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The Interested Forum

by Stanley E. Cox*

I. AN INTRODUCTION TO THE INTERESTED FORUM WAY OF THINKING

When Brainerd Currie rearranged his essays for publication in book form, he felt it appropriate to lead off with his article about Walmart v. Arabian American Oil Co.¹ He considered his comments about that case a "logical point of departure" for his entire theory.² It therefore also might be profitable for us, in this Symposium honoring him, to focus on the types of dilemmas presented by that case. In Walmart, a nonresident plaintiff brought suit against a nonresident defendant on a cause of action arising out of conduct which occurred wholly outside the forum.³ Plaintiff did not provide the content of the foreign law where injury occurred, yet the forum's choice-of-law rules said that relief could only come from that foreign law. The New York court in Walmart dismissed

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1. 233 F.2d 541 (2d Cir. 1956).
3. Plaintiff was an ex-serviceman from Arkansas. The conduct was a crash in Saudi Arabia between plaintiff's vehicle and a truck owned by defendant, who was incorporated in Delaware. See 233 F.2d at 542. For purposes of arguments made here, I want to make one important change or clarification of the Walmart facts. I want to insist that whatever New York presence the defendant had, New York was not its principal place of business. See also BRAINERD CURRIE, ON THE DISPLACEMENT OF THE LAW OF THE FORUM, reprinted in SELECTED ESSAYS IN THE CONFLICT OF LAWS 61 n.146 (1963) (indicating that the defendant being licensed to do business in New York would provide insufficient basis for assertion of a New York interest). Cf. Transcript, Choice of Law: How It Ought To Be, 48 MERCER L. REV. 639, 651, 655-56 (1997) (indicating that defendant's American headquarters were in New York).
for failure to provide the content of the foreign law. Other courts faced with similar facts have heard such cases on the merits, presuming, somewhat dubiously, that the content of unpled foreign law is identical to the content of forum law. Professor Currie would allow forum law to be applied, under the equally questionable rationale that forum law should always be applied unless the parties offer some persuasive reason

4. Professor Kramer agrees with a variation of this approach, making it one of the central tenets of his version of interest analysis. See, e.g., Larry Kramer, Interest Analysis and the Presumption of Forum Law, 56 U. CHI. L. REV. 1301 (1989); Larry Kramer, Rethinking Choice of Law, 90 COLUM. L. REV. 277 (1990); Larry Kramer, More Notes on Methods and Objectives in the Conflict of Laws, 24 CORNELL INT'L L.J. 245 (1991). To Professor Kramer, the most important insight of interest analysis is that interstate conflicts situations should be resolved in the same way as domestic suits. Professor Kramer thus sees Brainerd Currie's central contribution to conflicts doctrine as being insistence that one should look to see if there is law that is meant to apply to the facts of the case. If there is only one such law, the case is a false conflict. If there are multiple laws that vie for attention, the forum should determine, by looking at each law's purposes, which should dominate. But if there is no such law, then the case should be dismissed for failure to state a claim. Professor Kramer thus properly takes Brainerd Currie to task for insisting on the application of forum law where it clearly was not meant to apply, such as in the Walton facts. See also Larry Kramer, The Myth of the "Unprovided-For" Case, 75 VA. L. REV. 1045 (1989) (arguing that there is no such thing as an “unprovided for” case; either there is law which is meant to be applied or the case should be dismissed for failure to state a claim).

I, too, have criticized Currian insistence on application of forum law when it was not meant to apply. See Stanley E. Cox, Razing Conflicts Facades to Build Better Jurisdiction Theory: The Foundation—There Is No Law But Forum Law, 28 VAL. U. L. REV. 1 (1993) [hereinafter Cox, Razing Conflicts Facades]. Nevertheless, I think Professor Kramer fails to give proper weight to another of Brainerd Currie's central tenets. This is Currie's insistence on the legitimacy of the forum promoting its own policies, the rest of the world be damned. Currie's use of forum law as the tie-breaker law for true conflicts, his distrust of granting judges free reign to formulate policy at odds with forum policy, and his reluctance to displace forum law except on the clearest showing that another law should be applied (and this to happen only if the forum has no contrary interest) indicate the centrality of this promotion of forum policy to his thinking. Thus, whereas Professor Kramer characterizes Professor Currie's insistence on forum law in a situation like Walton as inconsistent with the whole of interest analysis, because no legitimate forum interest is being promoted, I think the Walton case posed for Professor Currie a true dilemma. Although forum interest was not present in terms that would satisfy the interest side tenet of his theory, Currie was equally reluctant to dismiss when the plaintiff may have a valid claim. My own version of interest analysis attempts to promote both of Currie's key insights by allowing only forum law to be used to govern claims, but allowing forum law to be used only when the forum has a legitimate regulatory interest in the dispute.

why another state's law should instead be applied. Each of these approaches starts from a fundamentally erroneous presupposition.

The most fundamental question about a case like Walton is whether New York should adjudicate the case at all. I contend New York should not hear such a case. The reason New York should not hear the case is because New York has no right to apply its law to the facts. The knee-jerk reaction on the part of many readers at this point might be, "But Professor Cox, you are confusing adjudicative jurisdiction with legislative jurisdiction." The reason the New York court should hear the case is because it has personal jurisdiction over the defendant. The only question left is whose law should be applied."

There are many things I might like to say in response to such a reaction, and some of which I shall elaborate on in the course of this brief Essay. Here at the front, however, I wish to emphasize that my responses are deliberately designed to blur and in fact eliminate the artificially imposed distinction between what academics call personal jurisdiction and what they sometimes call jurisdiction to prescribe and at other times refer to as subject matter jurisdiction.

For instance, regarding the insufficiency of doing business qua personal jurisdiction, I might wish to challenge the assumption that New York legitimately may bind a defendant for actions committed anywhere in the world on the basis of some paltry doing business within the territorial confines of New York state. Power to assert jurisdiction means power to bind, not literally, but via final judgment. New York's power to bind is only meaningful as power to apply law to the actions of the defendant. It is meaningless to discuss some abstract power over the person of the defendant as if such power exists in isolation from what the court will really do with the suit. If the defendant is before the court for decision on the merits, this necessarily means that there has been a

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determination, or perhaps more accurately an assumption, that it is proper for this court to bind the defendant by the law applied to the merits. I strongly challenge that assumption on Walton-type facts.

Similarly, regarding what might be viewed either as a subject matter or a personal jurisdiction problem, I might wish to explore what should happen when parties consent to the jurisdiction of New York courts to settle a Saudi Arabian dispute. How can party consent force the New York court system to expend resources on something outside its raison d'etre and for which it lacks competence to adjudicate? In other words, is not the New York court's jurisdiction over the parties a manifestation of its power to prescribe rather than an indication of the parties' waiver of personal jurisdiction rules?

Rather than elaborate now in the abstract on these deliberate blurrings of jurisdictional categories, I merely beg the reader's temporary indulgence if I seem to be confusing forms of jurisdiction. I do so only in an effort to take seriously the challenge of this Symposium. We are encouraged by Dean Dessem and the Symposium organizers to write "on a clean slate" regarding choice of law. If we were writing on a truly clean slate, we should seriously ask why New York would want to apply any law to a case like Walton. Neither of the parties is from the forum, nor did any of the litigation producing events occur there. Why not simply tell the parties to go away?

In fact, telling the parties to go away is my preferred solution to the dilemma of cases like Walton. A variant of it was one of the options considered by Professor Currie when he wrote his own article about the case. It is my belief Brainerd Currie did not adopt the approach of telling the parties to go away in Walton because he made the same mistake being made by most readers of this Article today. He assumed that jurisdiction had to be taken over at least some cases in which the forum had no interest. He thus accepted without sufficient questioning the personal jurisdiction "givens" of his day. He thus failed to write on a clean slate in this area. Although I will elaborate on my approach herein, let me emphasize two things now about my version of telling the parties to go away that distinguish it from related arguments by Professor Currie many years ago, on the one hand, and by Professor Kramer more recently, on the other.

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10. Transcript, supra note 3, at 640.
11. See CURRIE, supra note 2, at 61-62 (indicating that dismissal without prejudice is a possible solution for many cases similar to Walton).
12. See, e.g., id. at 63-64.
First, my version of telling the parties to go away is not a form of forum non conveniens dismissal. A prerequisite of forum non conveniens dismissal is that the forum already possesses valid jurisdiction over the case. My version of telling the parties to go away occurs precisely because the forum does not have valid jurisdiction to start with. I am not dismissing because another forum somewhere else may better hear the case. I am dismissing because the forum chosen may not hear the case.

Second, and similarly, my version of telling the parties to go away is not a dismissal with prejudice. Accordingly, it is not like the Federal Rules of Civil Procedure 12(b)(6) dismissals which I take to be advocated by Professor Kramer and others on some variations of these cases. One thing that makes the Walton facts so interesting is that we do not know whether there was law which legitimately might have been applied by some sovereign somewhere, and by which plaintiff might have recovered. To dismiss under 12(b)(6) or its equivalents, however, means either one of two things, both of which assume, improperly, that the forum can and should apply another sovereign's laws.

The first possibility implied in a 12(b)(6) dismissal is that there was no law anywhere which could have provided the plaintiff the relief requested. In this situation, a 12(b)(6) dismissal means that the forum had power to construe and apply all other potentially interested sovereign's laws and found those laws insufficient to provide the plaintiff relief. I reject this assumption that the forum had power to apply all nations' laws. I contend instead that the forum has power to apply only its own law.

There is, however, a second way to construe a 12(b)(6) dismissal in a case like Walton. It could be argued that a 12(b)(6) dismissal is warranted because the plaintiff failed to properly prove the content of potentially applicable law. Under this view, the plaintiff might have a remedy under foreign law, but having failed properly to plead and prove the foreign law, he should suffer the penalties for his willful and deliberate failure to identify the law under which he might recover. This

13. Cf. id. at 62.
16. The parties' failure to inform the court of the content of Saudi Arabian law left it completely in doubt as to whether Saudi Arabian law might provide relief. It was perhaps for this reason that the author of the Walton opinion preferred a remand, to give plaintiff another chance to bring Saudi Arabian law to the trial court's attention, but then to allow the trial court under New York practice rules, to take judicial notice of the content of Saudi law. See Walton, 233 F.2d at 546.
second type of 12(b)(6) dismissal, however, like the first, equally assumes that the forum would have power to apply potentially applicable foreign law from any jurisdiction where it might exist, if only the plaintiff had properly pointed to it. It is therefore indistinguishable from the first type of 12(b)(6) dismissal in its assumption of inherent authority in the courts of any sovereign to apply any other sovereign's laws. My dismissal in Walton-type situations, however, would be precisely because the forum has no law of its own to apply to the case, and because I believe it has no authority to apply anyone else's law to the facts. The effect of my dismissal therefore would be to leave the parties free to pursue the case in another forum which might have power to apply its law to the controversy.

II. THE INTERESTED FORUM APPROACH IN COMPARISON TO POTENTIAL ALTERNATIVES

As a way of developing my rationale for why the forum should not adjudicate a case like Walton, I would like to compare my approach to the alternative rationales which might lie behind the usually unchallenged assumption that the case raises only a choice-of-law rather than a jurisdictional problem. What might motivate a choice-of-law theorist to assume, as apparently almost all choice-of-law theorists who look at the case do, that the Walton litigants and facts are properly before a New York court? Why should the forum feel even a twinge of compulsion to apply some law from somewhere else to facts in which the forum has not the slightest interest? I can think of only two variants of arguments that could be offered in support of New York hearing a case such as Walton. Both types of arguments claim that the forum has an interest in adjudicating the case, although this interest would not be of the kind that would promote any specific forum policies and therefore would not count as interest in an interest analysis sense. Because my position that the forum should not hear the case rejects each of these proferred rationales, it is necessary to explore each in more detail.

Purported forum interest in hearing a case like Walton could be for one of two reasons. First, one might argue that it is the duty of all courts, including the forum's courts, to assist in the adjudication of rights which more legitimately are the concern of others. I call this the "forum as helper" model. Second, and alternatively, one might argue that it is the duty of all courts, including the forum's courts, to deal with international (or interstate) fact patterns in a way which promotes interstate justice and the formulation of good interstate rules of law. I call this the "forum as law-giver" model. Although each of these rationales has surface appeal, I believe each should be rejected as producing more harm than good. This is so because each approach's
supposed virtues end up being chimerical in implementation and because each approach fails properly to respect other jurisdictions' sovereignty. I will elaborate slightly in relation to the Walton facts on each of the two approaches.

A. The Forum As Helper

Under the first approach, which I have termed the "forum as helper" model, it might be deemed New York's duty to assist either the parties, their home states, Saudi Arabia, or the interstate system itself in the adjudication of rights which have arisen under another sovereign's laws. This notion of helping others in their doing of justice sounds noble enough when articulated as an abstract principle. It is arguably less noble, however, in actual application. Brainerd Currie argued that it may be rational for a state to act selfishly in regard to interstate conflicts.\footnote{See CURRIE, supra note 2, at ch. 2 (essay on Married Women's Contracts).} I additionally have emphasized that it may be impossible for a state not to act selfishly when it reaches the merits of any case before it.\footnote{See Cox, Razing Conflicts Facades, supra note 4.} A less strong way of saying the same thing is to emphasize that it may be irrational for a state to attempt to help others promote their different policies. Attempts to promote nonforum justice by purported application of another state's law may be irrational for several reasons.

1. Why Not Respect Judgments Rather than Prospectively (Mis)Apply Law?

First, when a state purports to apply another's law, it can never get the content of the law as "right" as would the courts of the sovereign whose law purportedly is being applied. The Walton facts very uniquely and precisely demonstrate this problem. In Walton, neither defendant nor plaintiff informed the forum court of the content of the supposedly governing Saudi Arabian law. Yet under the forum's choice-of-law rules only Saudi law had a right to be applied to the case. If the court, despite its lack of knowledge of the content of Saudi law, applied law to the case, the content of this applied law would stand only a random chance of accurately approximating the true content of Saudi Arabian law. It would be better if the forum court would leave such a case alone than misconstrue the governing law.

Walton, however, is merely an exaggerated example of the everyday probability for misreading, inherent whenever the forum purports to
apply another's law. In matters of first impression, or where there is ambiguity about the content of the foreign law, it is fairly obvious that the forum court's guess about true foreign law content is as likely to be wrong as right. Even when the objective content of foreign law seems relatively settled, however, the application of foreign law by the forum court is likely to come out differently than application by the foreign court. This is so because, as the legal realists quite properly taught us, legal rules are never solely objective, but take their shape at least partly through their varied application by actual decision makers. To the extent that the decision makers in one legal culture have a different shared sense of interpretation, even for seemingly similar law, the law of the two legal cultures is different. If the differences between the two legal cultures or sovereigns are real, one can never apply another's law as the other would apply it.

If we were writing on a truly clean slate, we should be seriously concerned about the dangers of misconstruction inherent in one sovereign purporting to apply another sovereign's laws. Why do we pretend that we can do this, and why do we insist that we should do this? It should not be a sufficient defense of this questionable practice to say that courts have always done it. Why have they always done it? If part of the reason, as surely must be the case, was belief that something called personal jurisdiction could not be obtained over the defendant in the forum which truly had a right to “call the shots,” should we not rethink in an age where minimum contacts thinking has replaced territorial superstitions? Why should we not insist on making sure the case is in the right court rather than urge uninterested courts to apply what we hope will be the right law?

Respect for the right of Saudi Arabian law to govern in situations like Walton arguably would be best shown by telling the plaintiff to get a Saudi Arabian judgment. This would be preferable to applying law which is not truly Saudi Arabian or to dismissing on the merits. The

19. The court in Walton recognized and commented correctly upon this problem. See Walton, 233 F.2d at 544 & n.9. I have developed similar arguments in greater detail elsewhere. See Cox, Razing Conflicts Facades, supra note 4.

20. See, e.g., In re Schneider's Estate, 96 N.Y.S.2d 652 (Sor. Ct. N.Y. Co. 1950) (Swiss law experts disagreeing on content of Swiss law); John D. Falconbridge, Renvoi in New York and Elsewhere, 6 VAND. L. REV. 708, 730-31 (1953) (indicating Schneider probably misconstrued Swiss law). Judge Friendly's observation in the Erie and choice-of-law context regarding the inherent difficulty of determining “what the New York courts would think the California courts would think on an issue about which neither has thought” even more accurately describes the problems inherent in any court purporting to apply another's laws. See Nolan v. Transocean Air Lines, 276 F.2d 280, 281 (2d Cir. 1960).

reality of choice of Saudi Arabian law would be demonstrated by advance commitment to respect a Saudi Arabian judgment, regardless of what the judgment might require the parties to do. This would be real deference to Saudi Arabian law.\textsuperscript{22} Purported application of Saudi Arabian law by a New York forum, on the other hand, is never the real thing.

Similarly, a dismissal on the merits in a situation like Walton, on the grounds that the plaintiff has not provided the court with the content of Saudi Arabian law, gives no effect to Saudi Arabian law. Instead, the litigation is resolved on the basis of forum pleading rules. By committing in advance to enforce any Saudi Arabian judgment the plaintiff might obtain, the forum would be truly committing to apply Saudi Arabian law.

2. Is There Ever Legitimacy to Assert Personal Jurisdiction Without Legitimacy to Apply Law?

It might be argued, however, especially on the Walton facts, that it would be unfair to force a plaintiff, who had the singular ill luck to be "torted" while temporarily visiting Saudi Arabia, to return to that uncivilized clime\textsuperscript{23} to seek justice. The defendant can be found closer to where the plaintiff normally resides. Why should not New York assist the plaintiff in doing justice at physical convenience to both parties?

Now, as Professor Currie might say, we have finally arrived at the place where the critical issue is joined.\textsuperscript{24} The critical issue is whether New York should be hearing the case. I contend that the forum as helper model for choice-of-law jurisdiction, in resolving the Walton facts, asks us to make a puzzling and contradictory collection of jurisdictional assumptions.

a. If There Really Exists an Obligation to Apply Others' Laws, Should Not Jurisdictional Rules Promote this Choice-of-Law Obligation?

The forum as helper model starts with the correct assumption that New York has no interest in promoting its own tort values through this litigation.\textsuperscript{25} The theory asks us nevertheless to assume that New York

\textsuperscript{22} Cf. Currie, supra note 2, at 52 & n.125 (noting that the public policy exception is inconsistent with the idea that obligation to apply foreign law is a high policy goal of the forum). See also Cox, Razing Conflicts Facades, supra note 4, at 33-35.

\textsuperscript{23} See Walton, 233 F.2d at 545 (so labeling Saudi law). I will say more later about plaintiff's attempts in Walton to avoid application of Saudi Arabian law because plaintiff contended it was too inferior a law to be applied to the merits. See infra notes 76-78 and accompanying text.

\textsuperscript{24} See Currie, supra note 2, at 52.

\textsuperscript{25} See supra note 3.
has a very high obligation to promote others' (in this case Saudi Arabia's) policies through application of foreign laws. However, in order for this obligation to arise, personal jurisdiction rules must make the defendant available for suit in the New York forum. Finally, however, these personal jurisdiction rules are asserted to be something which exist independently of and without regard to the high obligation to apply others' laws. As a result of this combination of assumptions and rules, a strange result obtains. No forum really has an obligation to assist in applying another's laws until its unrelated personal jurisdiction laws create that obligation. On the Walton facts, for example, the obligation to apply Saudi Arabia's law arises solely as an accident of New York personal jurisdiction rules, which were not crafted to take account of any obligation to apply Saudi Arabia's laws. This point seems not unique to the Walton facts, but rather a typical and accepted feature of the whole jurisdictional system.

26. The theory might also claim that, by having the most interested jurisdiction's laws applied, it fosters intersystem harmony, or something akin to that. I do not mean to indicate in text that the claim for forum as helper is limited to assisting other sovereigns solely on a bilateral or vested rights type basis. My focus in text on the lack of promotion of forum tort policies in the case before the court is all that I insist on emphasizing. The forum as helper model for choice of law insists that the forum should promote others' policies rather than just its own. I agree with Professor Currie that this is a particularly counterintuitive argument in any situation where some real forum interest is being displaced by the supposed greater good. See, e.g., CURRIE, supra note 2, at 52-53. I argue moreover that the obligation to promote larger policies rather than solely one's own remains unpersuasive even in situations where the forum has no specific interest which is being displaced.


28. Apparently the forum may restrict personal jurisdiction as much as it wishes without violating constitutional or comity concerns. See, e.g., Burnham v. Superior Court, 495 U.S. 604, 627 (1990) ("Nothing we say today prevents individual States from limiting or entirely abandoning the in-state-service basis of jurisdiction."); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 446 (1952) (indicating it was within Ohio's discretion either to authorize or not authorize personal jurisdiction on facts involved).
This seems a strange way to promote strong forum deference to others' laws. Writing on our clean slate, and assuming we really wished states to meaningfully assist in the prospective application of others' laws, should we not impose some obligation to hear the types of cases that would cause others' policies thus to be implemented? In the United States system, however, there is no such obligation. The main United States forum access case, *Hughes v. Fetter*,29 proceeds on a somewhat opposite assumption. The *Hughes* reasoning, so far as any interrelation between personal jurisdiction and choice of law is concerned, is that because there is personal jurisdiction in the forum, there is therefore no justifiable reason for Wisconsin to close its doors to the particular kind of suit being brought in that case.30 This is perpetuation of the idea that personal jurisdiction rationales exist independently of what the suit is about. If personal jurisdiction had not existed under Wisconsin law, there apparently would have been no obligation to implement another's policies.

United States personal jurisdiction doctrine could instead conceivably be built upon the Full Faith and Credit Clause to promote interstate choice-of-law concerns.31 If we were writing on a clean slate, the Full Faith and Credit Clause conceivably could be used either to expand or to contract jurisdictional reach. It might be thought desirable to expand personal jurisdictional reach to force states to hear more cases promoting the policies of other truly interested forums. Coming at the problem from the opposite direction, however, a restrictive theory of personal jurisdiction might desirably prevent states from taking jurisdiction when this could frustrate the interests of the state whose laws should be

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30. *Id.* at 612-13. In *Hughes*, Wisconsin had enacted a statute that foreclosed access to Wisconsin courts on any wrongful death action based on death in another state. Plaintiff brought suit in Wisconsin on a claim which arose because of a death in Illinois, and the case was dismissed under the Wisconsin statute. The Court held that such denial of access to Wisconsin courts violated the Full Faith and Credit Clause, presumably by failing to give effect to Illinois law. *Id.* at 612. However, in footnote 10 of the opinion, the Court also inferred that had Wisconsin wished to apply its own substantive law to the facts, this would not have violated the Full Faith and Credit Clause. *Id.* at 612 n.10. Professor Currie, in his treatment of the case, used these somewhat contrary messages to recast the decision as proceeding on equal protection grounds rather than from commands of the Full Faith and Credit Clause. See CURRIE, supra note 2, at ch. 6. Given the Court's retrospective gloss in *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 518-19 (1953) that "[t]he crucial factor in [Hughes] was that the forum laid an uneven hand on causes of action arising within and without the forum state. Causes of action arising in sister states were discriminated against," Currie's analysis seems on the right track.
applied. The United States system rejects either approach. The Supreme Court has specifically rejected using another state's interest as an important factor either to expand or to restrict state court jurisdictional reach. The Court instead emphasizes a doctrine based on personally waivable due process protections.


Current personal jurisdiction rules seem in fact to run opposite to the notion that a forum is obliged to promote others' interests. The modern minimum contacts test specifically promotes what it labels specific jurisdiction. This is personal jurisdiction upon the basis of contacts which give rise to or relate to the litigation. When contacts give rise to litigation, however, the state where jurisdiction is thus most easily able to be obtained (the state where the litigation arose) will likely have an interest in applying its laws to the litigation at hand. Given this, the most satisfying answer to the question of why specific jurisdiction is that the state with regulatory interest in the litigation should be able to assert jurisdiction over the case. Promoting personal jurisdiction in states which have an interest in applying their own laws to the controversy, as specific jurisdiction does, is an opposite rationale from encouraging states to promote other states' interests.

The other form of modern minimum contacts jurisdiction, general jurisdiction, if properly limited, seems no less interested in forum ability to regulate. Although general jurisdiction is defined by the Supreme Court as jurisdiction based on contacts which do not relate to or give rise to the litigation, the Court's test for propriety of general jurisdiction is "continuous and systematic" contacts. The only times the Supreme Court has spoken directly to the issue of what contacts rise to this level, it has indicated that the contacts should be substantial, akin to those

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32. This is closer to my view of how personal jurisdiction doctrine should be constructed. By limiting personal jurisdiction to only those situations where the forum could apply its own law to the litigation at issue, I would prevent any other forum from interfering with an interested forum's ability to issue a judgment.
necessary to establish the equivalent of domicile. Assuming these Court comments mean that a restrictive form of general jurisdiction is the proper test of its propriety, what would be a rational underlying purpose, in choice-of-law terms, behind such a restriction?

At first glance, general jurisdiction situations might seem to present the possibility that the forum would have no interest in applying its law, as the litigation arose from contacts which occurred elsewhere. Nevertheless, as Brainerd Currie's brand of interest analysis often emphasized, one of the primary interests a state may have is to benefit its own. I would additionally recognize interest to regulate the forum's own, regardless of where the forum defendant's conduct occurred. The interrelation between general jurisdiction and this either protective or regulatory interest in one's own becomes nearly a correspondence if general jurisdiction is construed narrowly. If general jurisdiction is limited to those situations where the defendant is most clearly or uniquely the forum state's own, it is increasingly likely that the state will have an interest in applying its law to its defendant's conduct.

c. Uninterested Forums Should Not Take Jurisdiction of Cases Raising Others' Concerns.

What we see then, when we look for possible choice-of-law concerns imbedded in current personal jurisdiction doctrine is that there seems

39. See, e.g., Restatement (Third) of the Foreign Relations Law of the United States § 402(2) (1987) (approving of jurisdiction to prescribe in regard to nationals for their actions abroad). On the *Walton* facts, for example, if New York was the defendant's principal place of business, New York law could have been applied under a deterrence rationale. See also *supra* note 3.
40. It is true of course that interest analysts may argue about whether a particular defendant-favoring forum law is loss allocating or conduct regulating, and thus whether a particular forum law should or should not be applied to defendant conduct which occurred elsewhere. My larger point, however, is not regarding the particular content of the law which the forum might apply to protect or not protect its own. Rather the larger point is that it is the forum's regulatory interest regarding its defendants that is triggered. The forum's interest is either in deterring the conduct of its own or of protecting its own from the effects of their conduct elsewhere.
to be virtually no concern for implementing others' policies. Instead there seems to be a fair amount of concern with implementing the forum's own regulatory policies. To my mind this counsels for a choice-of-law or jurisdiction theory that places the obligation to get the case to the forum with the most interest, so it may apply its own law. This is preferable to placing obligations on uninterested forums to apply others' laws. At least two related responses might be made to these observations by those strongly committed to the forum as helper choice-of-law model. First, it could be urged that personal jurisdiction rules should be different to expand jurisdiction to uninterested forums. A second and more modest version of this argument is to insist that at least some jurisdiction in uninterested forums is desirable for convenience or other reasons. Given this, it could be urged that so long as jurisdiction is allowed to go forward in uninterested forums, there is need for rules which impose on uninterested forums the obligation to apply only interested forums' laws.

Regarding the strong version of the need for uninterested forums argument—that the more uninterested forums we have hearing cases the better—I confess to be at a loss to understand why such a system would be a good thing. It is my further belief, or at least hope, that such an argument is not being advocated, even by those who most seriously urge no constitutional limits to personal jurisdiction doctrine, or who urge other significant reform of United States jurisdictional doctrine to make it easier to get suit started somewhere. What I suspect is being argued is that United States personal jurisdiction doctrine unnecessarily wastes resources in deciding issues unrelated to the merits. I have no objection to reforming United States personal jurisdiction doctrine so that it more quickly and clearly gets the right facts before the right court to decide on the merits. We can argue elsewhere about exactly what shape such rules should take.

To elaborate slightly here, however, I do not even have theoretical quarrel, at least for purposes of the arguments being made in this Essay, with completely reforming personal jurisdiction doctrine along the lines

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of what may be the Australian method.\textsuperscript{43} It would not necessarily be objectionable to let suit be started anywhere the plaintiff wants within a federal system and then encourage transfer to the court which would really decide the merits. Under such a system it would be important to note, however, that overhaul of related doctrines would be required. For instance, I would strongly object to keeping \textit{Van Dusen} rules\textsuperscript{44} in place for a system which admitted at the front end that the transferor court was not necessarily a court which should decide the merits. Transfers under such a regime look to me in terms of United States procedural statutes more like 28 U.S.C. § 1406 than § 1404 transfers and should be treated for choice-of-law purposes accordingly.\textsuperscript{45}

The important point is not how the case gets to the court that will decide the merits, but that eventually the case does get to such a court. It is in regard only to such a court that I insist that the court be an interested forum. When I therefore speak in terms of personal jurisdiction being appropriate only in a court which has interest in applying its own law, I do so in terms of the United States rules with which I am most familiar. Under these rules, valid personal jurisdiction gives the court which has it the right to "call the shots" on the merits. If we want to invent a different set of rules which divorces the right to bind a defendant from the right to initiate suit, then we are no longer, in my terminology, talking about an uninterested forum deciding the merits. Because I suspect that many reformers are indeed talking about such an entirely different method of initiating litigation, I fear I may be


\textsuperscript{44} \textit{Van Dusen} v. Barrack, 376 U.S. 612 (1964) (requiring under \textit{Erie} that transeree court apply choice-of-law rules of transferor court in § 1404 transfer situations).

\textsuperscript{45} When the transfer is under 28 U.S.C. § 1404, as in \textit{Van Dusen}, the personal jurisdiction was appropriate in the transferor court, and the choice-of-law rules, under \textit{Erie} and \textit{Klaxon}, transfer along with the case. When the transfer is pursuant to 28 U.S.C. § 1406, as in Goldlawr, Inc. v. Heiman, 369 U.S. 463 (1962), personal jurisdiction need not have been appropriate in the transferor forum, and therefore the choice-of-law rules do not transfer along with the case. \textit{See}, \textit{e.g.}, Follette v. Clairol, Inc., 829 F. Supp. 840 (W.D. La. 1993) (ruling that because personal jurisdiction had not existed in transferor Texas court, transfer was pursuant to § 1406 and Texas statute of limitations therefore did not apply). I do not cite this case for the correctness of its result, but rather for its correct recognition of the broader \textit{Erie} principles associated with §§ 1406 and 1404.

If a jurisdictional system made it easier to get the suit started, but later permitted transfer to the appropriate forum to have legitimacy to rule on the merits, it also would be necessary that the decisional law on when transfers are warranted be fairly clear to trial and appellate judges in such a system. This is so that cases would not remain in truly uninterested forums and so that all sides would not spend the same litigation resources they would have wasted in determining propriety of personal jurisdiction instead in battles about propriety of transfer.
creating and attacking a straw man when I argue against allowing suit in a multitude of uninterested forums. Nevertheless, a few brief comments seem in order.

On the Walton facts, for example, why not approve jurisdiction to hear the case in any state in the United States, or any country in the world? If the obligation is to encourage other countries to enforce Saudi Arabian law, why not force suit anywhere on Walton's claim, so long as the right law also is required to be applied? Part of the answer is that this intrudes on state sovereignty, requiring resources to be expended on things which the forum should not really have to care about. An uninterested forum should not have to adjudicate the rest of the world's claims. There is no international obligation, apart from crimes against humanity or similar violations of world order, that would compel a forum to take cases raising solely others' interests.

The rest of the answer to the question "why not encourage suit everywhere?" is already hinted at in what I previously have written in this Essay on the potential for misinterpretation. The forum which purports to be applying another's law is never able to get it quite right. Accordingly, expanded forum-shopping possibilities necessarily mean expanded probability of different results on the merits. The plaintiff can be expected to realize this and can be expected to sue, especially if enough is at stake, in the forum which will maximize recovery on the merits. It is simply unfair to the defendant to allow suit wherever the plaintiff thinks that the best case on the merits can be made. Allowing suit everywhere gives the plaintiff the upper hand on the merits.

d. The "Forum as Helper" Model Is Premised upon Outdated Notions of Territorial Power:

The immediately preceding points emphasize the defendant's right to avoid forum shopping rather than the state's rights to have its laws applied by the forum which hears the case. Once the focus is thus removed from the states' rights to have their laws implemented, however, and is shifted to the parties' rights to a fair forum, a much more modest version of the case for jurisdiction in uninterested forums can be made. To repeat the question from several paragraphs previously, in relation to the Walton case:

46. See supra notes 19-21 and accompanying text.

47. Forum shopping within the court system whose substantive laws are to be applied is of course also a reality. Intra-system forum shopping, however, can be combated through venue restrictions which limit, however arbitrarily, the potential for unbounded forum shopping. Completely unlimited inter-system forum shopping, however, simply skew the fairness balance too far.
It might be argued, however, especially on the Walton facts, that it would be unfair to force a plaintiff, who had the singular ill luck to be "torted" while temporarily visiting Saudi Arabia, to return [there] to seek justice. The defendant can be found closer to where the plaintiff normally resides. Why should not New York assist the plaintiff in doing justice at physical convenience to both parties? 48

There is certainly surface appeal for a system of relative convenience to the parties. Such a system would provide jurisdiction for the benefit of the plaintiff, so long as this is not too inconvenient to the defendant. Why not New York on the Walton facts? It is neither defendant's Saudi Arabian turf, nor plaintiff's backwoods Ozarks home. Presumably, being an international hub, New York is mutually accessible to both parties. Such a forum would necessarily be an uninterested forum a significant amount of the time, but one might claim this even as a virtue. 49 When it thus happens, however, that jurisdiction is necessarily placed in an uninterested forum, it could be argued that there also must be some limitation on choice of law that would require the convenient forum to give effect to an interested jurisdiction's laws. 50

As first rejoinder, I am unwilling to concede that it is in fact ever a good thing to have a case proceed in an uninterested forum. 51 Primari-

48. See supra text accompanying note 23.
49. See, e.g., Lewis, supra note 42; McDougal, supra note 42. Cf. Robert D. Brussack, Political Legitimacy and State Court Jurisdiction: A Critique of the Public Law Paradigm, 72 Neb. L. Rev. 1082 (1993) (arguing for mutual convenience as a goal of personal jurisdiction doctrine). For a humorous argument pushing the need for a disinterested and mutually convenient forum to its absurdly "logical" conclusions, see John M. Brumbaugh & William L. Reynolds, The Straight-Line Method of Determining Personal Jurisdiction, 44 J. Legal Educ. 130, 131 (1994) (proposing as solution to jurisdictional problems that a plaintiff who is located in a different state than the defendant, choose a court halfway between each, thereby equally dividing the inconvenience and burdens of litigation among the parties and the forum).
50. Cf. Russell J. Weintraub, Case Three: Personal Jurisdiction, 29 New Eng. L. Rev. 627, 664-668 (defeating jurisdiction in an uninterested forum on basis of its absurd choice-of-law rules which would lead to application of forum law).
51. In situations where the Supreme Court has emphasized plaintiff's need for a forum, the forum selected has had some interest in applying its own law to the controversy. See, e.g., McGee v. International Life Ins. Co., 355 U.S. 220 (1957) (plaintiff's decedent was resident of forum, as was beneficiary of policy). This would also be true of the European Community jurisdictional alternatives which favor plaintiffs in consumer and insurance situations. See The Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 30, 1968, art. 8-11, 14, 1968 J. O. (L299) 32, amended by 1978 (assession of Greece), amended by 1989 O.J. (L285) 1 (accession of Spain and Portugal); and The Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, art. 8-11, 14, 1988 O.J. (L319) 9. In classic interest analysis terms, the forum to which the plaintiff most belongs has a
ly, I object on the grounds previously stated. First, it is an intrusion on the state's sovereignty to impose obligations on it to hear cases which do not directly promote its own interests. Second, it is also a disservice to the defendant, who will inevitably get a perversion of foreign law applied to his case rather than the law to which the theory claims the defendant is entitled. There are also additional fairness considerations. One must remember that the plaintiff's law suit is merely an allegation. The costs of simply showing up to defend are borne in the United States system by the defendant, and may on some facts be considerable enough to force settlement of questionable claims once jurisdiction is obtained in the plaintiff's chosen (and relatively inhospitable) forum. If the Arabian American Oil company were an uninsured entity which did no business in the United States, to let Walton sue in a mid-western or southern state on a claim arising solely from Saudi Arabian actions might raise considerable fairness considerations. These defendant fairness factors are sometimes seen to be at the heart of the United States system's constitutional emphasis on defendant contacts as limiting ability to obtain jurisdiction.

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53. Lest the reader think I am being unduly parochial in my geographic selection of states, I emphasize that I am deliberately picking my home areas. As a Kentuckian, I am considered by others either a mid-westerner or a southerner. I consider the courts of my former Commonwealth to be particularly just and capable of providing even-handed, even enlightened justice to all comers. But I recognize that this perception may not be shared by outsiders. My larger point is that no system's courts are perceived by the proper set of outsiders as objective. The uninterested forum inevitably appears to the defendant to be biased, because it is a forum selected by the plaintiff for strategic reasons.

54. I re-emphasize that my own "take" on fairness considerations has little to do with the physical convenience or inconvenience to a defendant of being sued in a particular forum and has much more to do with the likelihood that the defendant will be disadvantaged on the merits by suit in that forum. Nevertheless, I have also argued, as a secondary consideration, that it might be possible, even in situations where the forum does have an interest in applying its law to the facts, that the physical location of the suit could be so inconvenient as to raise a constitutional problem. See Stanley E. Cox, Jurisdiction, Venue, and Aggregation of Contacts: The Real Minimum Contacts and Federalism Questions Raised by Omni Capital, International v. Rudolf Wolff & Co., 42 ARK. L. REV. 211 (1989). As the Supreme Court has noted in its personal jurisdiction doctrine, such situations should be very rare. See, e.g., Burger King, 471 U.S. at 476-77. In Asahi, where the Court purported to dismiss on the basis of such second level fairness considerations, it was in fact the lack of California's interest in applying its law to the suit which seemed to play a strong role for dismissal rather than any physical inconvenience to the Japanese defendant.
For purposes solely of the choice-of-law points being made in this Essay, however, let us assume arguendo that a case could be made for some kind of jurisdiction by necessity. Assume Walton has become immobile in the United States, and despite the potential high value recovery involved, assume that he is unable to hire Saudi lawyers to pursue his claim. Or assume that Saudi Arabia, since the time of the collision in which Walton was injured, has been taken over by a radical Muslim sect which proclaims death to any Americans who set foot within its borders. Its courts now automatically award damages against any United States citizens who sue or are sued in absentia there. Surely in such situations, the argument might go, we would want both to be able to provide a forum for recovery, but might want also to impose limits on that forum as to what law it could apply.

Even assuming that we would want to provide a forum for such suits, which I am assuming only arguendo for purposes of making the responses which follow, it should be clear that this will be a very small universe of cases. Such a small universe of exceptions should not dictate the jurisdictional rules for more normal cases. If such exceptional situations really do exist in the modern jurisdictional world, I would involved. See Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 114-15 (1987). Pure physical inconvenience factors, assuming legitimate forum interest in applying its law to the controversy, are properly viewed as matters of venue, which traditionally have been thought to raise no constitutional problems. I am thus in the minority in suggesting that inconvenient venue can rise to constitutional level on rare facts.


I am on record as being opposed to the creation of a form of jurisdiction by necessity as a new category of jurisdiction separate from normal principles of minimum contacts and litigation relatedness. See Stanley E. Cox, Comment, Giving the Boot to the Long-Arm: Analysis of Post-International Shoe Supreme Court Personal Jurisdiction Decisions, Emphasizing Unrealized Implications of the "Minimum Contacts" Test, 75 KY. L.J. 885, 909-10 (1987); Cox, Razing Conflicts Facades, supra note 4 at 64; Stanley E. Cox, Case Four: Choice of Law Theory, 29 NEW ENG. L. REV. 669, 685 n.2 (1995).
argue, in similar fashion to Brainerd Currie, that it would be better to have a completely arbitrary system for determining both where such suits should proceed, and also for determining whose laws among potentially interested jurisdictions should apply. The straight line method of jurisdiction seems as fair a method as any of determining which of a multitude of uninterested jurisdictions should hear a case which cannot be heard by an interested forum. By being clearly arbitrary, as was Currie's alphabetization rule, such a method is designed to highlight the obvious: One cannot simultaneously argue that the reason such cases must be heard elsewhere is because they cannot be heard by an interested forum and at the same time argue that only one of several equally uninterested jurisdictions has primary right to hear the case.

From the above, I submit that the forum as helper model, if it is persuasive anywhere, is persuasive in just those situations where it would have to be most arbitrarily implemented to avoid the injustices which otherwise would accompany unbounded forum shopping. In situations where there are interested forums available to hear cases, there is no compelling reason why an interested forum should defer to another interested jurisdiction's interests. In situations where there is no interested forum available, however, if such exist, there is no principled way to decide which of the many uninterested forums in the world should hear the case nor how they should break ties of true conflict regarding which of several jurisdictions' laws should be applied.

If these points are true, it is worth asking why the forum as helper model of choice of law has dominated and continues to dominate the Conflicts landscape. My best guess is that the particular historical

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56. See CURRIE, supra note 2, at 608-10 (suggesting alphabetical solution if the need is for some rule to resolve truly exceptional cases).
57. See Brumbaugh & Reynolds, supra note 49 (proposing, tongue in cheek, a straight line method of personal jurisdiction, whereby geographical equality resolves jurisdictional disputes).
58. See supra note 56 and accompanying text.
59. This is so because the claim to primacy would be based on some version of interest to adjudicate the merits not possessed by any other run of the mill jurisdiction. The forum being advocated may therefore apply its own laws to the action because of its adjudicatory interest in the action.
60. This was the heart of Brainerd Currie's attack on the obligatio version of forum as helper theory of his day. See, e.g., CURRIE, supra note 2, at 52-53, 437, 596-97, 601-02, 604 & n.60, 609-11.
interdependence between choice-of-law rules and personal jurisdiction rules which prevailed a century ago has not yet been modified to take account of the current reality of jurisdictional possibilities. Let me explain. Forum as helper makes sense only when you really do need other forums as helpers. During the time period in the United States when vested rights held sway and most significant relationship, the precursor to the Second Restatement, was starting to compete as a possibly more humane multilateral alternative, an exclusively territorial method of personal jurisdiction was also thought to be incontrovertibly the law. The rules of Pennoyer v. Neff were in fact conflicts rules.

Relying on Story's Conflicts treatise, the Court in Pennoyer emphasized that "no State can exercise direct jurisdiction and authority over persons or property without its territory." In short, in many instances, such as in Pennoyer, the forum which had sole interest in having its law applied to the facts of the case was thought to have no ability to issue a binding judgment against the defendant who needed to be bound by its laws. Forum as helper was needed in such a world.

As we have seen above, however, modern jurisdictional theory tries to empower a court to issue a binding judgment when that court has legitimate interest in promoting its policies by issuing that judgment. I would push these newer jurisdictional trends towards fuller harmony with choice-of-law doctrine. Whereas in the past forum as helper may properly have attempted to balance one sovereign's need to have its law applied against another sovereign's need to control things and persons

and Empirical Analysis of Choice of Law, 24 GA. L. REV. 49, 85 (1989) (indicating tendency in state courts to apply forum law more often under modern theories); see generally Stewart E. Sterk, The Marginal Relevance of Choice of Law Theory, 142 U. PA. L. REV. 949 (1994) (arguing that modern choice-of-law theory is usually used to mask reality of forum preference or perceived justice on the merits). There are enough significant instances of departure from forum law, however, to justify belief that lex fori is not fully being practiced in much of the conflicts world. See, e.g., Luther L. McDougal, III, The Real Legacy of Babcock v. Jackson: Lex Fori Instead of Lex Loci Delicti and Now It's Time for a Real Choice-of-Law Revolution, 56 ALB. L. REV. 795 (1993) (documenting significant number of departures from forum law).

The Restatement (Second)’s insistence that “special rules” should be “devised to deal with such cases in a manner designed to promote the smooth functioning of the international and interstate systems and to do justice to the parties,” and that such “course is the one pursued by civilized nations” probably still represents the inherited belief of judges about what they should be doing when they decide conflicts cases. See RESTATEMENT (SECOND) CONFLICT OF LAWS § 1, cmt. c (1971). In situations where the forum’s interest is clear, lex fori may prevail despite what the conflicts rules say should prevail, but in other situations, the rhetoric of multilateralism, which I have here labeled forum as helper, apparently still holds sway.

62. 95 U.S. 714 (1877).
63. Id. at 722.
within the territory, the way properly to promote sovereignty in the
modern world is to ensure that only courts with legitimate interest in
applying their laws to the facts should be able to issue binding
judgments. On the Walton facts, New York had no business meddling
with an auto accident which occurred in Saudi Arabia, involving claims
against a Saudi Arabian company by an Arkansas resident. The forum
should have told the plaintiff to go away.

B. The Forum as Law-Giver

There is a second possibility, however, for imposing a duty on New
York to adjudicate Walton's claim. This view directly rejects the idea
that forums should promote only their own policies, by directly critiquing
the idea of limited sovereignty. The argument is not that another state
is more interested, but rather that it is the duty of any state seized of an
international fact pattern to transcend its parochial mindset and
proclaim from the mountaintop what is the appropriate international
law to govern an international case. Two versions of such an argument
seem to have been offered to the court in Walton, and I will critique each
briefly here.

First, when Walton was asked to prove the particulars of Saudi
Arabian law, one of his responses to the court was that this was
unnecessary because the law governing his case was fundamentally the
same regardless of where suit was brought. This might be called the
universality aspect to the forum as law-giver approach. Walton's second
argument for forum as law-giver was more in the nature of "escape" from
arguably applicable law, but more charitably could be called the
"improvement" aspect of the theory. Walton claimed that Saudi Arabian
law was unworthy to govern his rights and therefore should be rejected
in favor of a more civilized law.

Regarding the first argument, or the universality aspect to the forum
as law-giver approach, the court in Walton quite properly responded that
it is factually inaccurate to claim all tort laws are alike in our conflicted
world. The name of our course, Conflict of Laws, implies that there
are serious differences between the laws of different jurisdictions on
nearly identical issues. How then can a forum as law-giver proponent
seriously argue that the actual content of the laws of a particular
jurisdiction which has an interest in the dispute do not matter? I do not
think proponents claim that there is no actual conflict between the laws
of different jurisdictions, only that there should not be.

64. Walton, 233 F.2d at 544-45.
65. Id. at 545.
66. See id.
Behind the forum as law-giver approach is a belief that the policies behind any particular field of law are discernible and should be promoted. The forum as law-giver advocate thus criticizes interest analysts for asking the wrong kind of interest question. The question under this approach is not whether one of several states has a law which is arguably on point. The question instead is which of several laws arguably on point promotes the only interests which that type of law rationally can promote. Professor Juenger, in his comments appearing in this Symposium issue, typifies this approach when he discerns no rational tort interest ever having been behind guest statutes and when he criticizes Brainerd Currie for wasting time on spousal capacity issues which were dead even at the time the Massachusetts case (on which Currie focused) was addressing them. The proper tort law is no guest statutes, and the proper contract law is no spousal incapacity to contract for a husband's debts. The advice of forum as law-giver proponents is to join the modern world and quit worrying about outdated (non)policies.

I do not in this Essay, nor anywhere else, wish to defend guest statutes or spousal incapacity laws on their merits. No defense on the merits can be made for bad laws. Nor do I wish in this Essay to make the focus of my disagreement with forum as law-giver advocates the existence of situations where it is not so clear which way a split should be resolved so as to make the law clearly better. I will say only in that regard that not all splits about substantive law are likely to be so easily resolved as those involving guest statutes or spousal capacity. If respected tort or contract scholars disagree about what is the right policy for several current issues of tort or contract law, there must be real conflict in some areas.

Let us assume solely for purposes of the arguments being made here, however, that everyone could agree in most cases which of several laws is better than the others. Let us assume arguendo that it is easy to figure out which law best embodies the relevant underlying principles of a particular field of law. It is in exactly those situations that I understand Brainerd Currie properly to have stuck by his forum preference guns on behalf of the forum which wishes to apply inferior law. He thereby also properly rejected the forum as law-giver choice of law methodology.

One of the points I always make about the Essay on Married Women's Contracts when I use it to demonstrate to my students Brainerd Currie's methodology is that he chose for his test case of interest analysis methodology a clearly "bad" forum law. No one in the 1950s, and even

less in the 1990s, could seriously advocate that a law which treats
married women as second class citizens has much to recommend it.
Even in such situations, I take it to be Currie's point, with which I
agree, that if the forum policy is clear, it is the forum's right to apply its
own law, and the rest of the world can hold its nose and walk away. This
being so, I have no trouble with the Oregon court's application of forum
law in Lilienthal v. Kaufman, 68 one of the other fact scenarios of this
Symposium. Spendthrift protection is arguably less of a drag on the
cootails of civilization than incapacitating all married women merely
because they are married women. Resolving true conflicts by applying
forum law is obviously what Professor Currie advocated in his changed
version of Milliken v. Pratt, 69 and it obviously does not matter to him
whether the forum law is a good law or not.

A few clarifying words may be in order, so that readers do not
misconstrue my position. First, whatever Professor Currie may have felt
about false conflicts, I do not find it profitable to believe in them. If the
forum, in making the case for application of its own law, wishes to
buttress that decision by making it appear that this promotes the only
policy which is implicated by these facts, it is probably sugar coating
reality. There has been significant and persuasive criticism that interest
analysts too easily make false conflicts appear where there are likely
ture conflicts. 70 I do not wish to add to this deception. I would prefer
instead that the entire false conflict aspect of interest analysis be
dropped from the methodology. The real heart of interest analysis for
me is the way it resolves true conflicts. Because the rule for resolving
true conflicts is the same as for resolving false conflicts (i.e., apply forum
law), I am willing simply to assume that all conflicts cases are true
conflict cases and that the real message of interest analysis is that the
forum should apply its own law when it has a legitimate interest in
doing so.

The false conflict trap can be especially troublesome, however, if the
forum purports to use the methodology to apply an inferior law from
another jurisdiction. This might mistakenly be done under the rationale

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68. 395 P.2d 543 (Or. 1964) (Oregon spendthrift law applied to Oregonians' California
contract).

69. 125 Mass. 374 (1878). Professor Currie changed the Milliken facts by assuming for
purposes of his arguments that the Massachusetts legislature, just prior to Milliken, had
expressed its legislative judgment that married women should not be given the capacity
to contract for debt. See CURRIE, supra note 2, at 80-81.

70. See, e.g., Joseph William Singer, Real Conflicts, 69 B.U. L. REV. 1 (1989); Jack L.
Goldsmith, III, Note, Interest Analysis Applied to Corporations: The Unprincipled Use of
a Choice of Law Method, 98 YALE L.J. 597 (1989). See also Cox, Razing Conflicts Facades,
supra note 4, at 38-43.
that the court has before it a false conflicts case, with the foreign jurisdiction's law's policies being the only ones implicated by the facts. *Schultz v. Boy Scouts of America, Inc.,*71 another of the cases discussed by the Symposium panel, seems just such a case. While I add my vote to those of the panelists who deem *Schultz* a true conflict,72 regarding the points being made in this Essay about the forum as law-giver methodology, it is not necessary to decide whether New York in *Schultz* really had an interest in applying its law or not. Assume arguendo that the court in *Schultz* was right and that New York had no interest in promoting its own policies on the *Schultz* facts. The case then becomes in all significant aspects indistinguishable from *Walton*. Just as New York would have no reason to promote the policies of Saudi Arabia, especially for a "bad" law,73 it has no obligation to promote New Jersey's policies, be New Jersey's law good or bad. The alleged inferiority of foreign law is always a make-weight in my view to the more basic point that the forum should promote only its own policies.

At any rate, I wish to make clear that my insistence that the forum may "stick by its guns" and apply inferior law is not meant to suggest that this should be done on behalf of any other state's interests. Only when the forum believes its own policies are promoted by application of

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72. As a true conflicts case, New York should have applied its own law to deter conduct which it had a right to regulate. Accordingly, the *Schultz* dissent had the proper approach to resolve the conflict between New Jersey and New York law. *Id.* at 689 (Jasen, J., dissenting).

73. Recall that plaintiff in *Walton* alleged that Saudi Arabian law amounted to the whim of a dictatorial monarch. *Walton,* 233 F.2d at 545. Although the court in *Walton* refused to believe that this was so, it acknowledged that such a situation would make its normal *lex loci* laws inoperable. *Id.*

One might achieve the same result by changing the *Walton* facts to create a public policy exception to application of foreign law. Suppose something draconian, for example, such as that in addition to monetary fines, a Saudi Arabian tribunal would allow the winning party to lop off hands of the offending motorist who caused him harm. If Saudi Arabian law, although thus clear in its content, were clearly obnoxious to New York policies, the New York court would reject application of the uncivilized law. The public policy exception thus always recognizes that no forum has an absolute obligation to carry out another's will. The case law interpreting the public policy exception, however, allowed for use of the exception on far less egregious facts than physical maiming. Simple differences in policy triggered its application, if the forum wished so to use it. See, e.g., *Kilberg v. Northeast Airlines,* 172 N.E.2d 526 (N.Y. 1961) (amount of wrongful death recovery); *Mertz v. Mertz,* 3 N.E.2d 597 (N.Y. 1936) (interspousal immunity). Given this, it could be argued that use of the exception promotes the inapplication of inferior law, where the forum has superior law and an interest in seeing that law applied. Cf. e.g., Monrad G. Paulsen & Michael I. Sovern, "Public Policy" in the Conflict of Laws, 56 COLUM. L. REV. 969 (1956).
a law which the rest of the world views as inferior would I uphold the forum's right, as in *Milliken* and *Lilienthal*, to apply its own law.

A second clarification regards the role of common law judges versus the legislature. Let me unqualifiedly emphasize that there is no reason for the forum to stick by an inferior law when this is solely a matter of its common law. I would expect all judges faced with new challenges to outdated common law practices such as spousal immunity or spousal incapacity to change those laws when confronted with the next case to raise the issue. Even for ancient statutory enactments, I would expect the common law judge, in a purely domestic case as much as an international one, to read away outdated provisions, knowing that the legislature can re-enact and clarify if it so desires. In the case of particularly obnoxious forum law, the judge is also obligated to declare such provisions in conflict with other forum law, such as the forum's constitution, and thus tell the legislature that it cannot enact absolutely inferior provisions. But what I understand Professor Currie to have done with his changed version of the *Milliken* facts is to have taken most of that ammunition away.\(^7\)

The legislature, in enacting a provision, intended for it to be applied. The question is "when"? What I understand Professor Currie in his discussion of the changed *Milliken* case to be emphasizing is that it is the job of the conflicts judge to figure out in exactly which situations the legislation should be applied. This cannot be done by ignoring state interest in having its policies applied. The court instead must try to discern whether a state policy is implicated. Even if a guest statute is solely a result of intense lobbying by the insurance industry, if the legislature intended that such a statute be applied to auto accidents occurring in the state's borders, or to auto accidents involving cars registered in the state (and thus subject to its insurance laws), then there is a good argument that the state law should be applied to such fact situations by that state's courts. We may argue intensely about exactly what situations the legislation should cover, but I do not see how we can avoid conceding that it is meant to cover some interstate situations.

One of my quarrels, therefore, with the forum as law-giver model is that it assumes forum law should be applied only in purely domestic situations. The forum as law-giver model tries to free the judge to become a proponent for interstate common law per se, so long as there is some interstate hook to which the litigation can be attached. But one

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74. An equal protection argument against spousal incapacity laws that incapacitate only wives theoretically might have been raised by Massachusetts judges, even on *Milliken*’s changed facts, but would not have succeeded in 1878, the time period of the case.
must ask by what authority the judge is freed to ignore state legislation which looks to be clearly on point. Absent a constitutional or treaty provision which creates power in a specialized court to hear cases raising solely interstate or international concerns, it would seem that the more sensible position would be to say that a state's courts are created to promote that state's policies. While the state legislature is not necessarily the final arbiter of what the state's policies should be regarding guest statutes, marital incapacity, or any other issue, I do not see how legislative intent can be ignored on the premise that it is irrelevant. Nor do I see how courts can pretend they are other than arms of the state when they are adjudicating even international fact patterns.

There is appeal, however, to a possibly more modest claim for a forum as law-giver court. Conceding that such a court might not be making international law per se, but only domestic law involving international fact patterns, the claim might be that such law should be different from domestic law, precisely because of the presence of the extra-state factors. I have no quarrel with this approach, if that is in fact how it operates.

But to return to the Walton facts, I am not at all sure that this is behind what I have termed the “escape or improvement” rationale for forum as law-giver courts. Walton claimed that he was entitled to a version of international law because Saudi Arabian law was uncivilized. I have already addressed some of the problems involved in an uninterested court attempting to construe another nation's laws. Those problems would only exacerbate if an uninterested forum claimed as its goal to discern why and how a Saudi Arabian forum might wish to depart from normal Saudi law because of the presence of an American plaintiff in the litigation. I am unconvinced that the Saudi tribunal would consider its own law as uncivilized as might a New York tribunal purporting to improve Saudi Arabian law on the basis of the international factors in the case.

75. The correct implication is that there ultimately is some positivistic aspect to a nation’s or state's courts. They do not spring into being of their own accord. They are creations of the state which gives them the wherewithal to operate. This does not mean that they must parochially promote state interest as selfishly as can possibly be defined whenever possible. But it also does not mean that they have an automatic free wheeling mandate to ignore the policy of the entity which caused them to come into being. The forum as law-giver proponents apparently see judicial power differently. Their argument may be that judicial power cannot be created, and still be called judicial power, unless it includes the power to declare law independently of the concerns of the state or of the people which caused the court to come into being.

76. See Walton, 233 F.2d at 545.

77. See supra notes 17-21 and accompanying text.
To emphasize the point, assume that Saudi Arabia is the forum, but that Walton is still making a variation of his argument to the Saudi tribunal. He would of course no longer so pejoratively castigate the content of Saudi Arabian law as uncivilized, but he might make a claim that as an American visitor to Saudi Arabia he is entitled to some sort of special treatment regarding what law would be expected to govern his claim. Let us suppose a Saudi judge, enamored of the forum as law-giver model, agrees with Walton and gives him a version of Saudi Arabian law specially tailored to the international facts of his case, thereby permitting a recovery well in excess of anything that would be owing in a purely domestic case.

This seems to me a strange set of affairs. It is not that I am opposed to Saudi Arabia improving its law whenever it wishes to do so to promote the full compensation policies inherent in tort law, or whatever other articulation of purpose behind content the judge wishes to offer. What I fail to see is how this need for improved policies is triggered solely by the international aspects of the case. Why should a Saudi judge improve Saudi law solely for the benefit of foreigners or solely because there are foreign aspects to the case? If lack of respondeat superior liability, presence of a guest statute, or contract law which incapacitates married women are all bad policies, they are surely bad policies in a wholly domestic case as much as when the accident of a foreign connecting factor brings such cases to the judge's attention.

One might contend that the forum as law-giver model would nevertheless be desirable in situations which truly are international by their very nature, as opposed to domestic. I have no quarrel with this in theory, but the devil is in identifying exactly what sorts of fact patterns we are talking about in practice. If the need for specialized international law is to escape an obnoxious domestic policy, why not simply reform the domestic policy? If the need is for different law for specialized situations, without any claim that the law is either better or worse than what applies in a purely domestic context, then the best solution would be to hammer out international treaties which might lead to potentially uniform law being applied potentially uniformly.

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78. I could understand, although I would not agree with, a Saudi Arabian judge making a downward deviation from normal full Saudi Arabian recovery when the foreigner was defendant. Conceivably this would be on the basis of a more formally articulated version of "poor foreigner, he cannot be expected to have conformed his conduct to our higher standards; we should judge him by a lesser law that we will invent solely to apply in such situations." I do not think such a law would be good forum policy, however, because it is my belief that whatever defendant connection with the forum allowed suit to be brought there would also support application of "higher standard" Saudi law against the defendant.
Absent true bilateral or multilateral state to state agreement, each state is merely proclaiming its own view of what should be the content of specialized law. The effort to proclaim rightly is certainly worth making, but no one should pretend that the proclamations thus issued have more validity behind them than do other forum proclamations about what the law ought to be. Questions about whether this forum should call the shots, and questions about what the shots should look like do not disappear once the law is labeled international or specialized. In other words, even assuming we could identify types of cases worthy of *lex mercatoria*, admiralty, or other specialized treatment, I emphasize that the content of such specialized rules is defined from the inside, as a version of forum law specially tailored to international or interstate fact situations. There is no exterior source for interstate law.

But to return to the *Walton* case, in most situations where the forum as law-giver model is offered, no credible case can be made for differentiated treatment. *Walton* is a garden variety auto accident case. The *Walton* case, like much conflicts case fodder, is not an international case deserving specialized treatment. It is merely a case with some international facts in it. Especially in such situations, the forum as law-giver model should not be used to escape domestic law. Instead, forum law should be improved across the board so that all those who experience tort injury in the forum state will receive proper tort recovery in the forum's tribunals.

III. CONCLUSION

My comments, inspired by the Symposium panel's re-evaluation of some of the basics of conflicts methodology, have been limited primarily to variations on problems raised by the *Walton* case. They are intended to demonstrate why an interested forum, applying its own law, is the only forum that ever should adjudicate a case. There are certainly other kinds of cases to which my theory would need to be applied to see whether it really makes sense. Nevertheless, if *Walton* seemed a good place for Brainerd Currie to start, there is something to be said for returning to that case in a Symposium dedicated to his memory and also premised on starting from scratch about what conflicts methodology should look like. My intent is to honor Brainerd Currie's memory by

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79. In particular, I would like in a future piece to accept the challenges Professors Borchers and Juenger make in their comments to this Symposium and explain why a version of forum interest theory can help shed light on the problems of multiple party, multiple claim cases and of class action litigation. *Cf.* Juenger, *supra* note 67; Patrick J. Borchers, *Back to the Past: Anti-Pragmatism in American Conflicts Law*, 48 MERCER L. REV. 721 (1997).
returning to the ground he previously plowed, and to see if something may still be cultivated from that soil. Whether what I have turned up amounts to rocks, fertile earth, or only the same tired red Georgia clay that has stuck to other's blades, I will let others tell me. I thank the Symposium organizers, however, for letting me hitch up the plow.