevant defense was protected from having to pay for his tort, with whatever social benefits inhere in allowing defendants or their insurers to keep their money. But I cannot help thinking it unwise to protect the defendant if his own state would not. On the other hand, the plaintiff-favoring law in an unprovided-for case is likely, at least, to reflect general policies both states share. Although no law “applies” in an unprovided-for case, all states share the general policies underlying tort law, policies favoring compensation, deterrence, and risk-spreading. Defenses, on the other hand, often embody special local concerns that may not reflect substantive policies that are as widely shared.<sup>51</sup>

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50. David F. Cavers, *A Critique of the Choice-of-Law Problem: Addendum 1972*, 17 HARV. INT’L L. J. 651, 652-55 (1976) (clarifying his concern as one for “conflicts justice”). Cavers had originally urged, quite to the contrary, the higher ideal of “justice in the individual case.” See David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 193, 198-200 (1933).

51. Procedural defenses and other defenses off the merits typically do embody somewhat shared policies; but their protections of nonresident defendants are at best incidental to their forum-protecting or forum-enhancing purposes. When a statute of limitations is applied *qua* forum law, it is properly applied either to protect the forum from stale claims or, arguably, to keep the door open to suit by residents. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 142(g) (permitting the forum to apply its own longer statute unless the forum has little interest in doing so). At the 1991 meeting of the ALI I moved an amendment from the floor, that present section 142(g) be added to section 142, and this motion carried. I argued that it would be anomalous if the forum could apply its own longer statute only to benefit *nonresident* plaintiffs. See PROCEEDINGS OF THE AMERICAN LAW INSTITUTE, 69TH ANNUAL MEETING, at 211-216 (1992). The Supreme Court has held that the forum always has constitutional power over the limitation of actions, *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988). See Louise Weinberg, *Choosing Law: The Limitations Debates*, 1991 U. ILL. L. REV. 683. *But see, e.g.*, Kathryn F. Nelson, *The 1990 Federal “Fallback” Statute of Limitations: Limitations by Default*, 72 NEB. L. REV. 454 (1993) (criticizing § 142(g) as making it impossible for defendants to plan since they cannot tell when they have achieved repose). This criticism of the forum’s longer statute subordinates the plaintiff’s substantive claim to the defendant’s alleged need to plan, without taking into account that the defendant typically does not plan a tort, would not do so depending on the length of some preferred statute of limitations, and that the defendant’s insurer has actuarial expertise and a full opportunity



Why is irrationality in choice of law so intractable? Is there not some general but principled guide that will enable judges to decide cases with less damage? A just result is not a bad thing. Result-orientedness, unprincipled as it is said to be, may not be as bad as the unjust results avoided by it.<sup>52</sup> Yet even if we were willing to accept a rule that reads, “Let the plaintiff have a chance to prove her case,” or, “Law at the plaintiff’s option,” we still might not have found a rule **103 Mich. L. Rev. 1652** that would produce material justice in all cases. Some time ago I tried to come to grips with the problem of immoral law.<sup>53</sup> I posited intolerable law, the law of slavery, in a contact state. I found no standard rule of choice that could be relied on to avoid outcomes that seemed to me plainly immoral. The problem inheres in the very idea of a body of rules governing choices of law. Superimposing an abstract choice-of-law process upon a case can insulate the mind from needful thought. It can also insulate the mind from the plight of the parties, the substance of law, and the requisites of justice in the individual case. As the legal realists warned, the more principled the application the more arbitrary the likely result.

## V. THE LAW OF THE FORUM

Of course, unfettered judicial discretion is hardly a palatable or even workable option. Some guidance is usually welcome. Even a seemingly inflexible rule can offer political cover in a difficult situation, or an escape from it. A default position can be particularly useful. Default rules are invented to resolve the problem of the insoluble problem in a way that will do least harm.

As far as a default position is concerned, it might not be a bad idea to return to Brainerd Currie’s original recommendation of residual forum law for the insoluble choice-of-law problem. Although forum law must be resisted in an immoral polity, forum law in America today ought to work. It certainly ought to work for Dean Symeonides, if only because, historically, forum law has been the overwhelming judicial choice. After all, judges are sworn to enforce and uphold their own states’ laws. We can hang on to that.

Other vital needs are served by forum law in every category of cases. The court applying its own law, even the uninterested court, at least vindicates policies declared in its own legislation or case law. Moreover, the court applying its own law avoids the discriminations that departures from forum law must entail.<sup>54</sup> (Symeonides believes that arguments about discrimination are specious. He says that those arguments have been overcome, but he offers no authority for that

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*ex ante* to take into consideration the longest likely period of repose. Moreover, Nelson’s view would permit defendants to carry their statute of limitations about with them wherever they commit their torts. Yet the policy of repose for the defendant would be of scant concern to the forum *qua* forum, being more particularly a concern of the state in which the defendant is based, whether at the forum or another state.

52. See generally Louise Weinberg, *Against Comity*, 80 GEO. L. J. 53 (1991); Weinberg, *On Departing from Forum Law*, *supra* note 36.

53. Louise Weinberg, *Methodological Interventions and the Slavery Cases, or, Night-Thoughts of a Legal Realist*, 56 MD. L. REV. 1316 (1997). For more well-known efforts, see, e.g., Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* (1981); Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (1975); A. E. Keir Nash, *In re Radical Interpretations of American Law: The Relation of Law and History*, 82 MICH. L. REV. 274 (1983); John Phillip Reid, *Lessons of Lumpkin: A Review of Recent Literature on Law, Comity, and the Impending Crisis*, 23 WM. & MARY L. REV. 571 (1982); Note, *American Slavery and the Conflict of Laws*, 71 COLUM. L. REV. 74, 75 (1971).

54. See Weinberg, *On Departing from Forum Law*, *supra* note 36.

**103 Mich. L. Rev. 1653** view, and I am unaware of any<sup>55</sup>.) Although, of course, in a true conflict case, both states have constitutional power, the forum that departs from its own presumably remedial law<sup>56</sup> in a true conflict case may be discriminating between two classes of its resident plaintiffs. It is permitting residents injured by residents to recover, but denying relief to residents injured by nonresidents, even though both classes of defendants are within the forum's jurisdiction *ex hypothesi*. This discrimination will seem particularly arbitrary where the nonresident defendant has entered the forum state and injured the resident plaintiff at her home there. Moreover, the forum departing from its own remedial law in a true conflict case is also discriminating against its resident defendants, requiring them to pay for their torts in wholly domestic cases, while permitting nonresident defendants within its jurisdiction to escape liability for the same torts. Of course, these choices of law are not arbitrary or irrational in a true conflict case. But they are discriminatory, since the tortfeasor's nonresidence is irrelevant to the remedial interests of the forum. Consider also that plaintiffs are likely to litigate at home, an observation Dean Symeonides finds substantiated statistically, and that forum law is very likely to be constitutional if it favors the resident plaintiff, since she is likely to be within its intended protections.

Although arguments supporting choices of forum law, or law that frankly favors the plaintiff, would not appeal to Dean Symeonides' **103 Mich. L. Rev. 1654** sense of fair play and evenhandedness, there are other good reasons, beyond the need to avoid discrimination, that should counsel courts to steer clear of defendant-favoring law when plaintiff-favoring law is available. Systematic choices of plaintiff-favoring law are better public policy than systematic choices of defendant-favoring law. When defendants engage in risky activities in reliance upon lax standards in their home states, shared public policies (favoring safety and fair dealing) would seem better served not by indulging such defendants in their race to the regulatory bottom, but rather by permitting plaintiffs injured by those activities to seek enforcement of higher legal standards. It is also sound public policy, universally recognized in American tort law, that innocent plaintiffs not bear the risk of their own injuries. Moreover, a court denying its own law

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55. See, e.g., Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 277-78 (1992) (acknowledging that, at best, judges can choose only between the lesser of two kinds of discrimination, interstate discrimination caused by interest analysis and intrastate discrimination caused by territorialism). As might be expected from an unreconstructed territorialist, Professor Laycock chooses intrastate discrimination as the lesser of two evils, and relies on the fact that the Founders did not provide against intrastate discrimination. Certainly there is no explicit equal protection clause in the Fifth Amendment, and even if there had been, there was no mechanism for making the Bill of Rights applicable to the states. The Privileges and Immunities Clause of Article IV deals only with interstate discrimination. But given the need to include the slave states in the Union, the Founders *could not* give us an equal protection clause. For the same reason, the Founders left civil rights vis-à-vis the states generally in the hands of the states themselves. Article IV aside, the national Constitution was not addressed to intrastate governance. Thus, the want of an equal protection clause, and indeed, the want of a Fourteenth Amendment, affords scant support for Laycock's inference that the Founders "did not fear" intrastate discrimination. Rather, it was an issue they could not and did not address. I should add that the founding generation did not have the advantage of modern choice-of-law methods. Creatures of the Enlightenment that they were, I should think judges of the Founding era would have preferred interest analysis to territorialism, since territorialism relies only on mechanical formalae, whatever their virtues, whereas interest analysis relies on reason. See, e.g., Chief Justice Marshall's understanding in 1803, *supra* note 30, of the need for rational construction of law before it can be applied.

56. I posit remedial law at the forum because the plaintiff has the choice of forum. But of course, it often happens that the plaintiff, with little real opportunity for forum shopping, sues at home, although the law of the forum is unfavorable to her, relying on the law of some other contact state.

to the suitor who has come to it for relief risks contributing to a regime of global lawlessness. For surely global lawlessness must follow from endemic non-enforcement of law and widespread denials of access to justice.<sup>57</sup> Thus, the forum generally will have sound reasons to apply its own law. And forum law is likely to favor the plaintiff, since the forum is the plaintiff's to choose. Currie's recommendation of the law of the forum as the preferred residual choice seems right, although he was diplomatic enough and conservative enough not to give these sorts of reasons.

The argument is sometimes made that the defendant is unfairly surprised and cannot adequately structure its enterprise if it is to be stripped of its defenses under an interested state's laws. Yet a defendant's insurer is the paradigmatic actuarial expert, and has every opportunity to structure the insured's coverage accordingly. It has every opportunity to adjust the defendant's premiums to take into account this and other risks. Given the near universality of liability insurance among suable defendants, it is somewhat unreal to speak of "unfair surprise" to tort defendants. They have insured against liability precisely because they anticipate it under *some* state's laws.

But what should be the result when the forum has unfavorable law, but the plaintiff must sue there? This is commonly the situation in the unprovided-for case. Should the forum in an unprovided-for case depart from its own defendant-favoring law to let the plaintiff prove her case? Even such a departure might be discriminatory. When the plaintiff must sue at home, it would be discriminatory to permit her to recover if the other state would let her, if the forum would deny relief to plaintiffs in wholly domestic cases. A departure from defendant- **103 Mich. L. Rev. 1655** favoring forum law would also discriminate between defendants in domestic cases, who are protected from liability, and defendants in conflicts cases, who are not. The forum can escape this bind by frankly acknowledging that the other state's remedial law is "better" law, and adopting it as its own.<sup>58</sup>

## VI. THE "LOSS OF INNOCENCE"

How does Symeonides come out on this most interesting of conflicts questions? What is his preferred default position for otherwise insoluble cases? Here, his thinking may have been clouded by a certain over-refinement. Much of Symeonides' book is organized to distinguish between "loss-distributing" and "conduct-regulating" law.<sup>59</sup> For example, compensatory damages, he explains, are "loss-distributing," and properly the business of the place of injury or the plaintiff's residence. Punitive damages, on the other hand, are "conduct regulating," and properly the business of the place of wrongful conduct. Symeonides has been among the important popularizers of this distinction, but it is surprising that he has taken it so seriously. Professor Little recently described this sort of distinction, correctly, I think, as spurious and

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57. I argue this in Weinberg, *Against Comity*, supra note 52. For relevant recent discussion see, e.g., Robert Wai, *Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization*, 40 COLUM. J. TRANSNAT'L L. J. 209 (2002); Edward T. Swaine, *The Local Law of Global Antitrust*, 43 WM. & MARY L. REV. 627 (2001); Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L. J. 1 (1991).

58. See Weinberg, *A Structural Revision*, supra note 27, at 501-03 (arguing that it is better judicial process for courts applying non-forum law to "adopt" rather than "choose" it).

59. See also La. Civ. Code art. 3544; Symeon Symeonides, *Louisiana's New Law of Choice of Law for Tort Conflicts: An Exegesis*, 66 TUL. L. REV. 677, 699, 715-31 (1992).

“hair-splitting.”<sup>60</sup> Symeonides appears to have been influenced by the doubtful — even embarrassingly wrong — New York case that launched these categories, *Schultz v. Boy Scouts of America*.<sup>61</sup> In that case, the court was so blinded by its characterization of the defense of charitable immunity as “loss-allocating,” that, in the midst of an expensive “I love New York” campaign intended to attract tourists, the highest court in New York, in effect, declared open season on visiting Boy Scouts. Disasters like this occur, as the legal realists warned, when we are overly abstract about choosing law. It is an exercise in specious reasoning to purport to choose between laws we have pigeon-holed in advance. That is the way law was chosen under the *First Restatement*, a **103 Mich. L. Rev. 1656** process the late David Cavers derided as “jurisdiction-selecting.”<sup>62</sup> Jurisdiction-selecting rules wind up choosing places, not laws. The danger in choosing territory instead of law lies in allocating governing power to a state before we know what that state’s law *is*,<sup>63</sup> and, in so doing, insulating the choice from both the living case and the operation of reason.

The mistake comes back to haunt Symeonides in his discussion of products liability cases. In charting his products liability conflicts,<sup>64</sup> Symeonides reveals to us that in more than half the cases studied, courts are choosing law that favors defendants. In other words, the makers and distributors of defective products, in more than half the cases, contrary to the most basic policies underlying products liability law, are succeeding in shifting the social cost of the injuries they cause to the injured and their dependents. Symeonides is struck by these unlikely findings. He suggests that a newly conservative judiciary may be partly responsible. He thinks that without modern conflicts methods the defendant tilt might be even heavier. Defendant-favoring outcomes, he supposes, might also to some extent be a consequence of the tort reform movement.

But then, swinging into his discussion of products cases, Symeonides situates products liability outside the ordinary law of tort. Ordinary tort law, he explains, is “conduct-regulating,” while products liability is “loss-distributing.” And indeed, the distinction makes sense, considered as an abstract proposition. Since products liability in our time has generally not been based on fault, it seems unconvincing to argue that it is *fairer* to place the risk of injury on innocent defendants than on innocent plaintiffs. It seems more convincing to ground products liability on risk-spreading policies, sensibly allocating to defendants the burden of insuring,

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60. Laura E. Little, Hairsplitting and Complexity in Conflict of Laws: The Paradox of Formalism, 37 U.C. DAVIS L. REV. 925, 934 (2004). See also, e.g., William A. Reppy, Jr., Codifying Interest Analysis in the Torts Chapter of a New Conflicts Restatement, 75 IND. L. J. 591, 594 (2000).

61. 480 N.E.2d 679, 686 (N.Y. 1985) (applying the charitable immunity law of New Jersey to defeat the wrongful death claim of the family of a child who committed suicide after being sexually abused on a scouting trip in New York, although under New York law the organization was not immune, in part on the ground that charitable immunity is loss-distributing rather than conduct-regulating).

62. See David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 180 (1933).

63. Jurisdiction-selecting appears to be unavoidable when the conflict is between federal and state governance. The problem arises from the exigencies of Erie on the one hand and the Supremacy Clause on the other. See generally Joseph P. Bauer, *The Erie Doctrine Revisited: How a Conflicts Perspective Can Aid the Analysis*, 74 NOTRE DAME L. REV. 1235 (1999); Louise Weinberg, *The Federal-State Conflict of Laws: “Actual” Conflicts*, 70 TEX. L. REV. 1743 (1992).

64. See also Symeon C. Symeonides, Choice of Law for Products Liability: The 1990s and Beyond, 78 TUL. L. REV. 1247 (2004).

especially since defendants are in a better position to spread the costs of insuring. Such loss-shifting and risk-spreading policies, though contested, are well understood and widely shared.

So far so good. But what happens when a true conflict is about punitive damages in a products case? That was the problem before the federal court in the Eastern District of Pennsylvania in 1996, in *Kelly* **103 Mich. L. Rev. 1657** v. *Ford Motor Co.*<sup>65</sup> *Kelly* was a products case in which punitive damages were sought for a wrongful death. The decedent was killed in her home state, Pennsylvania, while driving a defective car she had bought there. The only out-of-state feature of the case was that the car had been designed and manufactured in Michigan. Under Pennsylvania law, the plaintiffs were entitled to punitive damages. Under Michigan law, only compensatory damages were available. The federal diversity court, sitting in Pennsylvania, opined, without consulting Pennsylvania policy on the question, that punitive damages are excessive and destabilizing to the financial stability of defendants. The court then held conclusorily that Pennsylvania would choose Michigan law on this issue, thus denying punitive damages to the plaintiff. The court cited no authority for the proposition that in a products case Pennsylvania would choose foreign law to avoid imposing punitive damages on an egregiously negligent defendant who has injured a Pennsylvanian on Pennsylvania roads. But Dean Symeonides, in a startlingly revelatory passage, praises the *Kelly* court for resisting the “all-too-common temptation” to apply forum law to favor the local bereaved.

This sort of rigor, a resistance to retributive justice (or, in other cases, even to compassion), can have its seductions, even for very fair-minded people. There are those for whom *deference* and *comity* are obviously to be preferred to a forum’s “selfish” interests. To be sure, Michigan, as the place of manufacture, has an interest in protecting its defendant car makers from non-compensatory damages, in order to protect its automotive industry without denying full compensatory damages to those injured by the industry’s products. This makes the case a true conflict, but it does not *decide* the case. The fact that Michigan is an interested state does not strip Pennsylvania of its own policies and interests. As the place of injury and the place where its citizen was killed, Pennsylvania had every interest in punishment and deterrence, interests based on road safety policies widely shared with other states. Indeed, it seems odd that the manufacturer in *Kelly* should escape the force of Pennsylvania’s usual punitive damages rule because it *sent* its instrument of death into Pennsylvania instead of manufacturing it there. The federal district court also had a process interest in evenhandedly affording the Pennsylvania family the same full measure of Pennsylvania’s retributive justice that Pennsylvania courts meted out in other cases. (I pause to note with some amusement that all but one of the affiliating contacts with the case were in Pennsylvania — a bit of old-fashioned contact-counting of the sort that Symeonides is generally content to use as a tie-breaker.)

**103 Mich. L. Rev. 1658** Was Symeonides’ defense of *Kelly* a slip? Well, yes and no. Symeonides believes that punitive damages are “conduct-regulating” and thus are the proper business of the place of conduct. On the other hand, *Kelly* was a products case, and for Symeonides, products cases are cases of “loss distribution,” not “conduct regulation.” Loss distribution, for Symeonides, is the proper business of the place where the loss was suffered. All this puts Symeonides in the mind-boggling position of attributing conduct-regulating power in *Kelly* to the non-conduct-regulating state.

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65. *Kelly v. Ford Motor Co.*, 933 F. Supp. 465 (E.D. Pa. 1996).

*Kelly* can be evaluated without tying oneself into knots of that kind. In thinking about *Kelly*, nothing should turn on the fact that it is a products case, since it is hardly a no-fault case. The issue was punitive damages, after all, and punitive damages are awarded only on proof of fault — egregious fault. “Egregious fault,” in fact, is Pennsylvania’s own test for punitive damages.<sup>66</sup> It appears that Pennsylvania, both as place of injury and place where the decedent resided, had conduct-regulating interests at least as compelling as Michigan’s, wherever the actionable conduct occurred. Egregiously causing the death of a Pennsylvania woman on a Pennsylvania road is certainly conduct that cries out for punitive damages. But on this issue it is hard to see why the place of manufacture, for all its power in its own courts, should trump the place of injury in *its* courts.<sup>67</sup> As the place of manufacture, Michigan did and does have general regulatory interests. But, in *Kelly*, Michigan’s policy was *not* to regulate its manufacturers of egregiously faulty cars, beyond their ordinary exposure to compensatory damages. No “regulatory” purpose at all can be attributed to Michigan vis-à-vis punitive damages. Regulating the Ford Motor Company to discourage egregious fault was Michigan’s prerogative, but Michigan failed to exercise it. All we can reasonably say is that Michigan law is intended to protect its local automotive industry from all but strictly compensatory liabilities — even, or rather, *especially*, in cases of egregious fault on the industry’s part. Of course, Michigan may constitutionally protect its resident companies from punitive damages in its own courts. But it is hard to see why this Michigan policy, which seems about as “selfish” as it could be short of denying damages altogether, should have any extraterritorial effect at all. Pennsylvania was under no obligation to subordinate its own law and policies to another state’s law and **103 Mich. L. Rev. 1659** policies, certainly not to another state’s interests in protecting its local industry’s egregious wrongdoing, and certainly not where the result is an unsafe condition on Pennsylvania’s roads, and the death of a Pennsylvanian.

By not falling into the “temptation” of allowing the plaintiffs access to punitive damages, the federal court in *Kelly* failed to impress upon the defendant the gravity of conduct that caused a death far from the place of manufacture; failed to punish the defendant for it; failed to deter future such conduct with foreseeable impact on road safety; and failed to pressure the defendant to pay the costs of maintaining better standards. These are concerns Pennsylvania shares with many states, even if subordinated in Michigan. Dean Symeonides deplors “unilateralism,” a vice he attributes to modern methods in choice of law,<sup>68</sup> and esteems “multilateralism”<sup>69</sup> instead. But would not “multilateralism” have been better served in *Kelly* by vindication of these multistate policies than by deference to Michigan’s “selfish” interest in protecting its industry’s poor manufacturing practices and unsafe designs? The federal court in Pennsylvania, it appears, fell into the “temptation” of deferring to defendant-favoring law, and in so doing flouted the laws

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66. See, e.g., *Martin v. Johns-Manville Corp.*, 494 A.2d 1088, 1096 (Pa. 1985) (holding under Pennsylvania law that punitive damages will be imposed for egregious misconduct).

67. See *Nevada v. Hall*, 440 U.S. 410 (1979) (Rehnquist, J.) (holding, in a California case in which a California plaintiff was injured in California by a vehicle driven by a driver for the University of Nevada, that California had legitimate governmental interests such that it could constitutionally apply its no-sovereign-immunity rule to a sister state, Nevada, even though Nevada was substantially immune under its own law).

68. Dean Symeonides also spells out his argument favoring “multilateralism” over “unilateralism” in Symeonides C. Symeonides, *American Choice of Law at the Dawn of the 21st Century*, 37 WILLAMETTE L. REV. 1 (2001).

69. For recent comment on arguments of this class, see generally Stanley E. Cox, *Substantive, Multilateral, and Unilateral Choice-of-Law Approaches*, 37 WILLAMETTE L. REV. 171 (2001).

of the state in which it sat.<sup>70</sup> It did so without the rigor of the required vicarious analysis on the merits, instead concealing this departure from forum law and policy behind a veil of conflicts verbiage.<sup>71</sup> Had the federal court done its work on the merits, **103 Mich. L. Rev. 1660** it would have identified and vindicated Pennsylvania's policy favoring the punishment of egregious fault in causing a fatal tort to its citizens on its roads. By so doing it would have avoided discriminating irrationally between two classes of Pennsylvania's decedents — those who could recover because the product that killed them at home in Pennsylvania was made in Pennsylvania, and those who could not because the product that killed them at home in Pennsylvania was sent into Pennsylvania.<sup>72</sup>

The key to the riddle of Symeonides' satisfaction with *Kelly* is that, for him, modernist thinking about conflicts is somewhat to be regretted. Modernist thinking has been a letting-go of what Symeonides believes to be the highest ideal of judicial process: neutrality. He mourns this loss of apparent neutrality as a "loss of innocence."<sup>73</sup> Yet as Symeonides continues his deep conversation with himself, the reader begins to appreciate how much of the author's thinking is informed by a lively consciousness of the legal realists' message, and by the humane view that justice as a general rule *ought* to triumph. The excitement of the book, its building interest, is in Symeonides' continuing inner struggle with these conflicting ideals. He personifies in himself the underlying clash of values that is at the heart of the choice-of-law problem.

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70. *Cf.* *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941) (holding that the obligation of a federal district court applying state law is to apply the whole law of the state, including its choice rules). The Pennsylvania Supreme Court has not spoken to the issue of choice of law in products cases, but lower Pennsylvania courts in products cases evidently are choosing the law of the plaintiff's residence and not the place of manufacture. See, e.g., *Lewis v. Bayer AG*, 2004 WL 1146692 (Pa. Com. Pl. 2004) (not reported in A.2d) (holding in a class action that liability for statin-caused health problems would be governed by the law of each plaintiff's residence). *Cf.* *Nevada v. Hall*, 440 U.S. 410, 424 (1979): "In this case, California's interest is the...substantial one of providing full protection to those who are injured on its highways through the negligence of both residents and nonresidents." (internal quotations and citations omitted). Pennsylvania's retributive policy might even have gained force from the fact that the defendant's own state, the place of conduct, would not itself penalize the company's egregious fault — especially if a Pennsylvania court would have taken notice of the fact that over 40,000 Americans die in traffic accidents every year, hundreds of Pennsylvanians among them. Nor is there any indication in Pennsylvania cases that Pennsylvania shares the postmodern view that punitive damages are disfavored. The conclusion seems inescapable that the federal court in *Kelly* decided the case in gross disregard of the forum state's interests.

71. Had the court in *Kelly* been a state court, after the departure from Pennsylvania law Pennsylvania's policy would have been perceived to have been eroded, and might no longer have been describable unequivocally as favoring punitive damages for egregious fault. See *Weinberg, A Structural Revision*, *supra* note 27, at 502 (arguing that departures from forum law indicate the forum's preference for foreign law; suggesting that "the cleaner, more honest approach would be for the forum to "adopt" rather than "choose" another state's law when that state's law is perceived to be "better"); *Weinberg, On Departing from Forum Law*, *supra* note 36, at 601 ("a court that has found the law of a sister state to be 'better' than its own...has inescapably discerned its own current policy. Once that happens, the cleaner, more direct approach would be to make a change in local law. Even a statutory rule may be interpreted to conform to existing local policy, although this latter option may not always be practicable; but setting to one side the stumbling-block of outworn or wrong-headed legislation, identification of 'better law' in a sister state will inevitably suggest to the forum the advisability of adopting the sister state's view as its own.").

72. See *supra* note 36 and accompanying text.

73. Symeonides, *American Choice of Law*, *supra* note 68, at 45-46.

## VII. “SMART RULES” AND “CONFLICTS JUSTICE”

Arguing his way toward his ultimate proposal, Symeonides tentatively considers the possible advantages of rules that point toward law that is substantively “better.” He is keenly aware of choice-of-law policies counseling avoidance of substandard law, law of the kind he fell into the trap of approving in his discussion of *Kelly*.<sup>74</sup> Here, in this momentary dalliance with “better law,” he is evidently **103 Mich. L. Rev. 1661** influenced by the work of the late Friedrich Juenger.<sup>75</sup> I am not quite sure how Juenger’s view differs from the “better law” approach proposed by the late Professor Leflar.<sup>76</sup> For both writers, in the end it is plaintiff-favoring law that is “better,” and defenses that tend to be “substandard.” “Substandard” was Juenger’s word for lax regulatory standards and special local defenses.

Symeonides favorably contrasts Juenger’s proposal of rules pointing to quality law with the usual sorts of rules that point to *places*, without regard to the quality of the law at the chosen place. Juenger’s rules do succeed in escaping the opprobrium of being “jurisdiction-selecting.”<sup>77</sup> Dean Symeonides acknowledges that his own conflicts codes are in their nature “jurisdiction-selecting,” but explains that they have been *influenced* by “better law” thinking. Yet he also confesses unease about the “better law” project. Which laws are better? Characteristically avoiding the political aspect of the question, Symeonides simply points out that cataloguing all laws on a scale of intrinsic merit would be a hopeless task. But is discerning better law really so hopeless a task? Like many conservatives, Symeonides does not believe, or perhaps does not want to believe, the implicit message in both Leflar’s and Juenger’s work, that, generally, plaintiff-favoring law is “better.” Their insight gains force from another mid-twentieth century modernist insight, that the tort plaintiff is, in effect, an agent of enforcement of law — a private attorney general.<sup>78</sup> These modernist perceptions, old-fashioned as they may seem now, are not the less sound. The question, for Symeonides, becomes whether the vices of modernism outweigh these virtues.

Symeonides presents an interesting table of the changes that the conflicts revolution has wrought. He identifies contrasting characteristic features of the old-style “rules” and new-style “approaches.” As we have seen, he thinks rules tend to be “multilateral,” appreciative of the concerns of other sovereigns, while modern approaches, with their emphasis on the forum’s interests, are “unilateral.” Rules offer “certainty,” the new approaches “flexibility.” He contrasts the “territoriality” of the rules with the “non-territoriality” of modern approaches, and envisions a new role for **103 Mich. L. Rev. 1662** territorialism in choice of law. He ascribes to forum preference a near-tribalism, and associates it with our “loss of innocence.” Even so, he ventures to suggest that, taken all in all, the conflicts revolution has been a good thing. In particular, he

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74. But see the close of note 70, *supra*, for the possibility that in today’s conservative climate the law considered “better” in the past might be considered “substandard” today, and vice versa.

75. See FRIEDRICH K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE (1993); Russell J. Weintraub, *Choosing Law with an Eye on the Prize*, 15 MICH. J. INT’L L. J. 705 (1994) (reviewing Juenger).

76. See Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 282-304 (1966).

77. For the vice of “jurisdiction-selecting rules,” see *supra* text accompanying note 62.

78. See, e.g., *Newman v. Piggie Park Enter., Inc.*, 390 U.S. 400, 402 (1968) (per curiam) (“When a plaintiff brings an action... he... does so not for himself alone but also as a ‘private attorney general,’ vindicating a policy....” (citation omitted)).



acknowledges that “approaches,” unlike rules, need not fall into the trap of being “jurisdiction-selecting” rather than “law-selecting.” But in the end he admonishes us that the loss of innocence entailed in content-based examination of law should nevertheless limit the exercise.

Given the preponderance, then, as he sees it, of arguments more favorable to “rules,” Symeonides comes down predictably on the side of “rules.” He believes the pendulum has swung too far in the direction of flexibility and away from certainty. Agreeing with European critics, he feels that the American conflicts revolution has gone on too long and it is time for it to stabilize. What is needed, he concludes, is a way of employing the best of both techniques. The answer must be some better combination of the new with the old.

His ultimate conclusion, which he shares with some modernists, is that it ought to be possible now to write “smart” rules that will codify what is best about the American conflicts revolution, rules that will take into account state policies and interests, and yet will guide the judges toward the true rules made manifest in their actual work.<sup>79</sup> He has aspired to those sorts of goals in his own codifications. He urges judges to overcome their “anti-rule syndrome.” As for the kinds of rules he would propose, he favors capacious, complex rules, that bring to bear a multitude of factors and influences — contingent rules with fallback positions, sometimes allowing the parties a degree of influence upon the choice.<sup>80</sup> One need not agree with Symeonides’ preference for detailed codifications of conflicts law to find his argument interesting, fair-minded, and thoughtful. Symeonides’ rules will be complex because they will be sympathetic articulations of considerations gleaned from a lifetime of study of actual cases.

**103 Mich. L. Rev. 1663** But always the problem, for every choice-of-law proposal, however well-intended, however closely worked, is the question whether we are willing to give up on justice — whether we are willing to be satisfied with “conflicts justice,” as David Cavers tried to be,<sup>81</sup> and as Dean Symeonides is trying to be. We arrive, then, with Symeonides, at the heart of

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79. This is also the 1965 proposal of David Cavers, who called for “a body of rules, principles and standards of a new sort, developed through the workings of stare decisis and the combined efforts of courts and scholars....” DAVID F. CAVERS, *THE CHOICE-OF-LAW PROCESS* 78 (1965).

80. These ideas share some of the aspirations, virtues, and (alas) deficiencies of the widely ignored rule proposed for mass torts in AM. LAW INST., *COMPLEX LITIGATION PROJECT* (Proposed Final Draft, 1993), which received Symeonides’ strong support. The author of the proposed rule was Mary Kay Kane. I do not know to what extent Symeonides’ thinking may have influenced Kane’s proposal and vice versa; her choice rule for complex cases is like Symeonides’ codes in its hierarchy of contingencies and its contact counting. On probable reasons for the unenthusiastic reception of Kane’s effort, see, e.g., Gene R. Shreve, *Reform Aspirations of the Complex Litigation Project*, 54 LA. L. REV. 1139 (1994); Louise Weinberg, *Mass Torts at the Neutral Forum: A Critical Analysis of the ALI’s Proposed Choice Rule*, 56 ALA. L. REV. 807 (1993). Yet these critiques fail to account for the successful adoptions of Symeonides’ codes, which Kane’s rule resembles.

81. See CAVERS, *THE CHOICE-OF-LAW PROCESS*, *supra* note 79, at 86. A personal note: I should acknowledge that, although I was not the beneficiary of Cavers’ (or anybody else’s) formal conflicts course, I was Cavers’ student (in an irrelevant seminar). Years later, in one of his letters, he sent a kind but dispirited warning that “we are in a dying field.” I remember trying to cheer him up, pointing out in reply how much work needed to be done with new problems and emerging technologies, and ending, “These are great days!” I like to think this got him back to work. His last articles were about regulatory problems in the atomic age. He would have enjoyed digging into today’s problems of globalization, the internet, terrorism. See, e.g., Mathias Reimann, *The Yahoo! Case and Conflict of Laws in the Cyberspace*, 24 MICH. J. INT’L L. J. 663 (2003); Noah Feldman, *Choices of Law, Choices of War*, 25 HARV. J. L. & PUB. POL’Y 457 (2002); Joel P. Trachtman, *Economic Analysis of Prescriptive Jurisdiction*, 42 VA. J. INT’L L. J. 1 (2001). Just before the end, Cavers sent me, out of the blue, a pile of fading reprints of his work. I still treasure these, although he must have bestowed similar treasures on other whippersnappers. I remain, with Dean Symeonides, one of Cavers’ many admirers. But Cavers’ ideal of “conflicts justice” has always been much less appealing to me than his original concern for “justice in the individual case.” For this earlier position, see Cavers, A

the matter. Must “conflicts justice” be attainable only at the expense of “material justice?” If so, in the face of these conflicting demands, must we be content merely with “conflicts justice?” What is the right path? Symeonides feels the tug of “material justice.” It is a powerful aspiration. But somewhat ruefully he confesses that we may have to be content with “conflicts justice.” We will be successful enough if we can achieve that. He understands and regrets that even his “smart” rules are likely in a given case to deny “material justice.”

Indeed, as the manipulated but much-praised case of *Milliken v. Pratt* reminds us, “rules,” however “smart,” cannot guarantee even the uniformity and certainty and predictability that Symeonides cares so much about. In tort cases — the focus of *The American Choice-of-Law Revolution* — it is difficult even to believe that predictability matters. For the most parts torts are unplanned by the parties, rendering predictability of the law that will be applied to the tort a non-issue at the time of the tort. And, as I have already remarked, tort cases are actuarially predicted by the tortfeasor’s insurer, an acknowledged expert with every opportunity to take into account the range of likely choices of law, and to set premiums accordingly.

**103 Mich. L. Rev. 1664** A more serious problem for Symeonides’ argument from the neutral virtues of predictability and uniformity arises from the fact that Symeonides’ effort is a modern as well as a traditional one. He will not be content simply to try to cabin the discretion of judges, but rather will try to maximize the appeal of his rules, incorporating insights from the modern approaches. He will consider the interests of the various concerned states. While cueing the rules to judicial experience, he will afford reason a modest corrective role. His previous codifications, which he does not here discuss, therefore characteristically consist of multifarious, compound, multi-phase, multi-inquiry rules, rich in content and complex in application. And therein lies the difficulty. “Smart” rules will, in their very complexity, undermine predictability, and with it uniformity and certainty. I cannot refrain from remembering Walter Wheeler Cook’s rather savage remark that those who demand that choice rules give us both uniformity and justice are like “babies crying for the moon.”<sup>82</sup>

Symeonides feels he has done the best he could, given the intractability of the problem and the nature of codifications. His sort of rules, he believes, will bring to the choice-of-law problem a needed *balance*. In Symeonides’ thinking, a “smart” rule would recover some part of our lost “innocence” by balancing the claims of reason, shared norms, and material justice against the claims of “conflicts justice,” or, more particularly, neutrality. Whether or not one agrees with him, Symeonides’ effort to justify his work on politically neutral grounds — his struggle to reclaim “innocence” — renders his work more broadly attractive and sympathetic than any less balanced view could be.

But why should reason, and shared norms, and justice, have to be “balanced” against any ideal, even neutrality? In attempting to find a balance between justice and evenhandedness, Symeonides’ rules could risk displacement of more genuine and weighty systemic goals. As to this, with the empiricist’s fatalism, Dean Symeonides can answer arguments from reason, shared

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*Critique of the Choice-of-Law Problem*, *supra* note 62. It was Cavers’ “justice in the individual case” that became Willis Reese’s lodestar. See Willis L. M. Reese, *Conflict of Laws and the Restatement Second*, LAW & CONTEMP. PROBS., Autumn 1963, at 690. Cavers came under heavy fire — as Reese later would — for the supposed nihilism of “justice in the individual case,” and, regrettably, backed off, explaining that he had always meant only “conflicts justice.” CAVERS, THE CHOICE-OF-LAW PROCESS, *supra* note 79, at 86. To the extent I believe this I hope I am wrong. As for Reese’s ordeal, see the account in Weinberg, *A Structural Revision*, *supra* note 27, at 483-90.

82. Walter Wheeler Cook, An Unpublished Chapter of the Logical and Legal Bases of the Conflict of Laws, 37 U. ILL. L. REV. 418, 420 (1943).

norms, and justice itself, with an argument from hard *fact*. He points out that in litigation today, some rules — like it or lump it — just *do* tend to trump reason, shared norms, and justice — in virtually all courts.

Symeonides gives the example of the law of the joint domicile of the parties. He shows that today the law of a joint domicile is almost always applied, no matter what the issue, no matter what the circumstances. An exception for law that is “conduct regulating”<sup>83</sup> is currently making inroads on the joint domicile, but the joint domicile retains much of its attraction for judges. Their curious faith in the joint **103 Mich. L. Rev. 1665** domicile seems to be a species of mass mistake, something like the ineradicable common belief that the Declaration of Independence is either in the Constitution, or is the Constitution.

There is indeed a pervasive faith in the soundness of governance of virtually any issue by the state in which both parties reside. This must be an accident of history. At the start of the interest-analysis revolution, interest analysts were naturally captivated by their newly discovered power to identify the most obviously foolish choices of law. These were cases in which the courts, not recognizing a false conflict, somehow managed to apply the law of the uninterested state rather than the interested one. These early wrong cases were cases configured like *Babcock v. Jackson*, the case in which New York famously declined to go on making that error.<sup>84</sup> In these sorts of cases both parties typically resided in the forum state, where the law favored the plaintiff, while the injury occurred in some other state, where the law favored the defendant. When the traditional place-of-injury rule was applied in these cases, the interested forum — the joint domicile of the parties — would wind up applying the non-remedial law of the uninterested place of injury, barring suit in its own courts between its own residents. Confronted with such unreason, academics in droves, and with them judges, became convinced that all joint domicile cases must be false conflicts.<sup>85</sup>

But it is simply not true that all joint domicile cases are false conflicts. If the place of injury is the forum state, with plaintiff-favoring law, and if the parties are joint domiciliaries of another state with defendant-favoring law, the case is a *true* conflict. In such a case the forum, as place of injury, has legitimate governmental interests in applying its own remedial law to benefit the nonresident plaintiff, notwithstanding the laws of the joint domicile, and therefore has constitutional power to do so. Of course the joint domicile always has constitutional power too, and may wield that power in its own courts to shield its defendant from its own plaintiff’s claim. But that fact does not strip another interested state of power in *its* courts. Moreover, the interested forum not only can, but *should* furnish the remedy to the nonresident plaintiff, if only to avoid a discriminatory departure from its own law.

A more difficult problem is presented by a true conflict case in which the forum is the joint domicile, and has *defendant*-favoring law. **103 Mich. L. Rev. 1666** The injury occurred in a sister state with plaintiff-favoring law. It is tempting to say that in a case with this configuration, a true conflict, the forum should choose the remedial law of the place of injury. In this way the joint domicile can vindicate its widely shared general remedial policies. After all, if the plaintiff

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83. See *Schultz v. Boy Scouts of Am.*, 480 N.E.2d 679, 684-85 (N.Y. 1985).

84. 230 N.Y.S.2d 114 (1962), rev’d, 191 N.E.2d 279 (N.Y. 1963) (Fuld, J.).

85. See, for example, the first of the three “rules” announced in *Neumeier v. Keuhner*, 286 N.E.2d 454, 457 (N.Y. 1972) (Fuld, C.J.). There, seeking to fashion choice-of-law rules for a class of statutory cases, Chief Judge Fuld first prescribed the law of the joint domicile for cases in which the place of injury was elsewhere. Fuld apparently assumed that all cases of this kind would be false conflicts.

wins on the choice-of-law issue she still must try to prove her case, and still can lose it. It seems better legal process to let her have her day in court and at least air her grievance. At the appellate level the argument for her is even stronger, since it would require upsetting a jury verdict in her favor to rule against her on the dispositive choice-of-law point. Even so, I believe that when the forum with defendant-favoring law is the joint-domicile, it should not flee from its own law to the law of the place of injury. To do so would be to discriminate between two similar classes of its resident defendants. It would be to strip the protections of its own law only from its defendants in cases where the injury occurred out of state, bestowing them only on defendants injured at home. It would also be to discriminate between two classes of its resident plaintiffs, furnishing relief only to those injured out of state, while withholding it from those injured at home. Departures from forum law are always problematic, not least because they tend to be discriminatory in just such ways. That the forum has departed from its own law to come to the rescue of the plaintiff does not diminish the discrimination the departure will entail. In true conflict cases, of course, the application of non-forum law would not be arbitrary or irrational. But in unprovided-for cases there can be no good reason for discriminatory departures from forum law. Again, the forum can sometimes avoid such dilemmas by frankly acknowledging that the other state's remedial law is "better," and adopting the better rule as its own. In any event, since plaintiffs generally do have the choice of forum, my hope is that forum preference and plaintiff preference by and large will function very similarly as a practical matter.<sup>86</sup>

#### VIII. AGAINST "NEUTRALITY"

But what could David Cavers have meant by "conflicts justice?" Cavers knew that if judicial process appears to be abstract and neutral it can satisfy even the loser of a case that he has had a fair hearing. Robed Justice, holding aloft her scales, always wears a blindfold. Justice must be blind. Cavers, therefore, like Symeonides, attempted to fashion choice rules free of the bias of the forum.<sup>87</sup> For Cavers, the **103 Mich. L. Rev. 1667** forum must be a neutral forum. The judges at a Cavers forum, in other words, are freed in an interstate case from their obligation of fidelity to their own local legislature and their own local case law. Presumably local law has been fashioned with this background understanding, that its force is diminished in interstate cases. Other laws and other cases must have an equal chance of application, because Justice must be blind.

But what must Justice be blind *to*? Presumably Justice must be blind to the relative celebrity, wealth, political power, or influence of the parties. But it is hard to believe that Justice must be blind to *injustice*. Justice cannot be *that* blind. That being so, I should think neutrality and evenhandedness better served by faithful application of the law of the forum, when the forum has reason to apply it, than by the intercession of abstract methodological interventions which, however "smart;" can only deflect judges from that necessary task and sworn duty. To the party

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86. Cf. Borchers, *The Choice-of-Law Revolution*, *supra* note 45, at 383- 84 (noting that most American courts will choose either the law of the forum or the law that favors the plaintiff).

87. See CAVERS, *THE CHOICE-OF-LAW PROCESS*, *supra* note 79 (devising "principles of preference" to guide choices of law without reference to the biases of the forum); see also Perry Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 *YALE L. J.* 1191, 1209 (1987) (arguing that neutrality is the essential virtue of traditional territorialist approaches).

who has been stripped of the forum's protections and who has lost by virtue of abstractly chosen governance, the process will not necessarily look innocent.

Concededly, in the true conflict case, one in which two differing laws "apply," neither law will be arbitrary; and in the unprovided-for case, both states' laws will. But judges should think long and hard before turning away from their "preeminent province and duty to say what [their own state's] law is."<sup>88</sup> No amount of "conflicts justice" can satisfy a resident that a court in her own state was right to deprive her of a claim or defense it would have made available to her had her opponent not resided elsewhere. Nor can anything explain to a nonresident who has come to the interested place of injury for its remedial law, why the place of injury, with its obvious governmental interest in applying its remedial law to her case, nevertheless arbitrarily withholds it from her, as if reserving a scarce commodity for its own residents.

My differences with Symeonides obviously have something to do with the old differences between realists and formalists. Realists are unembarrassed by justice. The more straightforward a court is about providing justice, the more commendable the court, as far as we realists are concerned. But to a formalist there is something vulgar, political — almost illicit — about justice. When justice triumphs, formalists cannot help casting about for some overlooked neutral principle which, if applied rigorously enough, would have prevented it.

**103 Mich. L. Rev. 1668** For Dean Symeonides, as for David Cavers, justice is all very well; but the jewel in the crown of judicial process is neutrality.<sup>89</sup> Neutrality ranks highest among all neutral principles. In torts as in contracts, the protections of due process will seem insufficient to Symeonides unless characterized by disinterestedness and evenhandedness. Unless the highest standards of neutrality are maintained, the judicial process, and with it the choice-of-law process, as far as he is concerned, cannot be "innocent." It is very hard to disagree with argument on this level of loftiness and idealism. The formal neutrality that "conflicts justice" can provide, at least in theory, has seemed to many to be worth striving for. But I cannot help setting a much higher value than Symeonides does on "material justice," which *certainly* is worth striving for.

At the risk of shocking the reader, I venture to say that material justice is hardly well served by superimposing upon the parties to a tort case, in their actual situation, an ideal of neutrality which can only be spurious. I say "spurious," because the very notion of neutrality between the parties in an action in tort is utterly at odds with the realities of tort litigation. Of course, after a judgment favoring the plaintiff, nothing could be clearer than that the defendant is a tortfeasor who has caused injury, and the plaintiff an innocent victim. There can be no neutrality as between adjudged tortfeasor and victim. There is no legal, or indeed moral equivalence between them. But I would go further and point out that even before trial and judgment there is no legal or moral equivalence between the parties to a tort litigation. The tort defendant, although of course entitled to every protection of fundamental fairness and due process, enjoys no presumption of innocence. Rather, in these civil cases, certainly for purposes of deciding a dispositive conflicts question, the presumption is that the allegations of the plaintiff's complaint are true. The further presumption, for purposes of deciding the conflicts question, is that the complaint survives a motion to dismiss *on every other ground*. In other words, for purposes of deciding the conflicts question, the complaint is not frivolous. The complaint has merit. The defendant is not being pushed to the wall on some trumped-up claim. It therefore becomes necessary, if we are to think

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88. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (Marshall, C.J.): "It is emphatically the province and duty of the judicial department to say what the law is."

89. For similar views of neutrality, see *supra* notes 81 and 87.

about a choice of tort law without becoming bogged down in irrelevancies, to suppress our emotional commitments to defendants who *are* being pushed to the wall on trumped-up claims. There is much to be said for a frank recognition that the tort defendant is a presumptive tortfeasor, that the plaintiff presumptively has suffered a legally cognizable injury at **103 Mich. L. Rev. 1669** the defendant's hands, and that the law presumptively will, and should, furnish a remedy.<sup>90</sup>

In light of these truths, very possibly neutrality as well as fundamental fairness would best be served by unwavering application of the law of the forum — except, of course, for false conflicts in which the forum is the only uninterested state.<sup>91</sup> Forum law is the only law that blind justice can choose and administer *with formal neutrality* precisely because it applies in all other cases, without variation, without fear or favor, and under the direct supervision of the legislature. This may well be the only sort of fairness to defendants, when it comes to choosing law, that — since plaintiffs choose the forum — will not be unfair to plaintiffs.

#### ENVOI

*The American Choice-of-Law Revolution* is a deeply sincere record of its author's intellectual struggle toward solutions of serious problems in the conflict of laws. At the same time it is a close study of the ways in which American courts are dealing with those problems, and a careful consideration of what modern conflicts methods can **103 Mich. L. Rev. 1670** teach us. Whether or not Dean Symeonides' own codifications will be entirely successful at what they set out to do, his new book is entirely successful as a replication of his struggle.

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90. Similarly, there can be no neutrality between the parties in a contract case. There is no equivalence in law between the parties to an action on the contract. Under the allegations of the complaint, the contract debtor is presumptively a deadbeat, seeking to avoid her obligations. Under the allegations of the complaint, the plaintiff creditor, with a presumptively valid contract, has been left holding an empty bag. It becomes necessary, if we are to think about a choice of contract law without becoming bogged down in irrelevancies, to suppress our sympathy for debtors who are being pushed to the wall. The debtor may, if in difficult straits, seek whatever protections bankruptcy law may still afford. The contract creditor, like the tort plaintiff, has presumptively suffered a legally cognizable injury at the debtor's hands, and the law presumptively will, and should, provide a remedy.

91. Consider, for example, a case in which the law of the forum favors the defendant, but the forum's only contact with the case is that the plaintiff resides there. The place of injury, where the defendant resides, has plaintiff-favoring law. This is a false conflict, because the place of injury, having plaintiff-favoring law, is the only interested state. *See supra* notes 28-29 and accompanying text. This requirement of non-forum law at the uninterested forum in false conflict cases does not hold for unprovided-for cases. Suppose, for example, that the defendant resides at the forum and the forum has plaintiff-favoring law. Suppose further that the plaintiff resides at the place of injury, which has defendant-favoring law. In this latter, unprovided-for case, the forum should apply its own remedial law. Since the place of injury is uninterested in application of its particular defense, but shares general tort policies with the forum, the best accommodation is forum law. There should be an exception to this rule for the unprovided-for case in which the plaintiff is injured at home and sues there, the forum having defendant-favoring law. If forum law seems unjust in such a case, and I think it does, the injustice arises not from the fact that the plaintiff loses, but from the facts that, first, she is suing at home and may not be able to sue at a more favorable forum; and, second, that, since the defendant does not reside there, the forum has no interest in applying its special defense; but, as the place of injury, it retains its general underlying remedial and deterrent tort policies, which would be advanced by deference to the remedial law of the sister state. To avoid discriminatory departures from its own law, the uninterested forum with non-remedial law should if possible "adopt" rather than "choose" the sister-state's rule as its own. *See supra* note 58.

In this Review I have brought to bear the methods of interest analysis, which Dean Symeonides understands and admires, upon some of his own analyses. But my differences from Dean Symeonides should not obscure the importance of his book. This is not only a most original monograph, not only a major contribution to the literature, not only a fine course in the conflict of laws, not only a treatise from which sophisticates and novices alike can learn much, not only an intellectual adventure, but quite simply a book one can very much enjoy reading. One can wrestle with it, take issue with it, and yet savor it. I had a wonderful time with it. Dean Symeonides has greatly enriched the field with this splendid new work.