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A Real World Perspective On Choice Of Law

by Robert A. Sedler*

I. INTRODUCTION

I have been invited to respond to a symposium on "*Choice of Law: How It Ought to Be.*"¹ My response will be in terms of "Choice of Law: How It Is." That is, as the title of this Article indicates, I hope to bring a real world perspective on choice of law to the issues that have been discussed in the symposium. And I believe that a perspective on how choice of law operates in the real world—how choice of law is—may furnish considerable guidance on the question of how choice of law ought to be.

My real world perspective on choice of law contains three components. The first component I will call interest analysis and judicial method. This component represents my view as to how choice of law ought to be, and as I believe I have demonstrated in my numerous writings on choice of law, in practice, this is pretty much how choice of law is. The second component of my real world perspective on choice of law arises from the fact that I also teach and write in the area of Constitutional Law. Professor Felix has noted that Conflicts teachers who also teach Constitutional Law should be treating the subject of the constitutional issues as they arise in the Conflicts course in a broader context.² I agree with Professor Felix on this score. It is precisely because I also teach Constitutional Law, that I approach constitutional issues in this broader context, which I call constitutional generalism.³ The third

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1. Transcript, *Choice of Law: How It Ought To Be*, 48 MERCER L. REV. 639 (1997).

2. Transcript, *supra* note 1, at 704 (Professor Felix).

3. See generally Robert A. Sedler, *Constitutional Limitations on Choice of Law: The Perspective of Constitutional Generalism*, 10 HOFSTRA L. REV. 59 (1981) [hereinafter Sedler,

component of my real world perspective on choice of law comes from my experience as a litigating lawyer and "conflicts consultant." Although I have litigated extensively over the years in my other field of Constitutional Law, in the last decade or so, I have found myself litigating a number of conflicts cases in Michigan. I have also consulted with practicing lawyers on their conflicts cases. Thus, I have had some opportunity to observe "the conflict of laws in practice," and this has given me some idea of how courts deal with conflicts issues in actual litigation.

In this writing, I will discuss in detail the three components of my real world perspective on choice of law. In the course of this discussion, I will bring in all of the cases commented upon by the distinguished panelists in the roundtable discussion, and examine them from this real world perspective. When approached from this perspective, I submit that these cases are not at all difficult to resolve, and that in the real world, choice of law is not nearly as complicated as academic analysis of the choice of law process, such as that contained in the roundtable discussion, frequently indicates.

II. INTEREST ANALYSIS AND JUDICIAL METHOD

In my many years of teaching and writing on the Conflict of Laws, I have focused on essentially two themes. On the one hand, I am a strong proponent of interest analysis as the preferred approach to choice of law. I maintain that interest analysis is the preferred approach because it provides functionally sound and fair solutions to the choice of law issues arising in actual cases. Interest analysis simplifies the choice of law process by focusing on what the courts consider to be the most rational considerations in making choice of law decisions: the policies reflected in a state's rule of substantive law, and a state's interest in applying its law in order to implement those policies in a particular case. In other words, despite some disagreement on peripheral matters, I am an unabashed follower of Brainerd Currie's interest analysis. I believe that Brainerd Currie has not only revolutionized choice of law, but has developed an approach to choice of law that will endure "now and forever," because it is the most rational way for courts to resolve the myriad of choice of law issues that arise in practice. This includes Currie's forum preference solution to the "true conflict," which is a point of departure for some of Currie's other followers. I have defended Currie's interest analysis approach against the host of critics, old and

new,⁴ and have reformulated Currie's interest analysis approach so as to simplify it for use by the courts in the day-to-day process of deciding actual conflicts cases.⁵ I have further demonstrated that all of the courts that have abandoned the traditional approach to choice of law generally reach results, at least in torts cases, that are in practice consistent with the results that would be reached under Currie's interest analysis approach—including forum preference in the "true conflict"—regardless of which "modern" approach to choice of law they are purportedly following.⁶

On the other hand, I have also emphasized judicial method in conflicts cases. I have distinguished between the function of a court in a conflicts case and the use of the interest analysis approach in performing that function. I relate the function of a court in a conflicts case to what I see to be the general purpose of conflicts law: providing functionally sound and fair solutions for the *relatively few cases* that arise in practice in which a court has to make a choice of law decision. Therefore, the court's focus in a conflicts case should be on the precise choice of law issue presented for decision in the case before it, and the court's objective should be to resolve that issue in a way that will produce a functionally sound and fair result.

A court has to make a choice of law decision in an actual case only (1) when the case is connected with more than one state, and more importantly, (2) when the laws of the involved states differ on the point in issue. These cases are relatively few in number for two reasons. First, despite the fact that we live in a multistate (and increasingly multinational) world, most transactions, and thus, most cases that arise in practice, are connected with only one state. Most automobile accident cases, for example, involve two drivers who had the accident in their home state, and most contract cases involve two contracting parties who

4. See, e.g., Robert A. Sedler, *Professor Juenger's Challenge to the Interest Analysis Approach to Choice of Law: An Appreciation and a Response*, 23 U.C. DAVIS L. REV. 865 (1990) [hereinafter Sedler, *Juenger's Challenge*]; Robert A. Sedler, *Interest Analysis as the Preferred Approach to Choice of Law: A Response to Professor Brilmayer's "Foundational Attack,"* 46 OHIO STATE L.J. 483 (1985); Robert A. Sedler, *Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the "New Critics,"* 34 MERCER L. REV. 593 (1983) [hereinafter Sedler, *New Critics*]; Robert A. Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation*, 25 UCLA L. REV. 181 (1977) [hereinafter Sedler, *Governmental Interest Approach*].

5. Sedler, *Governmental Interest Approach*, *supra* note 4, at 220-22.

6. See Sedler, *Governmental Interest Approach*, *supra* note 4, at 190-220; Sedler, *New Critics*, *supra* note 4 at 635-43; Sedler, *Juenger's Challenge*, *supra* note 4, at 891-95. For a further discussion of choice of law in conflicts torts cases in practice, see ROBERT A. SEDLER, *ACROSS STATE LINES: APPLYING THE CONFLICT OF LAW TO YOUR PRACTICE* 47-68 (A.B.A. General Practice Section, 1989) [hereinafter SEDLER, *ACROSS STATE LINES*].

enter into a contract that is to be performed in their home state. In practice, then, the conflicts case is still the exceptional one.

Second, even when a case is connected with more than one state, most of the time the laws of the involved states will not differ on the point in issue. I am fond of saying that the law is alike except when it is different. With few exceptions, conflicts cases arising in American state courts are interstate cases.⁷ And while the conflict in some cases may be due to differing common law rules,⁸ whenever a conflict of laws exists between two American states, it is generally because one state has enacted a statute that changes the common law rule remaining in force in the other state,⁹ or in an area regulated by statute, such as wrongful death, where the statutes of the involved states differ in particular respects.¹⁰ Even when a case is connected with more than one state, in practice, the case usually will not present a choice of law issue. For these reasons, in relation to the total number of cases that arise in practice, there will simply be relatively few conflicts cases. Moreover, only a small portion of the conflicts cases that do arise in practice are actually litigated to conclusion—after all, the overwhelming number of all lawsuits are settled—and an even smaller portion make it to the appellate courts. This may be why those cases that do make it to the appellate courts are seemingly complicated and often result in lengthy opinions that are grist for the academic mill. But conflicts cases make up an infinitesimal part of the business of the courts, something that academic commentators might bear in mind when they discuss how choice of law ought to be.

7. I consider a case involving an American state and a Canadian province essentially an interstate case. Because most of the conflicts cases arising in American courts are interstate cases, American conflicts law has developed with reference to the interstate case. International cases are accommodated within the framework established for interstate cases, although presumably relevant differences would be taken into account by the court. See, e.g., *Hurtado v. Superior Court*, 522 P.2d 666 (Cal. 1974).

8. For example, one of the involved states uses a strict liability standard in a products liability case, and the other uses a negligence standard, or one state's law on comparative negligence is judge-made rather than statutory.

9. Most of the "classic" conflicts torts cases arose because one state had an immunity statute, such as a guest statute or a family immunity statute, that changed the common law rule remaining in force in the other state. Although these immunity statutes have for the most part been repealed, torts conflicts cases are likely to arise today when one involved state has enacted a "tort reform" statute, such as one with a provision that puts a cap on noneconomic damages, and the other has not.

10. Even though caps on wrongful death recoveries have for the most part been repealed, differences in wrongful death statutes still remain, particularly with respect to recovery of noneconomic damages.

Some thirty years ago, I analyzed the choice of law process in terms of "judicial method and the policy-centered conflict of laws."¹¹ I maintained that, in accordance with the common law tradition, courts should apply judicial method to the resolution of conflicts problems as they apply it to other areas of law.¹² Under judicial method, a court should render the choice of law decision with reference to the fact-law pattern presented in the particular case. The decision in that case would serve as a precedent for decisions in other cases presenting the same fact-law pattern, and the decision's rationale would serve as a guide to the resolution of future cases presenting different fact-law patterns. In time, depending on the number and kinds of cases that arose in each state, a body of conflicts law would emerge in that state through the normal workings of binding precedent and *stare decisis*.¹³

Furthermore, the criteria for the choice of law decision should be based upon considerations of policy and fairness to the parties. The rationale here is that the *criteria* for the choice of law decision—the decision to displace the forum's own law and to look to the law of another state, in whole or in part, for the rule of decision in the case—should relate to the underlying *justification* for such displacement. Under the "criteria-justification" rationale, the forum's law should be displaced only when either policy considerations, such as recognition of the legitimate interest of another state in having its law applied, or concerns for fairness, such as protecting the reasonable expectations of the parties, dictate the displacement of the forum's law in favor of the law of another state. In the absence of such considerations, the law of the forum should apply, just as it would in a domestic case.

Thus, under a judicial method and policy-centered conflict of laws approach, the choice of law process would operate in accordance with the following premises: (1) the basic law is the law of the forum, which will be applied in the absence of valid reasons for its displacement;¹⁴ (2) the

11. Robert A. Sedler, *Babcock v. Jackson in Kentucky: Judicial Method and the Policy-Centered Conflict of Laws*, 56 KY. L.J. 27 (1967) [hereinafter, Sedler, *Judicial Method*]; Robert A. Sedler, *Characterization, Identification of the Problem Area, and the Policy-Centered Conflict of Laws: An Exercise in Judicial Method*, 2 RUT.-CAM. L.J. 8 (1970); Robert A. Sedler, *Judicial Method Is "Alive and Well": The Kentucky Approach to Choice of Law in Interstate Automobile Accidents*, 61 KY. L.J. 378 (1973). See also Robert A. Sedler, *Choice of Law in Michigan: Judicial Method and the Policy-Centered Conflict of Laws*, 29 WAYNE L. REV. 1193 (1983).

12. Sedler, *Judicial Method*, *supra* note 11, at 42-45, 57-58.

13. *Id.* at 82-87.

14. As to the reasons why the law of the forum is the basic law, see BRAINERD CURRIE, *SELECTED ESSAYS IN THE CONFLICT OF LAWS* 75-76 (1963); Sedler, *Judicial Method*, *supra* note 11, at 87-95.

choice of law decision will be made with reference to the fact-law pattern presented in the particular case; and (3) the choice of law decision will be based on considerations of policy and fairness to the parties.

I would submit that what I have called judicial method and the policy-centered conflict of laws is in practice followed today by all the courts that have abandoned the traditional approach, at least in conflicts torts cases. And the policy component of judicial method and the policy-centered conflict of laws has been, in practice, interest analysis. That is, a consideration of the underlying policies and interests of the involved states in having their laws applied to implement those policies in the particular case has become the *dominant consideration* in resolving conflicts torts cases. Although only a small number of these courts expressly follow the Currie version of interest analysis as their articulated approach to choice of law, most other modern approaches, such as the *Restatement (Second) of Conflict of Laws*' "state of the most significant relationship" approach, which is the articulated approach followed by the largest number of courts that have abandoned the traditional approach, and Leflar's choice influencing considerations, which is followed by a number of others, include a consideration of the policies and interests as a relevant factor in the choice of law decision. In practice, that consideration has dwarfed all others, and as stated previously, the results reached by the courts in conflicts torts cases are generally consistent in practice with the results that would be reached under interest analysis. This includes the application of the forum's own law in the "true conflict." And again, this is because, as Currie emphasized, a consideration of the policies reflected in the laws of the involved states, as well as the interest of each state in applying its law to implement those policies in the particular case, seems to the courts to be the most rational way to resolve the choice of law issues presented in that case.

The operation of judicial method in practice has led to what I have called "rules of choice of law" in conflicts torts cases, which have emerged from the practice of the courts in deciding the conflicts torts cases that have come before them.¹⁵ These rules of choice of law are the diametrical opposite of choice of law rules, either traditional or modern, because they are not formulated *a priori* and then applied to the facts of particular cases. Rather rules of choice of law are like common law rules in other areas, such as tort law or contract law, in that they are derived from the decisions of the courts in actual cases and serve as

15. Robert A. Sedler, *Rules of Choice of Law Versus Choice-of-Law Rules: Judicial Method in Conflicts Torts Cases*, 44 TENN. L. REV. 975 (1977) [hereinafter Sedler, *Rules of Choice of Law*].

precedents for the resolution of future cases. It should be noted, however, that the tort rules of choice of law that I have identified are based solely on the *results* of the decided cases. They are not based on the courts' explanations for their decisions in those cases or on the application of the particular choice of law approach that the court is purportedly following. The courts generally do not refer to rules of choice of law as such.¹⁶ Nonetheless, it can be demonstrated that when analyzed within this result-based framework, the courts that have abandoned the traditional approach have reached fairly uniform solutions in the different fact-law patterns presented in conflicts torts cases. When the courts have differed, the differences are sufficiently clear as to indicate "majority" and "minority" views, as in other areas of law.

There are several reasons for this substantial uniformity of result in conflicts torts cases. First, the fact-law patterns in conflicts torts cases are easy to identify. The fact part of the fact-law pattern relates to the states where the parties reside, the state where the harm occurred, and if it differs, the state where the act or omission causing the harm occurred. The law part relates to whether the law in question allows or denies recovery, that is, whether it is plaintiff-favoring or defendant-favoring, whether it reflects only a loss allocation policy or an admonitory or regulatory policy as well, and whether it involves other policy considerations, such as those relating to workers' compensation.

Thus, a case may present the following fact-law patterns: (1) an injury in a nonrecovery state involving two parties from a recovery state; (2) an injury in a recovery state involving two parties from a nonrecovery state; (3) an injury in a recovery state involving a plaintiff from a recovery state and a defendant from a nonrecovery state; (4) an injury in a nonrecovery state involving a plaintiff from a recovery state and a defendant from a nonrecovery state; (5) an injury in a recovery state involving a plaintiff from a nonrecovery state and a defendant from a recovery state; and (6) an injury in a nonrecovery state involving a plaintiff from a nonrecovery state and a defendant from a recovery state. A case may also involve a law reflecting an admonitory or regulatory policy which may give rise to a different "interest mix" than would be present in the same fact-law pattern if the law only reflected a loss allocation policy.

16. But see *Sexton v. Ryder Truck Rental*, 320 N.W.2d 843, 851 (Mich. 1982), referring to the "most universal rule of choice of law": when two residents of the forum are involved in an accident in another state, the law of the forum applies (quoting Robert A. Sedler, *Choice of Law in Michigan: A Time to Go Modern*, 24 WAYNE L. REV. 829, 849 (1978)).

The use of interest analysis by the courts in practice has been a major factor contributing to the fairly uniform solutions in the fact-law patterns of conflicts torts cases. First, contrary to the contentions of many critics of interest analysis, in actual cases, the policies and interests of the involved states are not difficult to identify.¹⁷ In the ordinary accident case, where the law at issue reflects only a loss allocation policy, the states interested in applying their respective laws to implement that policy are the parties' home states, where the consequences of the accident and of imposing or denying liability will be felt by the parties and their insurers. So, where the law of the plaintiff's home state allows recovery, that state is interested in applying its own law to allow recovery irrespective of where the defendant resides or where the accident occurs. Likewise, where the law of the defendant's home state denies recovery, that state is interested in applying its law to deny recovery, again irrespective of where the plaintiff resides or where the accident occurs.

Conversely, where the law at issue reflects only a loss allocation policy, the state where the accident occurs has no interest in applying its law to deny recovery to a nonresident injured there, and in my opinion, as will be discussed more fully below, no real interest in applying its law to allow recovery to a nonresident injured there. Finally, when a state's law reflects an admonitory or regulatory policy, its interest in applying its law in furtherance of that policy is predicated on its connection with the conduct sought to be deterred, or the activity sought to be regulated, and the consequences of the act or omission. Thus, the state where the conduct or activity took place and the state where the consequences of the act or omission occurred would have a real interest in applying its law in order to implement the admonitory or regulatory policy reflected in that law, regardless of where either the actor or the victim resides.

Second, as I have stated repeatedly and as Currie has emphasized, it seems rational to a court to make the choice of law decision with reference to the policies and interests of the involved states. In the false conflict situation, where only one state has a real interest in applying its own law in order to implement the policy reflected in that law, there is every reason to apply the law of that state and no good reason not to apply it. In the true conflict situation, it seems fully reasonable to a

17. See Sedler, *Juenger's Challenge*, *supra* note 4, at 880-84; Sedler, *New Critics*, *supra* note 4, at 617-20; Sedler, *Governmental Interest Approach*, *supra* note 4, at 194-204. For purposes of interest analysis, a law is assumed to reflect all legitimate policies that could be advanced by its application. Of course, in a particular case a court can disagree over a question of policies and interests, just as it can disagree over any other question. But in most cases, such disagreement is not likely to occur.

court for it to apply its own law in order to advance its own policy and interest, so long as this will not produce any unfairness to the party against whom that law is being applied.¹⁸ Although academic commentators may search endlessly for a neutral solution to the true conflict, the results in practice indicate that neutral solutions do not have much appeal to the courts deciding the cases before them. Thus, in practice, the courts will almost invariably resolve true conflicts by simply applying their own law, as Currie advocates. And even though interest analysis can only identify, but not resolve the unprovided-for case, such identification is helpful in leading the courts to a means of resolution in that situation.¹⁹

I have identified a number of rules of choice of law in conflicts torts cases. The first and most universal rule of choice of law, followed by all of the courts that have abandoned the traditional approach, is that when two residents of the forum are involved in an accident in a different state, the law of the forum applies. When the law of the forum allows recovery, the forum is interested in applying its law for the benefit of the resident plaintiff; when the law of the forum denies recovery, the forum is interested in applying that law for the benefit of the resident defendant. Thus, the forum will apply its own law in this situation, notwithstanding that the accident occurred a different state.²⁰

It is the first rule of choice of law that explains the results in *Babcock v. Jackson*²¹ and *Grant v. McAuliffe*.²² Although these cases are typically cited as the classic example of the false conflict, more impor-

18. Fairness to the parties is an independent choice of law consideration. Totally apart from due process constraints of "fundamental unfairness," see *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981), a court is reluctant to apply its own law despite a real interest in doing so where the application of its law may produce some unfairness to the party against whom it is being applied, although the degree of unfairness may not rise to constitutional dimensions. In the tort area, fairness relates to foreseeability and reliance. The application of a state's law may produce unfairness if the party against whom that state's law is being applied could not reasonably foresee the application of that law at the time the party acted, and, in the circumstances presented, the party was entitled to rely on the law of another state and conform its conduct to the requirements of that state's law. Although such cases will be fairly rare, they sometimes do occur, and when they do, the forum will displace its own law despite a real interest in having that law applied. See the discussion and review of cases in Robert A. Sedler, *Interest Analysis, Party Expectations and Judicial Method in Conflicts Torts Cases: Reflections on Cooney v. Osgood Machinery, Inc.*, 59 BROOK. L. REV. 1323, 1328-30 (1994).

19. See Sedler, *Governmental Interest Approach*, *supra* note 4, at 233-36 (discussion of the unprovided-for case).

20. See Sedler, *Rules of Choice of Law*, *supra* note 15, at 1033-34.

21. 191 N.E.2d 279 (N.Y. 1963).

22. 264 P.2d 944 (Cal. 1953).

tantly, as Professor David Currie has pointed out in the roundtable discussion, "in a federal system, every state has the right to make up its own laws for its own people."²³ For the courts deciding a case presenting this fact-law pattern, this is the dispositive point. This is what persuaded the California court in *Grant v. McAuliffe* to "manipulate the system" in order to bring about the application of California law, and the New York court in *Babcock v. Jackson*, to "spark the conflicts revolution" by abandoning the place-of-the-wrong rule once and for all. By the same token, the courts of the parties' home state are not at all concerned about any interest of the state where the accident occurred in applying its law.

In the roundtable discussion, Professor Blumoff raises the question of whether *Grant v. McAuliffe* would still present a false conflict if Arizona required gross negligence for contributory negligence while California stuck with the normal contributory negligence standards and the defendant's estate wanted to pursue a contributory negligence defense.²⁴ This is not the question that the California court would ask. If this is what California law was on this issue, California law would be defendant-favoring, so California's interest in applying its own law would now be predicated on its connection with the defendant. But either way, two California parties are involved, and California will apply its own law. So, when two residents of a state with a defendant-favoring rule are involved in an accident in a state with a plaintiff-favoring rule, and the plaintiff brings suit in the parties' home state, that court again will apply the first rule of choice of law and the plaintiff will lose.²⁵ This is why in this situation, which is covered by the third rule of choice of law, astute plaintiff's counsel will bring suit in the accident state, obtaining jurisdiction under its long-arm act, and hope that he or she can persuade that state to apply its own plaintiff-favoring law for the benefit of the out-of-state plaintiff.

Continuing with the roundtable discussion of *Babcock* in terms of interest analysis, the panelists discuss the policy behind the Ontario guest statute and the matter of determining policies and interests.²⁶ This discussion points out the differences between academic analysis and

23. Transcript, *supra* note 1, at 661 (Professor D. Currie).

24. *Id.* at 665 (Professor Blumoff).

25. See, e.g., *Tower v. Schwabe*, 585 P.2d 662 (Or. 1978) (where residents of the forum, which had a guest statute, were involved in an accident in another state, forum's guest statute applies); *Hubbard Mfg. Co. v. Greeson*, 515 N.E.2d 1071 (Ind. 1987) (where Indiana resident was killed in Illinois while using lift manufactured by Indiana manufacturer in Indiana, Indiana products liability law, which was more favorable to manufacturer, applies).

26. Transcript, *supra* note 1, at 668-70.

real world litigation. The policy behind the Ontario guest statute did not matter to the New York court that decided *Babcock*. When the New York court discussed that policy, it was only to demonstrate that Ontario did not have a real interest in applying its guest statute in a case involving New York parties. But New York's interest is the same regardless of Ontario's interest; New York will apply its own law because both parties are from New York. In other words, the crucial question in actual litigation is whether the forum has a real interest in applying its own law in order to implement the policy reflected in that law. If the forum has a real interest in applying its own law, it will do so, both where the other involved state does not have a real interest (the false conflict), and where the other involved state does have a real interest (the true conflict). So, when I reformulated Currie's interest analysis for use by the courts in actual litigation, I did it first in terms of the forum's real interest. The proposition is that where the forum has a real interest in applying its own law to further the law's policy, it will do so, assuming, as is usual, that this will produce no unfairness to the other party.²⁷

In the roundtable discussion, Professor Posnak laments the fact that in the new edition of the Cramton, Currie, Kay and Kramer casebook, *Babcock* is reduced to a note case. We are told that this was done at the instance of Professor Kramer, who described *Babcock* as "analytic mush."²⁸ In the current edition of this outstanding casebook, *Tooker v. Lopez*²⁹ is substituted for *Babcock*. In *Babcock*, where the trip originated in New York and was to end there, the New York court took an "eclectic" approach to choice of law, and supported its decision by invoking both the *Restatement (Second) of Conflict of Laws*' state of the most significant relationship approach and Currie's interest analysis.³⁰ In *Tooker*, the facts were different—the parties were students at Michigan State University, and the accident occurred on a trip from East Lansing to Detroit—but the fact-law pattern was the same, and the New York court applied New York law allowing recovery.

One way of looking at *Tooker* is to say that the New York court came down on the side of interest analysis instead of the factual contacts component of the state of the most significant relationship approach. But the factual contacts set out in the *Restatement (Second) of Conflict*

27. Sedler, *Governmental Interest Approach*, *supra* note 4, at 221-33.

28. Transcript, *supra* note 1, at 667 (Professors Posnak, Kay, D. Currie, and Rees).

29. 249 N.E.2d 394 (N.Y. 1969).

30. Brainerd Currie noted at the time that, "The majority opinion [in *Babcock*] contains items of comfort for almost every critic of the traditional system." Brainerd Currie, *Comments on Babcock v. Jackson*, 63 COLUM. L. REV. 1233, 1234 (1963).

of *Laws*, here section 145, are to be evaluated in light of the general choice of law considerations of section 6, which include the policies and interests of the involved states.³¹ Suppose that the New York court in *Babcock* had expressly adopted the *Restatement (Second) of Conflict of Laws'* state of the most significant relationship approach. Would this have changed the result in *Tooker*? Of course not. Because the fact-law pattern is the same in *Babcock* and *Tooker*, the court in *Tooker* would have invoked the general choice of law considerations of section 6, most particularly the policies and interests of the involved states, and would have held that New York was the state of the most significant relationship on the issue of guest-host immunity in this case. In other words, regardless of which articulated approach to choice of law the New York court was following, it would have applied New York law in *Tooker*, just as it did in *Babcock*, despite the factual differences in the two cases. The most significant fact of both cases was that two New York parties were involved in an accident in a different state, and the New York court would apply New York law to determine liability for the accident.

The second and also universally followed rule of choice of law is that when two parties from a recovery state are involved in an accident in a nonrecovery state, recovery will be allowed. This is the classic false conflict, and recovery will be allowed regardless of where suit is brought or whether both parties are from the same or different recovery states.³² Cases presenting this fact-law pattern do not arise very often because usually the plaintiff and the defendant will be residents of the same state, and the plaintiff will bring suit in that state. But in those cases where, for one reason or another, suit is brought in the accident state, that state will displace its own law in favor of the law of the plaintiff's home state. A very significant factor in the application of interest analysis in practice is recognition of the false conflict and application of the law of the only interested state. So, the second proposition in my reformulation of Currie's interest analysis is that where the forum does not have a real interest in applying its law in order to implement the policy reflected in that law, but another state does, the forum will apply the law of the only interested state.³³

The third rule of choice of law covers the situation presented in cases such as *Schultz v. Boy Scouts of America, Inc.*,³⁴ which is discussed in

31. See SEDLER, *ACROSS STATE LINES*, *supra* note 6, at 33-36 (discussion of the state of the most significant relationship approach).

32. See Sedler, *Rules of Choice of Law*, *supra* note 15, at 1034.

33. Sedler, *Governmental Interest Approach*, *supra* note 4, at 220-22.

34. 480 N.E.2d 679 (N.Y. 1985).

the roundtable, and *Milkovich v. Saari*,³⁵ where two parties from a non-recovery state are involved in an accident or other negligence-based tort in a recovery state. In this fact-law pattern, suit will be brought in the recovery state, with jurisdiction obtained under the long-arm act, because if it were to be brought in the parties' home state, that court would apply the first rule of choice of law and deny recovery. Here the courts are divided, with the majority of the courts allowing recovery.³⁶ The courts that do allow recovery tend to emphasize the forum's "better law" and the even-handed treatment of non-residents injured in the forum.³⁷ In my view, the state where the tort occurred does not have a real interest in applying its law in this situation to allow recovery to the nonresident injured there. This is because, as regards the loss allocation policy reflected in the forum's law allowing recovery, the consequences of the accident and of allowing or denying recovery will be felt by the parties and their insurers in the parties' home states.³⁸ Because the parties' home state has a real interest in applying the loss allocation policy reflected in its law for the benefit of the resident defendant, the case presents a false conflict, and the forum should apply the law of the parties' home state as the law of the only interested state. This was the position taken by the New York court in *Schultz*. In *Milkovich*, which involved two parties from a guest statute state, Ontario, who were traveling together in Minnesota, where the accident occurred, the Minnesota court applied its own law allowing recovery.

Much of the discussion of *Schultz* by the panelists deals with the question of whether New York's law imposing liability for negligence can be seen as embodying a deterrent policy.³⁹ If it did, then New York would have a real interest in applying its law in order to implement that deterrent policy because the conduct occurred in New York. The case would then present a true conflict, and New York would apply its own law.⁴⁰ The dissent in *Schultz* talked about a deterrent policy, and courts that apply the forum's law to allow recovery, as the Minnesota court did in *Milkovich*, sometimes make some reference to deterrence. However, it is difficult for me to see how a rule of law imposing liability for negligence, as opposed to one imposing liability for intentional torts,

35. 203 N.W.2d 408 (Minn. 1973).

36. See Sedler, *Rules of Choice of Law*, *supra* note 15, at 1035.

37. See *Milkovich*, 203 N.W.2d at 417.

38. See Robert A. Sedler, *Choice of Law in Michigan: Judicial Method and the Policy-Centered Conflict of Laws*, 29 WAYNE L. REV. 1193, 1214-16 (1983).

39. Transcript, *supra* note 1, at 676, 677 (Professors Kay, Rees, Posnak, Knowles, Felix, and D. Currie).

40. See *infra* note 55 and accompanying text.

can be said realistically to reflect a deterrent policy. Rules of law imposing liability for negligence realistically should be considered to reflect only loss allocation policies. It does not matter in *Schultz* that the scoutmaster had engaged in intentionally wrongful conduct, because the suit was not against the scoutmaster, but against the financially responsible charitable organization, and liability was predicated only on a theory of negligence. Because a rule of law imposing liability for negligence does not reflect a deterrent policy, I think that the New York court was correct in holding that it had no interest in applying its law on the point in issue, and that it should apply the law of New Jersey as the law of the only interested state.⁴¹

If the victim had been from New York, the case would have presented a true conflict, and the New York court would have applied New York law. This fact troubled the Minnesota court in *Milkovich*, and the other courts that have applied their own law to allow recovery in this situation. Although the court in *Milkovich*, following Leflar's choice-influencing considerations, emphasized that Minnesota law, which did not have a guest statute, was the better law, the concern for the even-handed treatment of nonresidents injured in Minnesota also surfaced in the decision.⁴²

I see this fact-law pattern presenting a conflict between the result that would be produced by a strict application of interest analysis and the concern for even-handed treatment of nonresidents injured in the forum. As I will point out later, there are no constitutional problems in denying recovery to the nonresident victim injured by a fellow nonresident while allowing recovery to the resident victim injured by the same nonresident.⁴³ And, as pointed out previously, courts generally want to recognize the interest of the only interested state in applying its law in the false conflict situation. But surely it is not unreasonable for a court to say that, at least in this situation, a concern for the even-handed treatment of nonresidents outweighs the need to recognize the interests

41. For a recent decision holding that the law of the parties' home state applies in the *Milkovich* situation, see *Collins v. Trius, Inc.*, 663 A.2d 570 (Me. 1995). As the court stated:

The superiority of the common domicile as the source of law governing loss-distribution issues is evident. At its core is the notion of a social contract, whereby a resident assents to casting her lot with others in accepting burdens as well as benefits of identification with a particular community, and ceding to its law-making agencies the authority to make judgments striking the balance between her private substantive interests and competing ones of other members of the community.

663 A.2d at 573.

42. 203 N.W.3d at 417.

43. See *infra* notes 94-98 and accompanying text.

of the parties' home state. It is precisely because a conflict between these concerns exists in this fact-law pattern that the courts are divided. This is one area where the results reached by some courts in practice—those that apply their own law to allow recovery—are not fully consistent with the results that would be reached under interest analysis.

The fourth rule of choice of law covers the true conflict with a recovery state plaintiff and a nonrecovery state defendant, when the accident occurs in the plaintiff's home state, either because of an act done there, as in the ordinary automobile accident, or because of an act done elsewhere that has created a foreseeable risk of harm in the plaintiff's home state and in fact has caused such harm.⁴⁴ The plaintiff, of course, will bring suit in the plaintiff's home state, and in this true conflict situation, the forum will apply its own law allowing recovery.⁴⁵

The fifth and sixth rules of choice of law cover the true conflict with a recovery state plaintiff and a nonrecovery state defendant, where the accident occurs in the defendant's home state. Because this is a true conflict, the result in practice will usually depend on whether suit can be brought in the plaintiff's home state. If the suit is brought in the defendant's home state, that state, will apply its own law denying recovery. This is the sixth rule of choice of law.⁴⁶ Frequently, however, jurisdiction can be obtained in the plaintiff's home state, either because the defendant is a corporation doing substantial business there,⁴⁷ because the underlying accident had substantial factual contacts with the plaintiff's home state,⁴⁸ or even because the defendant is personally served in the plaintiff's home state. In this situation, the forum will usually apply its own law allowing recovery, assuming that this produces no unfairness to the defendant. This is the fifth rule of choice of law.⁴⁹

44. The latter situation is illustrated by *Bernhard v. Harrah's Club*, 546 P.2d 719 (Cal.), *cert. denied*, 429 U.S. 829 (1976). Because the Nevada casino advertised extensively in California, it was subject to jurisdiction there, and California applied its own law imposing dram shop act liability.

45. Sedler, *Rules of Choice of Law*, *supra* note 15, at 1035-36.

46. *Id.* at 1037-38.

47. See for example, *Schwartz v. Consolidated Freightways Corp.*, 221 N.W.2d 665 (Minn. 1974), *cert. denied*, 425 U.S. 959 (1976), in which the defendant was an interstate trucking company doing substantial business in Minnesota. It was sued there in a case arising in Ohio involving one of its vehicles and a Minnesota victim.

48. See for example, *Foster v. Leggett*, 484 S.W.2d 827 (Ky. 1972), in which the defendant was a resident of Ohio, but worked in Kentucky, and the parties went on a day trip from Kentucky to Ohio, intending to return to Kentucky that evening. The accident occurred while the parties were in Ohio.

49. See Sedler, *Rules of Choice of Law*, *supra* note 15, at 1036-37.

*Rosenthal v. Warren*⁵⁰ involves the fifth rule of choice of law. In *Rosenthal*, a New York resident died after surgery performed by a renowned surgeon in a hospital in Massachusetts. At that time, Massachusetts law limited recovery for wrongful death; New York law did not. If suit had been brought in Massachusetts, the Massachusetts court, following the sixth rule of choice of law, would have applied its own law limiting recovery. The plaintiff, however, brought suit against the physician and the hospital in New York, primarily on the basis of attachment jurisdiction, which the Supreme Court subsequently held to be unconstitutional.⁵¹ However, the hospital also engaged in extensive fundraising activities in New York, and this may have been sufficient in retrospect to sustain the exercise of jurisdiction over the hospital, if not the physician.⁵² In any event, jurisdiction was not in issue in *Rosenthal*.

Although the panel members generally agree that it was proper for New York to apply its own law in this true conflict situation, Professor David Currie raised a question about the defendants' expectations and the possible unfairness in applying New York law.⁵³ Professor Blumoff responded to this concern by noting that patients from all over the world came to the hospital to be treated by the surgeon and that this would be reflected in the defendants' insurance coverage.⁵⁴ It surely does not seem unfair to expect that in these circumstances the hospital and the doctor would not be relying on the Massachusetts limitation and would have insured against unlimited liability. Thus, I see no unfairness in denying the defendants in *Rosenthal* the benefit of the Massachusetts limitation on wrongful death recovery.

But Professor Blumoff goes on to raise the question of the Massachusetts family doctor who is on vacation in New York and treats a New York child. He says that this doctor is entitled to rely on the Massachusetts limitation, and is troubled by the question of whether, if the doctor were sued in New York—as the doctor might be if personally served there—it would be unfair for New York to apply its own law on the issue of damages recoverable.⁵⁵

Fairness is an independent choice of law consideration. A court will not apply its own law, despite a real interest in doing so, where the application of its law would be unfair to the party against whom it is

50. 475 F.2d 438 (2d Cir.), *cert. denied*, 414 U.S. 856 (1973).

51. *Shaffer v. Heitner*, 433 U.S. 186 (1977).

52. Transcript, *supra* note 1, at 713 (Professors Posnak and Knowles).

53. *Id.* at 708 (Professor D. Currie).

54. *Id.* at 713 (Professor Blumoff).

55. *Id.*

being applied.⁵⁶ It is in the fact-law pattern presented by the fifth rule of choice of law that problems of fairness may arise, precisely because the defendant may have been entitled to rely on the law of its own state and conform its conduct and insurance coverage to the requirements of that state's law. Where this is so, considerations of fairness justify application of the law of the defendant's home state.

Professor Blumoff's family doctor example is similar to the situation involved in *Blakesley v. Wolford*.⁵⁷ In that case a Pennsylvania resident was advised by her physician to have a complicated procedure performed by a Texas oral surgeon. The Texas oral surgeon met with the plaintiff when he was visiting in Pennsylvania, and arranged to perform the procedure at a hospital in Texas. The operation was unsuccessful, and caused additional injury to the plaintiff. In a malpractice action against the oral surgeon in Pennsylvania (the oral surgeon made no objection to Pennsylvania's exercise of jurisdiction, although such an objection might have been sustained), the court held that Texas law, which was more favorable to the defendant, applied on the issues of informed consent and limitations on malpractice damages.⁵⁸ The court emphasized that the plaintiff voluntarily went to Texas to have the procedure performed, and accordingly, the defendant was entitled to rely on the Texas law of informed consent and limited liability for damages.⁵⁹

In most cases, however, as *Rosenthal* indicates, the application of the forum's law to allow recovery in the fact-law pattern of the fifth rule of

56. See the discussion of fairness, *supra* note 18.

57. 789 F.2d 236 (3d Cir. 1986) (applying Pennsylvania law).

58. *Id.* at 243.

59. *Id.*

choice of law will not be unfair.⁶⁰ In the few cases where it is, the forum will not apply its own law despite a real interest in doing so.⁶¹

The seventh rule of choice of law is that where the law of the state in which an act or omission occurs reflects an admonitory or regulatory policy, the actor will be held liable when that act or omission causes harm in a different state. Here, the state where the act or omission occurs has a real interest in applying its law in order to implement the regulatory or admonitory policy reflected in that law, and ordinarily, the

60. The absence of unfairness resulting from the application of the law of the plaintiff's home state in this situation is illustrated by *Schwartz v. Consolidated Freightways Corp.*, 221 N.W.2d 665 (Minn. 1974), *cert. denied*, 425 U.S. 959 (1976). In that case, the laws of the involved states differed on the issue of contributory fault. Ohio law at that time made contributory negligence a complete bar to recovery. Minnesota was a comparative negligence state. There was no unfairness to the defendant in applying Minnesota law on the point in issue. Although the application of Minnesota law on this issue was not foreseeable to the defendant at the time of the accident because the accident occurred in Ohio, there was no reliance on Ohio's contributory negligence rule by Consolidated's driver—Consolidated's driver did not deliberately become involved in an accident with the vehicle driven by the Minnesota plaintiff on the theory that the Minnesota driver would be barred from recovering for the accident because of the plaintiff's own contributory negligence.

61. I have found two other cases where, in this situation, considerations of fairness justified the application of the law of the defendant's home state. In *Barrett v. Foster Grant Co.*, 450 F.2d 1146 (1st Cir. 1971) (applying New Hampshire law), a New Hampshire employee of a New Hampshire contractor suffered serious injuries while working on an electrical transformer in Massachusetts, and brought suit against the Massachusetts landowner in New Hampshire. The landowner would not be liable under Massachusetts law, which only imposed a duty to warn of hidden dangers. The plaintiff contended that New Hampshire law imposed a higher duty of care. The court held that Massachusetts law applied on the duty of care owed by landowners to persons on the land, emphasizing that the Massachusetts landowner was entitled to rely on the Massachusetts standard of care when acting on its Massachusetts land. *Id.* at 1154.

In *Bader v. Purdom*, 841 F.2d 38 (2d Cir. 1988) (applying New York law), New York parents visiting friends in Ontario left their small child unsupervised, and the child was injured by their friends' dog. They brought a negligence action on behalf of the child in New York. Realistically, of course, the suit was against their friends' homeowner insurer (presumably the friends permitted themselves to be served with process in New York), and the insurer sought to recover contribution and indemnity from the allegedly negligent parents, which was permitted under Ontario law, but not under New York law. The court characterized this case as a true conflict, and looked to Ontario law under the second *Neumeier* rule. *Id.* at 40 (citing *Neumeier v. Kuehner*, 286 N.E.2d 454, 458 (N.Y. 1972)). Here, it can be contended that the application of New York law on the issue of contribution and indemnity would have been unfair to the dog owners, the nominal defendants in the case, because they were entitled to conform their conduct to the requirements of Ontario law, under which the child's parents, and not the dog owners, were responsible for the child's protection. Thus, the dog owners would not have to be concerned about the child's safety while the parents were present.

state where the harm occurs will have no interest in insulating the actor from liability.⁶²

The eighth rule of choice of law deals with the unprovided-for case: the plaintiff is from a nonrecovery state and the defendant is from a recovery state. In this situation, recovery usually will be allowed irrespective of where the accident occurs, although under New York's *Neumeier* rules, recovery is denied when the accident occurs in the victim's home state.⁶³ The roundtable discussion treats *Erwin v. Thomas*⁶⁴ and *Hurtado v. Superior Court of Sacramento County*⁶⁵ as presenting the unprovided-for case. As I will point out shortly, *Erwin v. Thomas* requires special consideration, so for the time being I will focus on *Hurtado*. Although it has been contended by Professor Larry Kramer that there is no such thing as the unprovided-for case,⁶⁶ my real world analysis need not consider this point. In the fact-law pattern covered by the eighth rule of choice of law—which under Currie's interest analysis represents the unprovided-for case—the result in practice is that recovery will generally be allowed under the law of the defendant's home state, where suit is likely to be brought.

Apart from the forum's disposition to apply its own law in any case—the courts agree that the basic law is the law of the forum, which will not be displaced in the absence of good reasons for its displacement—there are a number of reasons why I think that the forum is likely to apply its own law in this fact-law pattern.⁶⁷ First, there is the

62. Sedler, *Rules of Choice of Law*, *supra* note 15, at 1038. The application of this *rule of choice of law* is illustrated by one of the choice of law issues presented in the litigation arising out of the 1987 Northwest flight 255 disaster. That flight crashed on takeoff from Detroit Metropolitan Airport, killing all passengers on board save one, and killing or injuring a number of persons on the ground. Most of the victims were from Michigan, Florida, Arizona and California. The plane was designed and manufactured in California by McDonnell-Douglas. Regarding the claims of the Michigan defendants against McDonnell-Douglas, there was a choice of law issue in that California employed a strict liability standard, as opposed to Michigan's negligence standard, and California law allowed recovery of punitive damages, while Michigan law did not. The court held that California law applied on these issues, because California had a real interest in applying its law in order to implement the admonitory and regulatory policy reflected in that law, and correspondingly Michigan had no real interest in applying its defendant-favoring rule for the benefit of the California manufacturer. *In re Disaster at Detroit Metro. Airport* on Aug. 16, 1987, 750 F. Supp. 793 (E.D. Mich. 1989) (applying Michigan law).

63. Sedler, *Rules of Choice of Law*, *supra* note 15, at 1038-39.

64. 506 P.2d 494 (Or. 1973).

65. 522 P.2d 666 (Cal. 1974).

66. Larry Kramer, *The Myth of the "Unprovided-For" Case*, 75 VA. L. REV. 1045 (1989).

67. Professor Rees noted that Brainerd Currie favored the application of the law of the forum in the unprovided-for case, and agrees with this solution, because, as he puts it, "foreign law should be applied only where some useful purpose would be served thereby."

matter of common policy. The common policy of American states is to allow the recovery of damages for negligence, and a limitation on damages or an immunity rule, is an exception to that common policy. Because the only state interested in making an exception to that common policy, the defendant's home state, does not do so, the common policy comes to the fore, and the defense will not be allowed irrespective of where the accident occurred.⁶⁸ Second, because the law of the defendant's home state imposes liability, the defendant can be expected to insure against such liability and can foresee the application of the law of the defendant's home state irrespective of where the accident occurs or where the plaintiff resides. In any event, in the unprovided-for case, as Currie has defined it, the result will usually be the application of the law of the defendant's home state allowing recovery.

This brings me to *Erwin v. Thomas*. The panel's discussion of this case, as well as the opinion of the Oregon court, ignored one rather salient fact: the Washington rule allowing the husband but not the wife to maintain a cause of action for loss of consortium amounts to unconstitutional gender-based discrimination in violation of the Fourteenth Amendment's Equal Protection Clause. Even though this salient fact may not have been as evident in 1973 as it is today,⁶⁹ it is true nonetheless, and should affect our discussion of this case in retrospect. If the wife had brought the case in Washington and had raised the constitutional question, it may be assumed that the Washington court would have held the gender-based discrimination reflected in the Washington law of consortium to be unconstitutional. At this point, the Washington court could have either held that the cause of action would be extended to the wife or that the husband's cause of action was abolished. When a law providing benefits to a member of one sex only has been held unconstitutional, the courts have typically held that the benefit should be extended to the other sex. If the Washington court had so interpreted the Washington law relating to a cause of action for loss of consortium, there would no longer be a conflict between Washington law and Oregon law on the point in issue, and the wife could maintain her action for loss of the husband's consortium.

The Oregon court, if the constitutional question had been raised in *Erwin v. Thomas*, could have held that the gender-based distinction in

Transcript, *supra* note 1, at 719.

68. Professor David Currie makes a similar point in his discussion of *Hurtado*. Transcript, *supra* note 1, at 719.

69. The first case in which the Supreme Court held that the Fourteenth Amendment's Equal Protection Clause reached gender discrimination was *Reed v. Reed*, 404 U.S. 71 (1971).

the Washington law of consortium was unconstitutional, and could have predicted that Washington would extend the cause of action to the wife. If so, there would have been no conflict of laws on the point in issue. Or, more properly, because the Washington court should determine questions of Washington law, the Oregon court could have dismissed the case on forum non conveniens grounds with the condition that the defendant submit to suit in Washington and waive any statute of limitations objection. Thus, in retrospect, *Erwin v. Thomas* may have really been a no conflict case.

However, I want to posit the situation where Washington law denies a cause of action for loss of consortium to both the husband and the wife. Otherwise the facts are the same as those in *Erwin v. Thomas*. In my opinion, the Oregon court should hold that Washington does have a real interest in applying its law denying a cause of action for loss of consortium to the Washington plaintiff, and because there is no countervailing Oregon interest, dismiss the suit. In other words, I see *Erwin v. Thomas* as presenting the false conflict rather than the unprovided-for case, with Washington being the only interested state.

A state law that denies a cause of action for loss of consortium reflects a view about the nature of marriage. The state is saying that one spouse does not have a legally protected interest in the sex, society, and services of the other spouse, because recognition of such an interest would be inconsistent with its view of the nature of the marriage relationship. The only state interested in applying its law with respect to matters going to the nature of the marriage relationship is, of course, the marital domicile. Thus, the law of the marital domicile should be applied on the issue of recovery for loss of consortium. In a case subsequent to *Erwin v. Thomas*, the District of Columbia Court of Appeals took this position, and held that where a Virginia spouse was killed in Virginia due to the negligence of a District of Columbia defendant, Virginia law, which did not allow a cause of action for loss of consortium, applied.⁷⁰

The ninth rule of choice of law involves the situation where tort liability is sought to be imposed against an employer in connection with a work-related injury. This rule of choice of law is that the tort liability of an employer to an employee who is covered by workers' compensation, or liability to a third party for contribution resulting from a work-related injury, is determined by the law of the state where the employer has taken out workers' compensation insurance to cover the particular

70. *Stutsman v. Kaiser Found. Health Plan*, 546 A.2d 367, 373 (D.C. 1988).

employee.⁷¹ This rule of choice of law is predicated on considerations applicable to workers' compensation, particularly the protection of the expectations of the employer who has taken out workers' compensation to cover the particular employee. These considerations are analogous to the fairness considerations that sometimes preclude the application of the forum's own law under the fifth rule of choice of law, despite the forum's real interest in doing so.

We see then that in the torts area, judicial method and interest analysis have combined to form rules of choice of law. The application of these rules of choice of law produce results in practice that are generally consistent with the results that would be produced by the application of Currie's interest analysis.

I have not examined choice of law in the contracts area as thoroughly as I have in the torts area. But here too we can see the operation of interest analysis in practice, at least to some degree. Obviously, in contracts cases, because the transaction was planned in advance, there is a greater concern with possible reliance on the law of a particular state and resulting unfairness if the law of that state is not applied. Nonetheless, when it is not disputed that a contract came into being, and when the contract is connected with more than one state, the parties at the time of contracting usually could have foreseen the application of either state's law to govern their rights and liabilities under the contract, so that it would not be unfair to apply the law of either state.

In practice, interest analysis surfaces in contracts cases when the matter in issue involves a strong policy of the forum, and the forum has a real interest in applying its law in order to implement that policy in the particular case.⁷² One such situation involves nonrecognition of express choice of law clauses. Most of the time, the court will recognize an express choice of law clause without much discussion. However, in many of these cases, it does not appear that there was actually a conflict of laws, and in any event, in most of them the law of the state chosen by

71. Sedler, *Rules of Choice of Law*, *supra* note 15, at 1039. Although the rule as originally formulated referred only to the employer's liability to the employee, the cases on which it was predicated included the matter of liability to a third party for contribution. See the discussion of this rule and its application in *Cooney v. Osgood Machinery, Inc.*, 612 N.E.2d 277 (N.Y. 1993), and in Robert A. Sedler, *Interest Analysis, Party Expectations and Judicial Method in Conflicts Torts Cases: Reflections on Cooney v. Osgood Machinery, Inc.*, 59 BROOK. L. REV. 1323 (1994).

72. Many rules of substantive contract law, such as those relating to contract formation and contract construction and interpretation, do not in and of themselves reflect a strong policy. Rather, they represent specific solutions designed to implement the broader policies of protecting the legitimate expectations of the parties and ensuring stability in commercial transactions.

the parties is the law that the court would have applied even in the absence of an express choice. The true recognition of a choice of law case is the one where the court is asked to recognize an express choice of law that would displace the law that the court otherwise would be applying, which is usually its own.

I believe that it can be demonstrated that a court usually will *not* recognize an express choice of law clause to displace the otherwise applicable law where the matter in issue involves a strong policy of the forum or the other state whose law would be applied in the absence of an express choice.⁷³ Likewise, in regard to claims under franchise agreements, where suit is brought in the franchisee's home state, and its law differs materially from the law of the franchisor's home state by providing greater protection to the franchisee, that state is likely to apply its own law to protect the resident franchisee.⁷⁴ In the same vein, while there is disagreement over whether coverage for environmental pollution involves contract interpretation or contract regulation, under New Jersey conflicts law, this question is resolved with reference to policies and interests: New Jersey law relating to insurance coverage applies when the insurance covers operations of an out-of-state manufacturer who has deposited waste in New Jersey;⁷⁵ New Jersey law relating to insurance coverage also applies when the insurance covers a New Jersey factory that deposited its waste in Pennsylvania.⁷⁶ Finally, where the forum has a real interest in applying its law relating to the statute of frauds in order to implement the transaction-regulating policy reflected in that law, it will do so.⁷⁷ We see then that interest

73. See SEDLER, *ACROSS STATE LINES*, *supra* note 6, at 73-75. Similarly, as Professor Symeonides has pointed out in his annual survey of choice of law, the few cases where a court does not recognize an express choice of law are cases where the court found "that the chosen law was contrary to a strong public policy of the state whose law would have been applicable in the absence of choice." Symeon C. Symeonides, *Choice of Law in the American Courts in 1996*, 1996 AALS CONFLICTS NEWSLETTER (ASSOCIATION OF AMERICAN LAW SCHOOLS) at 38, and cases cited therein.

74. See, e.g., *Maher & Assocs. v. Quality Cabinets*, 640 N.E.2d 1000 (Ill. App. Ct. 1994). Usually there will be an express choice of law provision in favor of the law of the franchisor's home state, and most often, the court will find that the laws of the involved states do not differ in material effects.

75. *Gilbert Spruance Co. v. Pennsylvania Mfrs. Ass'n Ins. Co.*, 629 A.2d 885, 892 (N.J. 1993).

76. *General Ceramics Inc. v. Fireman's Fund Ins. Co.*, 66 F.3d 647, 649 (3d Cir. 1995) (applying New Jersey law); *J. Josephson, Inc. v. Crum & Forster Ins. Co.*, 679 A.2d 1206 (N.J. Super. Ct. App. Div. 1996).

77. See, e.g., *Intercontinental Planning, Ltd. v. Daystrom, Inc.*, 248 N.E.2d 576 (N.Y. 1969); *Bushkin Assocs. v. Raytheon Co.*, 473 N.E.2d 662 (Mass. 1985).

analysis operates, at least to some degree, in conflicts contracts cases as well.

The only contracts case that the panel discusses is the classic true conflict case of *Lilienthal v. Kaufman*.⁷⁸ The panelists have some disagreement over what may be called the "strength" of the interests of the involved states in *Lilienthal*. Professor David Currie, for example, suggests that California should take a "restrained and enlightened interpretation" of its policy and interest, and apply Oregon law to protect the Oregon spendthrift,⁷⁹ while Professor Knowles says that California had the "greater interest,"⁸⁰ and Professor Posnak says that the application of Oregon law "really could discourage Californians from lending money or generally doing business with Oregonians in California."⁸¹

What would happen if a case like *Lilienthal* should arise today? To me, the answer is obvious. The plaintiff would bring suit in California, obtaining jurisdiction under its long-arm act, and California would apply its own law imposing liability. Because the transaction-regulating policy reflected in the California law imposing liability will be advanced significantly by its application to this California-centered transaction, California has a real interest in applying its law and is not concerned about Oregon's opposing interest. Likewise, because the transaction is centered in California, there can be no unfairness to Kaufman in the application of California law. And since it is difficult to imagine that the plaintiff in a case like *Lilienthal* would bring the suit in the defendant's home state,⁸² there need be no concern with how that court would decide it. Nor is it particularly useful to try to posit a solution to this "true conflict" that would purportedly lead to the same result in California and in Oregon. If we are going to analyze the soundness of

78. 395 P.2d 543 (Or. 1964).

79. Transcript, *supra* note 1, 690-91.

80. *Id.* at 693.

81. *Id.* at 694.

82. Professor Felix says that if California had a long arm statute at the time of *Lilienthal*, he would think of a malpractice action against the plaintiff's attorney, and that if California didn't have a long arm statute, the California legislature should enact one, so that the plaintiff's attorney could bring the case in California. Transcript, *supra* note 1, at 690. In defense of the plaintiff's attorney in *Lilienthal*, the attorney probably assumed that the Oregon court would apply California law as the law of the place of contracting. In the early and middle 1960s, as courts abandoned the state-selecting rules of the traditional approach, plaintiffs' attorneys were sometimes caught up in the change, and in retrospect turned out to have chosen the wrong forum. Today, however, a plaintiff's attorney who brings the suit in a state that has a real interest in applying its law for the benefit of the defendant should indeed be subject to a malpractice action when the court does so and the plaintiff loses the case.

the result in this situation, the analysis should be in terms of the "soundness" of the application of California law to impose liability.

In summary, the distinction that I drew many years ago between judicial method and the function of the courts in a conflicts case on the one hand, and interest analysis as the preferred approach to choice of law on the other hand, is no longer significant. The courts in performing their function of deciding the actual conflicts issues that arise in practice have effectively employed interest analysis in performing that function. "How Choice of Law Is" means that in practice the courts resolve the choice of law issues that arise in actual cases with reference to considerations of policy and fairness to the parties, and the results reached by the courts in these cases are generally consistent with the results that would be reached under Currie's interest analysis approach.⁸³

III. CONSTITUTIONAL GENERALISM

It is precisely because Constitutional Law is my other field that I approach constitutional issues relating to choice of law from the perspective of constitutional generalism. The perspective of constitutional generalism considers constitutional structure and doctrine, and general principles of constitutional interpretation, and applies these to constitutional limitations on choice of law. Constitutional generalism considers the broad, organic purpose and function of the Due Process and Full Faith and Credit Clauses and the doctrines the Supreme Court has developed in applying these provisions in other contexts.⁸⁴

It seems to me that many conflicts commentators tend to approach constitutional limitations on choice of law more from a "conflicts

83. It is necessary to say something about the matter of "generally consistent." Although conflicts cases are relatively few in relation to the total number of cases that arise in practice, in the aggregate there will be a substantial number of conflicts cases decided each year by state supreme courts, state intermediate appellate courts, federal courts of appeals, and federal district courts. By looking at all of these cases, it would be possible to find some cases where a court following a particular approach to choice of law, such as the *Restatement (Second) of Conflict of Laws'* state of the most significant relationship approach, reached a result that was not consistent with the result that would be produced by the application of Currie's interest analysis. And under the *Neumeier* rules, New York purportedly does not use interest analysis to resolve the true conflict or the unprovided-for case. New York lower courts and federal courts in diversity cases must operate within the framework of the *Neumeier* rules. But on the whole, when the results reached in practice, especially by the highest state courts, are considered over a period of time, these results will be shown to be "generally consistent" with the result that would be produced by the application of Currie's interest analysis.

84. See generally Sedler, *Constitutional Generalism*, *supra* note 3, at 59.

perspective"—a perspective that assumes that constitutional limitations on choice of law are necessary to promote "conflicts justice" and to accommodate the conflicting interests of states in a federal system. They then find such limitations inhering in the Due Process and Full Faith and Credit Clauses of the Constitution.⁸⁵

It is my submission that when constitutional limitations on choice of law are approached from the perspective of constitutional generalism, the Constitution should be interpreted as placing only the most minimal limitations on the power of state courts to make choice of law decisions, and that in our constitutional system there should not be any significant constitutional limitations on choice of law.⁸⁶ This is the result that follows from the Court's most recent decisions on constitutional limitations on choice of law.⁸⁷ These decisions, taken together, hold that a state court's decision to apply its own law in a conflicts case is unconstitutional only when the application of that state's law is arbitrary or fundamentally unfair. The application of a state's law is arbitrary only when the state has no legitimate interest in applying its law on the point in issue or the state has no factual contacts with the underlying transaction. The application of a state's law is fundamentally unfair only when the party against whom that law is being applied could not have possibly foreseen the application of that state's law at the time the party acted, and the party was entitled to rely on the law of another state and conform its conduct to the requirements of that state's law.

In practice, cases where the application of a state's law would be unconstitutional under this test will be exceedingly rare.⁸⁸ First, a

85. See *id.* (citing various articles).

86. *Id.* at 74-100.

87. *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988).

88. In *Phillips Petroleum*, the Court held violative of due process Kansas' application of its own law to govern all the claims in a class action case involving some twenty-eight thousand plaintiffs resident in all the different states and in some foreign countries. 472 U.S. at 811. The case involved a claim for unpaid interest on suspended royalty payments for oil and gas leases, none of which were located in Kansas. Here the application of Kansas law to govern the claims of the non-Kansas plaintiffs was both arbitrary and fundamentally unfair. Kansas would have no interest in applying its law to determine liability on the claims, the claims were not connected with Kansas in any way, and the parties could not have foreseen the application of Kansas law to govern their claims.

An example of the arbitrary application of a state's law is the textbook favorite, *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930). Plaintiff assumedly was a resident of Texas, where suit was brought under the now unconstitutional method of attaching a third-party debt due defendant. Defendant was a Mexican insurance company, who in Mexico had entered into a fire insurance contract with plaintiff covering plaintiff's vessel only when it was being used in Mexican waters. The contract contained an express choice of law

court that has abandoned the traditional approach will not apply its own law if it has no real interest in doing so, and a court that continues to follow the traditional approach will apply the law of the state where the accident occurred or the contract was made.⁸⁹ In an interstate accident case, where the plaintiff is from a recovery state, the defendant is from a nonrecovery state, and the accident occurred in the defendant's home state, the plaintiff's home state can constitutionally apply its own law so long as the application of its own law is not fundamentally unfair to the defendant. This is what occurs in practice under the fifth rule of choice

provision in favor of Mexican law and a one-year built in limitation provision, which was valid under Mexican law. The refusal of the Texas courts to recognize the built-in limitation provision to bar the suit was held violative of due process. *Id.* at 411. Texas had no legitimate interest in applying its law regulating insurance contracts to a contract of fire insurance covering a vessel only when it was being used in Mexican waters, because there would be no significant social or economic consequences in Texas if plaintiff was unable to recover for this loss. Likewise, the underlying transaction had no factual connections with Texas. Therefore, the application of Texas law to determine the rights of the parties under this contract was violative of due process. *Id.*

An older example of fundamental unfairness is *John Hancock Mutual Insurance Co. v. Yates*, 299 U.S. 178 (1936). There, the insured was at all times a resident of New York, where the life insurance policy was issued. After his death, his wife moved to Georgia, where the insurance company was doing business, and brought suit there to recover on the policy. The insured had made false statements as to prior medical care in the insurance application, which, under New York law barred recovery on the policy. Under Georgia law, false representations as to prior medical care barred recovery on the policy only if they were "material." The jury found in that case that they were not. *Id.* at 179, 180.

The application of Georgia law on the issue of whether the insured could avoid liability because of the insured's false representations was held violative of due process, and the result is best explained in terms of fundamental unfairness. *Id.* at 181-82. At the time the contract was entered into and continuing until the insured's death, the only possibly applicable law was that of New York. The insurer, in reliance on New York law, would assume that it did not have to be concerned about the accuracy of the information contained in the insured's application until the insured died and a claim was made by the beneficiaries. At that time it could assert the provisions of New York law absolutely voiding the contract because of the misrepresentations of prior medical care, whether material or not. If the insurer had known that a different standard, such as Georgia's "material misrepresentation" standard, would be applicable, presumably the insurer would have checked the application more carefully before issuing the policy, or would have taken steps to cancel the policy at an earlier time when proof of materiality was more likely to have been available. For these reasons, the application of Georgia law on the point in issue would be so fundamentally unfair as to be violative of due process.

In *Allstate*, the Court referred to *Yates*, along with *Dick*, as "extreme examples of selection of forum law." 449 U.S. at 311.

89. Because these states have factual contacts with the underlying transaction, the application of their law to govern the transaction is necessarily constitutional. *See, e.g., Carroll v. Lanza*, 349 U.S. 408 (1955) (application of the law of the state where an accident occurred although both parties are nonresidents).

of law.⁹⁰ The constitutionality of the application of the law of the plaintiff's home state in this situation under an "interest and fairness" test was specifically recognized by the Court in *Allstate Insurance Co. v. Hague*.⁹¹

Second, totally apart from the matter of fundamental unfairness, as we have discussed earlier, a Court will not apply its own law, despite a real interest in doing so, where the application of its own law may produce *some unfairness* to the party against whom it is being applied, even though the degree of unfairness may not rise to constitutional dimensions. Although such cases will be fairly rare, they sometimes do occur. As discussed previously, they are most likely to occur in the situation covered by the fifth rule of choice of law.⁹²

In other words, in the real world of choice of law, constitutional limitations on choice of law have little if any relevance. The limited circumstances in which the application of a state's law would be declared unconstitutional are circumstances in which a state court would not choose to apply its own law in any event.⁹³

The perspective of constitutional generalism also demonstrates why the Privileges and Immunities Clause of Article I, section 2, and the Fourteenth Amendment's Equal Protection Clause impose no constitutional limitations on the use of interest analysis, and do not render unconstitutional a result that has the effect of favoring forum residents over nonresidents with respect to the application of the forum's law. Some years ago Brainerd Currie, in a joint article with Professor Herma Hill Kay (then Schreter), explored the question of "unconstitutional discrimination" in choice of law,⁹⁴ and more recently, Professor John Hart Ely (who is a very distinguished Constitutional Law scholar, but who does not teach Conflict of Laws) asserted a constitutional objection

90. See *supra* notes 50-61 and accompanying text.

91. 449 U.S. 302 (1981). "An automobile accident need not occur within a particular jurisdiction for that jurisdiction to be connected to the occurrence." *Id.* at 314. The injury or death of a resident of State A in State B is a contact of State A with the occurrence in State B. *Id.* at 315 n.20.

92. See *supra* notes 55-61 and accompanying text.

93. In *Sun Oil Co. v. Wortman*, the Court held that the forum could constitutionally apply its longer statute of limitations to allow a suit that was time-barred under the substantive law of the state that it was applying to the case. 486 U.S. 717, 727 (1988). So, even though Kansas could not constitutionally apply its own substantive law to the out-of-state claims in *Phillips Petroleum*, it could constitutionally apply its own statute of limitations to allow suit on the claims that were time-barred under the substantive law of the state that it was constitutionally required to apply to determine the claims on the merits.

94. Brainerd Currie & Herma Hill Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, 69 YALE L.J. 1323 (1960).

to a state's interest in protecting its own.⁹⁵ In the 1983-84 *Mercer Law Review* Symposium on the Conflict of Laws,⁹⁶ I responded at length to Professor Ely's constitutional objection. The essential thrust of that response was that Professor Ely "completely misunderstands the basic premise of interest analysis and the reasons that, in certain circumstances, a state's real interest in applying a rule of substantive law in order to implement the policies reflected in that law is limited to residents and does not extend to nonresidents."⁹⁷ I then went on to explain why interest analysis, properly understood, does not result in unconstitutional discrimination against nonresidents even though the effect of its application in a particular circumstance may be to give only forum residents, the protection of the forum's law.⁹⁸

In the present Article, I will illustrate this point first by a consideration of the situation presented in *Schultz v. Boy Scouts of America, Inc.*,⁹⁹ and *Milkovich v. Saari*.¹⁰⁰ In those cases, two parties from a nonrecovery state are involved in an accident or other negligence-based tort in a recovery state. In this situation, suit will be brought in the recovery state, with jurisdiction obtained under that state's long-arm act. If it were to be brought in the parties' home state, that state would apply its own law, denying recovery. As I have discussed previously, in my view, the recovery state does not have any real interest in applying its law to allow recovery to the nonresident injured there. This is because, as regards the loss allocation policy reflected in the forum's law allowing recovery, the consequences of the accident and of allowing or denying recovery will be felt in the parties' home state. Because the parties' home state has the only real interest in applying the loss allocation policy reflected in its law for the benefit of the resident defendant, the case presents a false conflict, and thus, the forum should apply the law of the parties' home state as the law of the only interested state. This was the view of the New York Court of Appeals in *Schultz*, and if *Milkovich* had arisen in New York, the New York Court of Appeals would have applied the Ontario guest statute to deny recovery.¹⁰¹

95. John Hart Ely. *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173 (1981).

96. Symposium, *Conflict of Laws*, 34 MERCER L. REV. 471 (1983).

97. Sedler, *New Critics*, *supra* note 4, at 620.

98. *Id.* at 627-635.

99. 480 N.E.2d 679 (N.Y. 1985).

100. 203 N.W.2d 408 (Minn. 1973).

101. However, if the forum's law allowing recovery involved an admonitory or regulatory policy, the forum would have a real interest in applying its law in order to implement the admonitory or regulatory policy reflected in that law. Suppose that two spouses from a state that still recognizes spousal immunity were involved in an altercation

To present the privileges and immunities issue more sharply, I will make *Milkovich*, an interstate case, and posit a situation where a Minnesota resident and an Ohio resident are riding in the same automobile driven by an Ohio resident in Minnesota when an accident occurs. Let us also assume that Ohio has a guest statute, which it did at the time of *Milkovich*. Although the case between the Ohio plaintiff and the Ohio defendant presents a false conflict as per my view of real interests, the case between the Minnesota plaintiff and the Ohio defendant presents a true conflict. Thus, I would say that Minnesota should apply its law allowing recovery for the benefit of the Minnesota plaintiff, but apply the Ohio guest statute to deny recovery in the claim of the Ohio plaintiff against the Ohio defendant. The effect then is to give the Minnesota plaintiff the benefit of Minnesota tort law allowing recovery while denying the benefit of the same Minnesota tort law to the Ohio defendant. In this sense, Minnesota has "discriminated" against the Ohio plaintiff. But the "discrimination" is not violative of privileges and immunities.

The Privileges and Immunities Clause does not prohibit all distinctions between residents and nonresidents. It prohibits what may be called invidious discrimination against nonresidents; that is, it prohibits the differential treatment of nonresidents simply because they are nonresidents and without regard to any reasonable basis of distinction between residents and nonresidents. It does not prohibit reasonable distinctions between residents and nonresidents when the fact of residency or nonresidency is relevant to the matter in issue.¹⁰²

In this situation, the fact of residency or nonresidency is relevant to the question of whether the forum has a real interest in applying its law

in New York (and suppose that New York were following "pure" interest analysis instead of the *Neumeier* rules). This case would present the true conflict, because the parties' home state has a real interest in applying its immunity rule, and New York has a real interest in applying its law providing recovery in order to implement the admonitory policy reflected in its tort law allowing recovery for intentional torts. The nonresident plaintiff would get the benefit of New York law, because New York has a real interest in applying its law in order to implement the admonitory policy reflected in that law.

On the other hand, if the spouses were involved in an automobile accident, New York, following *Schultz*, would conclude that it did not have any interest in applying its law in order to implement the loss allocation policy reflected in that law, and so would apply the law of the parties' home state, denying recovery. There is a rational basis for the distinction between the two out-of-state plaintiffs with respect to the application of New York law allowing recovery: in the assault situation, New York has a real interest in applying its law to allow recovery, while in the automobile accident situation, it does not. Thus, the alleged discrimination between the two nonresident plaintiffs with respect to the application of New York law does not violate equal protection.

102. See Sedler, *New Critics*, *supra* note 4, at 628-31.

allowing recovery for the benefit of the particular plaintiff. Because the forum has a real interest in applying its law allowing recovery for the benefit of the resident plaintiff, but does not have a real interest in applying its law allowing recovery for the benefit of the nonresident plaintiff, the distinction between residents and nonresidents with respect to the matter in issue is reasonable, and thus not violative of privileges and immunities. Another way of looking at it is that in this situation both sets of plaintiffs are treated equally in that their rights to recovery are determined by the laws of their respective home states. If Ohio did not have a guest statute, there would be no conflict of laws, and the Ohio plaintiff would recover against the Ohio defendant in the same manner as the Minnesota plaintiff recovers against the Ohio defendant. Thus, the reason the Ohio plaintiff cannot recover against the Ohio defendant is that the applicable law in a case involving parties from the same state is the law of their home state, and under the law of the Ohio defendant's home state, recovery is not allowed.¹⁰³

Similarly, the application of the law of the plaintiff's home state to deny recovery in the unprovided-for case, as the New York Court of Appeals did in *Neumeier v. Kuehner*,¹⁰⁴ would not have been violative of privileges and immunities if the plaintiff had been from Ohio, even though, if the plaintiff had been from New York, recovery would have been allowed as per *Babcock*. When two New York residents are involved in an accident in another state, New York, of course, has a real interest in applying its law to allow recovery. But it clearly has no such interest in applying its law when an Ohio plaintiff is involved in an accident with a New York defendant in Ohio, and in my opinion, no real interest even if the accident had occurred in New York. Again, the distinction is a reasonable one, and again, each plaintiff receives the protection (or lack of it) afforded by the law of the plaintiff's home state. If Ohio did not have a guest statute, there would be no conflict of laws, and the Ohio plaintiff would recover against the New York defendant.¹⁰⁵

103. This is the result that obtains under the first *Neumeier* rule, which was applied by the New York court in *Schultz*. Although the rule is based on interest analysis, it is "neutral" in the same sense as the rules of the traditional approach or any other "rule" are neutral. It treats all parties the same irrespective of whether they are residents or nonresidents.

104. 286 N.E.2d 454 (N.Y. 1972).

105. The only time there would be a violation of privileges and immunities would be if a state denied a nonresident the benefit of its laws simply because that party was a nonresident. Suppose the highly improbable situation where a state provided that nonresident accident victims injured in the state by a resident defendant could not recover against the defendant, even though recovery is authorized by that state's law and by the

In *Milkovich*, as discussed previously, one of the reasons the Minnesota court applied its own law allowing recovery was a concern for the even-handed treatment of nonresidents injured in the forum. This is certainly a legitimate choice of law consideration, although I think that it is less important than recognition of the real interest of the parties' home state in applying its law denying recovery. And even though I think that it is "discriminatory" in the unprovided-for case to deny the non-resident plaintiff the benefit of the forum's law allowing recovery that "discrimination" does not rise to constitutional dimensions.¹⁰⁶

The point that I would emphasize is that, in our consideration of "How Choice of Law Ought to Be," our focus should be entirely on choice of law considerations. The perspective of constitutional generalism teaches us that the Constitution imposes virtually no limitations on a state's power to make choice of law decisions. This is as it should be in our constitutional system.

IV. THE LITIGATING LAWYER AND "CONFLICTS CONSULTANT"

Although I have consulted with practicing lawyers on a variety of conflicts issues, my litigation experience has been focused and reflects my "politics," so to speak. I have been retained by plaintiffs' personal injury lawyers in a number of cases where an out-of-state accident victim has brought a products liability suit against a Michigan vehicle manufacturer. In all of these cases, in which the defendant is usually one of the "Big Three" automakers, the subject vehicle was designed in Michigan, and the accident involving an out-of-state victim occurred in the victim's home state. In all of these cases, the plaintiff wanted to sue in Michigan and obtain the application of Michigan law, while the vehicle manufacturer wanted the suit to be brought in the plaintiff's home state and to be tried under the law of that state.

At first glance, this seems just the reverse of what we would expect in a products liability case. In the typical products liability case, we would expect that the plaintiff would want to bring the suit in the plaintiff's home state because it is more convenient for the plaintiff to do so, and to obtain the application of that state's law. The assumption here would be that the law of the plaintiff's home state is plaintiff-favoring while the law of the manufacturer's home state is defendant-favoring. The plaintiff would bring suit in the home state, obtaining jurisdiction under

law of the plaintiff's home state. Here, both states allow recovery, so there can be no reasonable basis for denying the nonresident plaintiff injured in the state the right to recover damages against the defendant.

106. See Robert A. Sedler, *Interstate Accidents and the Unprovided For Case: Reflections on Neumeier v. Kuehner*, 1 HOFSTRA L. REV. 125, 143-49 (1973).

the long-arm act, and in this true conflict situation, the forum would apply its own law, allowing recovery.

As would be expected in a state dominated by vehicle manufacturing, Michigan's common law generally is more favorable to manufacturers than to plaintiffs. The standard of liability in a products case is negligence rather than strict liability, and Michigan does not allow recovery of punitive damages. Why then would a Florida victim, for example, whose home state follows a strict liability standard (I don't know about punitive damages), want to bring a products liability suit against General Motors or Ford or Chrysler in Michigan? The answer lies in venue, a matter that is of little concern to academics in Civil Procedure or Conflict of Laws. Venue in suits brought by out-of-state plaintiffs against Ford, and until the last few years against General Motors and Chrysler as well, lies in Wayne County, which embraces the City of Detroit. Wayne County juries are considered very favorable to plaintiffs.¹⁰⁷ Plaintiffs' lawyers tell me that there is no real difference in the proof necessary to make out a case of design defect liability under strict liability or under negligence, so the difference in the applicable standard of care is not important in practice. And most design defect cases do not lend themselves to punitive damages anyway. So, the out-of-state plaintiffs were not giving up very much in the way of a substantive advantage by bringing their suits in Michigan—they did so in order to get the perceived advantage of having their case tried by a Wayne County jury.¹⁰⁸

In all of these cases, the defendants had moved in the trial court to dismiss the case on *forum non conveniens* grounds, and in no case did the court grant the motion. It is rather difficult for Michigan vehicle manufacturers to argue that they are being "oppressed" by a products liability suit in their home state, where all the facts relating to the design of the subject vehicle occurred. They keep emphasizing the supposed importance of the facts surrounding the accident, but these facts seem less important to the courts than the facts relating to the

107. I don't know whether this can be demonstrated empirically, but both plaintiffs' lawyers and defense lawyers believe it, so personal injury cases in Wayne County are worth more for settlement purposes than personal injury cases tried elsewhere.

108. As a result of a recent Michigan Supreme Court interpretation of the venue statute in design defect suits against General Motors and a corporate headquarters move by Chrysler, venue against these defendants is no longer in Wayne County. However, it was still perceived by the plaintiffs' lawyers in the cases involving these defendants as advantageous to have the case tried before a jury in the Detroit metropolitan area rather than before a jury in the area of the plaintiff's home state where the case would otherwise be tried.

design of the vehicle, on which the design defect claim must be predicated.

The most interesting part of the argument on the forum non conveniens motions for me relates to the choice of law issue. The applicable law is a relevant, though not dispositive, issue in a forum non conveniens motion, and it was argued by the defendants in all of these motions. Michigan follows a *lex fori* approach to choice of law, which incorporates interest analysis. Under this approach Michigan law applies as the law of the forum unless "reason requires that foreign law supersede the law of the [forum] state."¹⁰⁹ This would occur only in the false conflict situation where Michigan is the disinterested state. In the true conflict situation, Michigan law applies, of course, and the unprovided-for case is in effect subsumed into the *lex fori* approach; because the other involved state by definition has no interest in having its law applied, Michigan law applies as the law of the forum.¹¹⁰ In these cases, I argued that Michigan law applies on all the issues in the case: where Michigan law is defendant-favoring, Michigan law applies because the forum applies its own law in the true conflict, and where Michigan law is plaintiff-favoring, Michigan law also applies as the law of the forum, because the plaintiff's home state has no real interest in applying its defendant-protecting rule for the benefit of the Michigan defendant. Again, these are cases where choice of law is unimportant, but the conflicts commentator would seemingly be surprised to see the plaintiff arguing that the forum's defendant-favoring rule should apply in the true conflict while the defendant is arguing that the court should apply the plaintiff-favoring rule of the plaintiff's home state.

I have also litigated two cases that have reached the appellate courts, and in these cases choice of law was indeed determinative of the outcome. Both of these cases involved Ford Motor Company as defendant, an out-of-state victim injured or killed in the victim's home state as plaintiff, and the statute of repose of the plaintiff's home state. Michigan does not have a statute of repose. The conflicting results in the Sixth Circuit (where I won)¹¹¹ and in the Michigan Court of Appeals, Michigan's intermediate appellate court (where I lost),¹¹² in retrospect turned on the courts' differing views of the nature of interest analysis. Ford conducted no manufacturing activities in the states where the accident occurred. I argued that that state had no real

109. *Olmstead v. Anderson*, 400 N.W.2d 292, 302 (Mich. 1987).

110. I have discussed Michigan's approach to choice of law in Robert A. Sedler, *Continuity, Precedent, and Choice of Law: A Reflective Response to Professor Hill*, 38 WAYNE L. REV. 1419, 1429-37 (1992).

111. *Mahne v. Ford Motor Co.*, 900 F.2d 83 (6th Cir.), cert. denied, 498 U.S. 941 (1990).

112. *Farrell v. Ford Motor Co.*, 501 N.W.2d 567 (Mich. Ct. App. 1993), app. denied, 519 N.W.2d 158 (Mich. 1994).

interest in applying its statute of repose for the benefit of Ford, a nonresident manufacturer. Ford's lawyer argued that Ford carried out substantial nonmanufacturing activity in those states, was a significant employer in the state, and was a "good corporate citizen," so that that state had a real interest in applying its statute of repose for the benefit of Ford. If the court agreed with me, this would be the unprovided-for case, Michigan law would apply as the law of the forum, and the defense of the statute of repose would be rejected. If the court agreed with Ford's lawyer, the case would present the false conflict (I did not argue that Michigan had a regulatory interest in applying its general tort law to hold Ford liable—as I could have if Michigan law imposed a strict liability standard or imposed punitive damages), and the defense would be sustained.

My position, of course, is supported by Currie's interest analysis, which looks to a state's interest in applying a particular rule of substantive law in order to implement the policy reflected in that law. Because Ford did not manufacture any vehicles in the victims' home states, it was not a resident manufacturer, and the manufacturer-protecting policy reflected in the statute of repose would not be advanced by its application in favor of Ford. The Sixth Circuit agreed with this view of interests, but the Michigan Court of Appeals did not. In effect, the Michigan Court of Appeals viewed interests in a different way, perhaps akin to Professor Leflar's view of "total governmental interests."¹¹³ In any event, by viewing interests as it did in that case, the Michigan Court of Appeals was able to treat the case as a false conflict, and to displace Michigan law in favor of the law of the plaintiff's home state.¹¹⁴

113. See generally Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CAL. L. REV. 1584 (1966).

114. The Michigan Supreme Court, by a vote of four-to-three, denied leave to appeal in *Farrell*. 519 N.W.2d 158 (Mich. 1994). This has resulted in an anomalous situation in Michigan with respect to the choice of law issue presented in the cases of *Mahne* and *Farrell*. In these cases, both the Sixth Circuit and the Michigan Court of Appeals were interpreting Michigan conflicts law as pronounced by the Michigan Supreme Court in *Olmstead*, and they interpreted that decision differently. For *Erie* purposes, only the state supreme court can authoritatively declare the law of the state. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Decisions of intermediate appellate courts need not be followed if the federal court "is convinced by other persuasive data that the highest court of the state would decide otherwise." *West v. A.T. & T. Co.*, 311 U.S. 223, 237 (1940). Here the matter of how the Michigan Supreme Court would decide this case has been determined by the Sixth Circuit, which predicted that the Michigan Supreme Court would hold that Michigan law applied. This interpretation is binding on the lower federal courts in Michigan unless and until the Sixth Circuit decides otherwise, which is not likely. So, a plaintiff's lawyer having a case such as this will bring suit in a Michigan federal court, which will hold that

Another case involving choice of law that I litigated turned out to be a "no conflict" situation. A volunteer fire company in a Baltimore suburb ordered a fire truck under an arrangement by which the chassis would be manufactured by a Michigan company and custom-designed by a Virginia company. When the fire truck was taken out for the first time, the hose exploded, killing a young volunteer firefighter, who was unmarried and had no dependents. His parents and siblings brought a products liability claim against the Michigan and Virginia companies in Michigan, alleging that both companies were responsible for the fatal explosion. Under Michigan and Virginia law, the parents and siblings could recover noneconomic damages for their loss of companionship and the like. The Maryland wrongful death statute limited recovery to economic damages, which would make the case worthless. However, the Maryland wrongful death statute also contained a choice of law provision, directing that the wrongful death claim had to be brought under the law of the state where the conduct causing the death occurred. That provision made the Maryland wrongful death statute a functionally restrictive substantive rule, applicable only to cases where the conduct causing the death occurred in Maryland.¹¹⁵ If suit had been brought in Maryland, it would have had to have been brought against the Michigan defendant under the Michigan wrongful death act and against the Virginia defendant under the Virginia wrongful death act. Because both of those acts allowed recovery of noneconomic damages, and because the Maryland wrongful death act was by its own force inapplicable in this case, there was no conflict of laws on the issue of recovery for noneconomic loss, and recovery was allowed.

The no conflict situation was in effect presented in *Walton v. Arabian American Oil Co.*,¹¹⁶ because neither party raised an issue as to choice of law. The panel members apparently agree that if neither party raised an issue as to choice of law, it would be proper for New York to apply its own law as the law of the forum, and this is the situation that prevails in practice. If neither party raises an issue as to choice of law, the forum's law applies.¹¹⁷ Although the panel members disagree over whether New York could properly apply its own law over the defendant's objection in *Walton*, if the case arose today, the court would hold that the defendant, who is the party seeking to rely on foreign law, has the

Michigan law applies. The evil that *Erie* was designed to prevent has come to pass; the result on a question of state law will differ depending on whether suit is brought in federal court or state court.

115. See Robert A. Sedler, *Functionally Restrictive Substantive Rules in American Conflicts Law*, 50 S. CAL. L. REV. 27 (1976).

116. 233 F.2d 541 (2d. Cir. 1956).

117. See SEDLER, *ACROSS STATE LINES*, *supra* note 6, at 22-23, and cases cited therein.

burden of proving the content of that law. If foreign law does not differ from the law of the forum on the point in issue, the case in effect presents the no conflict situation, and the law of the forum applies. Realistically, this means that the court cites forum doctrine and precedent in resolving the legal issues in the case.

Many cases in practice are no conflict cases, most frequently because the laws of the involved states do not differ on the point in issue, as in the ordinary automobile accident situation. And sometimes, even when the laws do differ, as with respect to the standard of care in a design defect cases, both lawyers may decide that for different reasons it is not to their advantage to raise a choice of law issue. Remember that once a court has abandoned the traditional approach, there is no longer any notion of governing law. On a number of occasions I have received a telephone call from a practicing lawyer who has a "conflicts" case and wants to arrange for a consultation on the question of "what law applies?" My first question to the lawyer is, "are there any differences between Michigan law and the law of the other state, and can those differences make a difference in the outcome?" If the answer to either question is "no," as it often is, I tell the lawyer that there is no real issue of "what law applies" in the case: the case will be handled like a purely domestic case and will be decided under Michigan law. So there is no need for a consultation.

In 1996, a signal event happened which will dry up most of the kinds of conflicts cases I have been litigating in Michigan: the Michigan legislature enacted a cap on recovery for noneconomic loss in products liability cases. Under interest analysis, the Michigan courts will apply the cap in suits against Michigan vehicle manufacturers in order to implement what is now the defendant-protecting policy reflected in Michigan law. The advantage for the out-of-state plaintiff in suing the vehicle manufacturers in Michigan and getting the benefit of a Michigan jury has thus disappeared in most cases. In most products liability cases, as in most tort cases generally, the "big money" is in the damages for noneconomic loss, and if under the law of the plaintiff's home state, damages for noneconomic loss are not capped or the cap is higher than Michigan's cap, the out-of-state plaintiff will sue the Michigan manufacturer in the plaintiff's home state and recover the higher amount of damages for noneconomic loss.¹¹⁸ It will only be in a situation where

118. This situation again illustrates the true conflict and the effect of the forum preference solution to the true conflict. Now that Michigan law caps recovery for noneconomic loss, Michigan has a real interest in applying the cap for the benefit of a Michigan manufacturer, and will do so if suit is brought in Michigan. Conversely, the plaintiff's home state has a real interest in applying its law allowing unlimited or greater

the law of the victim's home state bars the suit entirely, as in the statute of repose cases, that the out-of-state plaintiff will be suing the Michigan manufacturer in Michigan.

My litigation experience has given me some insights into the matter of *forum shopping*, or as I prefer to call it, *forum selection*. I submit that the pejorative term, "forum shopping" (which was levelled against the plaintiff in all the *forum non conveniens* cases I litigated), should be limited to the situation where the chosen forum has no connection at all with the underlying transaction. In all of the cases that I litigated in Michigan, the defendant was a Michigan vehicle manufacturer that had designed the subject vehicle in Michigan, and Michigan law constitutionally could, and in fact would, be applied in most of the cases. Thus, there was nothing improper in the plaintiffs bringing suit in Michigan. Likewise, there would have been nothing improper in their having brought the suit in their home states, as they will be doing now after Michigan has capped damages for noneconomic loss in products liability cases. When two states are involved with an interstate case, so that both states can constitutionally exercise jurisdiction and can constitutionally apply their own law, the plaintiff should be able to make a choice of forum and obtain the benefit of the law of the state with the plaintiff-favoring rule.

In my view, the pejorative term, "forum shopping," should be limited to the situation where the plaintiff has sued the defendant in a state where jurisdiction can be founded only on the defendant's doing unrelated business there, and where the forum has no other connection with the parties or the underlying transaction, so that it would not and probably could not constitutionally apply its own law on the point in issue. My classic example of forum shopping is a suit against General Motors in Michigan, brought by an Ohio plaintiff to recover damages resulting from an automobile accident that occurred in Ohio when a General Motors employee drove a vehicle away from a General Motors plant there. In this situation, the Michigan court would apply Ohio law on the issue of negligence, and the likely reason the Ohio plaintiff sued General Motors in Michigan was to obtain the benefit of trial before a Michigan jury. This case, unlike the cases involving a products liability claim against General Motors, is an appropriate candidate for dismissal on *forum non conveniens* grounds.

An even worse example of forum shopping occurs when the suit is brought against a defendant in a state where the defendant does

recovery for the benefit of its resident plaintiff. The plaintiff will sue the Michigan manufacturer in the home state, obtaining jurisdiction under the long-arm act, and that state will apply its own law, allowing recovery.

unrelated business in order to avoid the bar of the statute of limitations of the plaintiff's home state or the state whose law would otherwise apply. Suppose that a Michigan plaintiff is injured while driving a General Motors automobile in Michigan and wants to bring a products liability claim against General Motors. The plaintiff delays in filing suit, and by the time the plaintiff gets around to doing so, the suit is barred by Michigan's statute of limitations. Because General Motors does substantial business in all fifty states, it is potentially subject to suit in every state of the Union. The plaintiff's lawyer then searches for a state where the suit is not barred by the statute of limitations, and where there is no borrowing statute. Until a few years ago, this would have been Mississippi, which had a six-year statute of limitations for tort actions and no borrowing statute. General Motors' motion to dismiss on *forum non conveniens* grounds in Mississippi would fail on the ground that there was no more appropriate forum in which suit could be brought because the Michigan statute of limitations had expired. The Mississippi court would then decide the case, applying Michigan law, although suit would have been time-barred in Michigan.

What makes forum shopping possible is the current law of jurisdiction, which permits suit against corporate defendants in every state in which they do substantial business and individual defendants in any state in which they can be "tagged." The way to eliminate forum shopping is to change the law of jurisdiction so as to limit suit to an appropriate forum. By an "appropriate forum," I mean a state whose connections with the parties and/or the underlying transaction are sufficient that the state could constitutionally apply its own law on the point in issue.¹¹⁹ But we should not be searching for an elusive "choice of law uniformity" in an effort to eliminate "forum shopping." We should also recognize the legitimacy of forum selection to obtain the benefit of a more favorable outcome, legal or otherwise. Thus, with regard to choice of law, where more than one state is involved with the parties and/or the transaction, and the law of one of those states favors the plaintiff, it is perfectly proper for the plaintiff to sue in that state and obtain the benefit of its plaintiff-favoring rule.

My experience as a litigating lawyer and "conflicts consultant" has enabled me to see the crucial relationship between jurisdiction and choice of law in actual conflicts cases. It has also enabled me to see in practice the operation of Currie's forum preference solution to the true

119. The notion of limiting suit to an "appropriate forum" that could apply its own substantive law to the case has been around for a long time. See, e.g., Albert A. Ehrenzweig, *A Proper Law in a Proper Forum: A "Restatement" of the "Lex Fori Approach,"* 18 OKLA. L. REV. 340 (1965).

conflict. Whenever a state has a real interest in applying its law in order to implement the policy reflected in that law, it is very likely to do so, and the plaintiff, in order to prevail, will bring suit in that state. Likewise, in the unprovided-for case, the out-of-state plaintiff will bring suit in the defendant's home state on the premise that it is easier to persuade a court to apply its own law than to displace it. Most of the time that premise will prove correct. The only time that the plaintiff's choice of forum will not make any difference in the choice of law result is in the false conflict situation because, in practice, once the false conflict is identified, the court will apply the law of the only interested state, whether that be the forum or another state.

V. CONCLUSION

Over a decade ago, in 1983, it was my privilege to write a major law review article on interest analysis in the *Mercer Law Review* two-part Symposium on Choice of Law. In that article, I responded to the critics of interest analysis, old and new, and demonstrated why interest analysis was the preferred approach to choice of law. Now, given the opportunity to comment on the fascinating roundtable discussion *Choice of Law: How It Ought to Be*, I have ended up by writing another major law review Article on "Choice of Law: How It Is." In looking for a conclusion to this Article, I found that I needed to look no further than my conclusion to the 1983 article. How choice of law *is* in practice may in large measure influence our views on how choice of law *ought to be*. We may indeed learn something from the practice of the courts in deciding actual cases, and that something is that the courts reach results in practice that are generally consistent with the Currie version of interest analysis. I would further submit that the courts have generally reached functionally sound and fair results in the cases coming before them for decision.

I will, therefore, conclude the present Article as I concluded that 1983 article.

Once it is recognized that the purpose of conflicts law in our legal system is to provide functionally sound and fair solutions for those relatively few cases that arise in practice, the preferred approach to the resolution of conflicts problems should be the approach that best facilitates this purpose. For all the theoretical criticisms of interest analysis as a basic approach to choice of law, it cannot be denied that in the real world it is interest analysis that has been applied by the courts and that, in practice, the courts have generally reached functionally sound and fair results in the cases coming before them for decision. Therefore, I submit that the validity of interest analysis as

a basic approach to the resolution of conflicts problems has been empirically demonstrated.¹²⁰

In answer to the question of how choice of law ought to be, I would say that choice of law ought to be the way that choice of law is. And the way that choice of law is, is the way of interest analysis that Brainerd Currie set forth these many years ago.

120. Robert A. Sedler, *New Critics*, *supra* note 4, at 644.

