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Annual Brainerd Currie Lecture


by Gary J. Simson *

Mercer University School of Law, which dates back to 1873,† has had many distinguished graduates in its long history. In the realm of legal scholarship, however, one graduate—Brainerd Currie—unquestionably stands alone above them all. In the course of an academic career that began in 1935 with two years at his alma mater and included substantially longer stints on the law faculties at Duke and the University of

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* Dean and Macon Chair in Law, Mercer University. Yale College (B.A., 1971); Yale Law School (J.D., 1974). This Article is based on remarks that I delivered on September 21, 2011, as the first Annual Brainerd Currie Lecture at Mercer University School of Law. It is also a revised and expanded version of the essay that I contributed to LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN (Mahnoush H. Arsanjani et al. eds., 2011). I am grateful to my colleague Hal Lewis for various helpful comments.
Currie transformed through his scholarship the field of conflict of laws.

It is no exaggeration to say that Currie was the most influential conflicts scholar of the last century. In fact, that claim probably understates the case, because Currie was influential in his field in a way that few scholars ever are in theirs. Not only did he change the way in which other conflicts scholars thought about conflicts problems. Even more impressively, he changed the way in which the great majority of state supreme courts did so. His writings, far more than anyone else’s, sparked what many have come to call a "revolution" in choice of law. Ironically, one of the relatively few states to resist explicitly adopting his insights is Georgia, where he was born and educated and where he launched his remarkable teaching career.

I will discuss Currie’s contributions with greater specificity when I provide an overview of choice of law in Part I below. For now, I want to underline his tremendous stature as a legal scholar and reformer, because that stature is what prompted me in the spring of 2011—less than a year after I came to Mercer to become dean—to help create the lecture series that had, as its inaugural entry, the lecture on which this Article is based. As one might expect in light of my many years teaching and writing in conflict of laws, I had been thinking about ways of honoring the memory of this extraordinary graduate almost from the moment that I had the good fortune to be asked to join the Mercer law faculty as dean. When the law school received some funding in early 2011 that the donor had designated as money to be allocated toward lectures, I broached with Billie Pritchard, the Law Review’s editor-in-chief, and my conflicts colleague Hal Lewis, the longtime faculty advisor to the Law Review, the idea of having an Annual Brainerd Currie Lecture that the lecturer would agree to develop into an article for the Mercer Law Review. I am grateful to both of them and to the entire Law

6. See Dowis v. Mud Slingers, Inc., 279 Ga. 808, 621 S.E.2d 413 (2005) (reaffirming Georgia’s continued adherence to the traditional place-of-wrong rule, and explicitly rejecting Currie’s governmental interest analysis approach as well as other approaches that build on Currie’s insights but that do not focus exclusively on governmental interests).
7. See Latty, supra note 3, at 2.
Review board for embracing the idea and helping bring to realization both the inaugural lecture and this Article.

My project in this Article concerns "choice of law"—that branch or subset of the field of conflict of laws that seeks to determine the applicable law in cases not confined in their elements to a single jurisdiction. Specifically, I attempt to answer a question given little attention by courts and scholars before Currie: What role should the needs of the interstate and international systems play in choice of law? Interestingly, although Currie himself had little to say on this question, his scholarship was instrumental in clearing away the traditional-rules thicket that was obscuring the question's importance.

After briefly discussing in Part I the current state of choice of law in the United States and the place of interstate and international needs within it, I turn my attention in the remainder of the Article to the prescriptive question of the role that those needs should play. I explain in Parts II and III the value of answering this question within the framework of a forum-centered approach to choice of law. In Part IV I discuss problems inherent in identifying interstate and international needs, and in Part V I consider the difficulties entailed in determining the degree to which such needs are implicated in particular cases. I conclude in Part VI by returning to Currie and attempting to reconcile his deservedly lofty stature in the field with his inattention to a concept as important as the role of interstate and international needs.

Throughout the Article, I limit my focus to courts in the United States. I should emphasize at the outset that I do so not because courts elsewhere are any less interesting or important. They surely are not. Rather, I do so because any attempt to address the question at hand is most meaningful in the context of one or another particular court system and because the U.S. court system is the one I know best.

8. Put somewhat differently, choice of law deals with cases that transcend, in their parties or events, the boundaries of the forum state. If all aspects of a case are limited to the forum state, the court has no need to reflect on which state's law(s) govern the issue(s) in the case. Forum law obviously applies. When a case transcends the boundaries of the forum state, however, some basis at least potentially exists for the court's choosing nonforum law to decide one or more issues in the case. A court's "choice of law" approach is the mechanism by which it determines which, of two or more potentially applicable laws, should apply to each issue in the case. See Gary J. Simson, Issues and Perspectives in Conflict of Laws: Cases and Materials vii, 3 (4th ed. 2005). Unless I expressly indicate otherwise, I use the terms "state" and "jurisdiction" interchangeably in this Article.
I. AN OVERVIEW OF U.S. CHOICE OF LAW AND THE ROLE OF INTERSTATE AND INTERNATIONAL NEEDS

Broadly speaking, the history of choice of law in the courts of the United States can be divided into two eras: before Babcock v. Jackson and after. Prior to Babcock—a 1963 decision by the New York Court of Appeals—courts throughout the United States virtually uniformly framed the choice-of-law analysis set forth in their written opinions in terms of territorial rules of largely medieval origin. Although the American Law Institute had published in 1934 the Restatement of Conflict of Laws in hopes of generating widespread conformity among state courts to a particular set of rules, the rules—after 1934 as well as before—commonly varied from state to state at any one time and within a single state over the years. At least on the surface, however, the various sets of traditional rules all required courts to arrive at their choice-of-law decisions indirectly. After characterizing the case at hand as one in tort, contract, or another area of the law, the court would (1) apply the place-of-wrong, place-of-making, or other rule triggered by the characterization, (2) ascertain the jurisdiction identified by the rule, and (3) with exceptions for forum procedures and forum public policy, apply the law of the selected jurisdiction across the board.

The New York Court of Appeals' pathbreaking opinion in Babcock was the first state high court opinion to disavow strict adherence to the traditional rules. In Babcock the court announced that it would no longer feel bound to apply the place-of-wrong rule in tort cases. In subsequent years, the great majority of state high courts did likewise, and a similar proportion expressly renounced the traditional approach

10. See SIMSON, supra note 8, at 13.
11. RESTATEMENT OF CONFLICT OF LAWS (1934) [hereinafter FIRST RESTATEMENT].
12. See William Draper Lewis, Introduction to id. at viii-ix.
13. See SIMSON, supra note 8, at 13.
14. See id. at 13, 15.
15. For a sense of Babcock's historic importance in the development of choice of law, see the contributions by Currie and other leading conflicts scholars of the time in Symposium, Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws, 63 COLUM. L. REV. 1212 (1963), and the various perspectives offered by a later generation of conflicts scholars in Symposium on Conflict of Laws: Celebrating the 30th Anniversary of Babcock v. Jackson, 56 ALB. L. REV. 693 (1993).
16. See Babcock, 191 N.E.2d at 285 (“[T]he rule, formulated as it was by the courts, should be discarded.”).
in contract cases. In rejecting strict adherence to the place-of-wrong rule, the Babcock court was able to draw support from earlier cases in New York and elsewhere that had adhered to the traditional rules in form but that could sensibly be understood as manipulating the rules to reach results defensible in terms of unarticulated policy considerations. As other state supreme courts declared their rejection of one or another traditional rule, they typically offered a similar reinterpretation of past decisions, along with citation to cases in which other states' high courts had explicitly rejected the rule.

Currie was central in two respects to state high courts' refusal in Babcock and later cases to remain tied to the traditional rules. First, in a virtual avalanche of articles between 1958 and 1963 in leading law reviews across the country—articles collected into book form in 1963 for publication by a leading university press—Currie leveled one after another powerful attack on the logic of the traditional rules and exposed their fundamental lack of "rational" justification. With razor-like analytical precision and often no less cutting satirical humor, Currie

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17. See Simson, supra note 8, at 14. As indicated infra text accompanying notes 33 & 36, states' refusals to be bound by one or another traditional rule often have not meant total rejection of the rule. For better or for worse—and I certainly am one of those who would contend it is for worse—many states that have renounced strict adherence to one or another rule instead have adopted in its place a choice-of-law methodology that explicitly or implicitly takes the old rule into account. See Gary J. Simson, Leave Bad Enough Alone, 75 Ind. L.J. 649, 649-51 (2000) (noting the express displacement by the Restatement (Second) of Conflict of Laws (1971) of the First Restatement and its array of traditional rules, and criticizing the many "presumptive rules" set forth in the Restatement (Second) of Conflict of Laws as "frequently bear[ing] a striking and rather frightful resemblance to the territorial rules that the Second Restatement purported to lay to rest"); Gary J. Simson, The Neumeier-Schultz Rules: How Logical a "Next Stage in the Evolution of the Law" After Babcock?, 56 Alb. L. Rev. 913, 923-25 (1993) [hereinafter The Neumeier-Schultz Rules] (calling attention to the New York Court of Appeals' tacit reversion under rules 2 and 3 of its Neumeier rules to the place-of-wrong rule that Babcock had seemingly disavowed, and explaining why a court "could hardly do worse in a policy sense than revert back" to the old rule).


21. The term, "rational," and its opposite, "irrational," were Currie favorites. See, e.g., CURRIE, supra note 20, at 100 ("rational justification"), 106 ("rational results"), 110 ("irrational results").

22. For a sampling of Currie humor, see the following excerpt from one of his take-no-prisoners attacks on the logic of the traditional place-of-making rule:
mercilessly skewered the old rules and made adherence to them seem intellectually dishonest, if not willfully obtuse. Currie was hardly the first scholar to question the old rules, but he can fairly be seen as the most effective.

Second, in those same writings, Currie simultaneously erected for state courts a choice-of-law structure to replace the one that he was so vigorously tearing down. Virtually every state high court that has explicitly departed from the traditional approach has made the "governmental interest analysis" approach formulated and championed by Currie a significant ingredient of its choice-of-law methodology.

If the scene is enacted in Massachusetts, the immanent law of the state, which droppeth as the gentle rain from heaven, pervades the contract, rendering it, if it is the promise of a married woman to answer for the debt of her husband, wet and void. If, then, as persons seeking shelter from the rain, the parties move their solemn charade across a state line, and act out their parts in a congenially dry climate, what possible difference can that make in terms of anything that Massachusetts or any other interested state may be trying to accomplish through its laws?

Id. at 88 (footnote omitted).


24. See SIMSON, supra note 8, at 91. For more on courts' attention to interest analysis as part of a broader methodology, see infra text accompanying notes 32-36.

Whether or not a state supreme court, in adopting one or another modern approach, expressly acknowledged or even fully understood its debt to Currie, that debt existed simply as a matter of fact. Even a cursory review of the citations in state court opinions adopting a modern approach makes clear the great influence of conflicts scholars in getting courts to rethink the received wisdom in choice of law. Moreover, as Professor, now-Dean, Larry Kramer explained so well, Currie was a towering and unavoidable influence on virtually every serious conflicts scholar of his day, and he continued to dominate the scholarly debate long after his death:

The late 1950s and early 1960s must have been an exciting time for choice-of-law scholars. Brainerd Currie published his landmark studies in 1958, and these had an immediate and profound effect on the field. Within a few years, a number of other scholars published their best work, either building on or reacting to Currie.

Currie's writings—including his particular formulation of a choice-of-law method—continue to dominate discussion and set the agenda. Generally speaking, the work of scholars classified as interest analysts tends to be measured by its fidelity to Currie, while scholars who reject interest analysis set themselves in opposition to Currie alone without seriously engaging anyone or anything else.

Larry Kramer, More Notes on Methods and Objectives in Conflict of Laws, 24 CORNELL INT'L L.J. 245, 245-46 (1991) (footnotes omitted). Although it is twenty years since Professor Kramer made the above observation, his characterization of Currie's place in the
Interest analysis, unlike the traditional rules, calls upon the court to arrive at its choice-of-law decision directly, not by means of any choice of jurisdiction. The court must identify the policies underlying the laws in conflict and determine whether the lawmaking states are interested in effectuating those policies under the facts of the case. A state is interested in effectuating a policy underlying its law if and only if doing so would benefit one or more of its residents. If only one state has an interest in applying its law, the case presents a "false" conflict, and the court should select the law of the interested state.

According to Currie, if more than one state has an interest—a "true" conflict case—and the forum state is one of the interested states, or if the court determines that no states have an interest, the court should apply forum law. A number of commentators, however, have made clear their disagreement with Currie's forum-preference solution in true conflict cases. In their view, courts should proceed in such cases to a more nuanced analysis of each state's interest.

As might be expected, state supreme courts have been much more in agreement on the proposition that they should not be bound strictly by the traditional rules than on the methodology that they should follow instead. According to a recent survey, all but ten state high courts no longer abide by the traditional rules in tort cases, and all but twelve no longer do so in contract cases. However, in departing from the traditional approach, state supreme courts vary significantly in the factors that they take into account and in the weight that they assign those factors.

Only the California and District of Columbia high courts adhere single-mindedly to interest analysis, and they do so only in cases of tort. Much more commonly, state supreme courts have used interest analysis as part of a more inclusive approach. For example, in seeking scholarly debate seems no less apt today.

to determine for any particular issue the state of "most significant relationship," the many state supreme courts subscribing to the approach of the Restatement (Second) of Conflict of Laws consider governmental interests in tandem with five other "factors relevant to the choice of the applicable rule of law." In addition, in their search for the state of most significant relationship, they look for guidance to more specific Second Restatement provisions that give presumptive weight to directives typically patterned after one or another traditional rule. The handful of state high courts that have adopted Professor Robert Leflar's approach examine governmental interests in the course of analyzing five "choice-influencing considerations." The various state supreme courts that have cobbled together more eclectic approaches essentially combine interest analysis with one or more of the factors on the Second Restatement and Leflar lists and, in some instances, have included a default of sorts to the traditional rules.

Whether or not a court takes into account the needs of the interstate and international systems and, if so, how much priority it assigns to those needs is very much a function of the forum's choice-of-law methodology. At one end of the spectrum are courts that limit their focus to interest analysis. Interstate and international needs are almost entirely outside their field of vision because interest analysis leaves little room for courts to consider policies other than those reflected in states' domestic laws of tort, contract, etc. Because states' domestic laws (also often called their "internal" or "local" laws) are adopted with intrastate cases paramount in mind, the policies reflected in those laws


33. See, e.g., Second Restatement, supra note 32, § 146 ("In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship . . . "). For a summary and critique of the Second Restatement approach, see Simson, Leave Bad Enough Alone, supra note 17.


37. Essentially, interest analysis allows for consideration of policies other than those underlying a state's domestic law only to the extent that such policies shed light on the range of multistate circumstances to which the domestic policies may fairly be understood to apply. See Simson, supra note 8, at 100, 135-51.
do not include policies that are implicated only in multistate cases—policies of a sort epitomized by the policy of serving the needs of the interstate and international systems.\textsuperscript{38}

At the other end of the spectrum are courts subscribing to the Second Restatement approach. First on the Second Restatement's list of seven factors relevant to choice of law is the needs of the interstate and international systems.\textsuperscript{39} Moreover, the Second Restatement suggests that interstate and international needs generally deserve priority. According to a comment in the Second Restatement, "Probably the most important function of choice-of-law rules is to make the interstate and international systems work well."\textsuperscript{40}

Somewhere in between lie the various courts that consider interstate and international needs but that do not regard them as inherently more deserving of priority than other factors. Most obviously meeting this description are courts that subscribe to the Leflar approach, which, under the rubric of "maintenance of interstate and international order," lists interstate and international needs as one of five unranked choice-influencing considerations.\textsuperscript{41} Courts adopting a more eclectic approach typically call for attention to interstate and international needs and do so without assigning that factor priority. Although the traditional rules do not explicitly call for serious consideration of the needs of the interstate and international systems, they implicitly invite at least some attention to those needs. This is most apparent with regard to the traditional rules' public policy doctrine. That doctrine provides a vehicle for courts to reject the application of sister-state or foreign-nation law seemingly applicable under the place-of-wrong, place-of-making, or other traditional rule relevant to the case. However, under standard formulations of the doctrine it limits rejection of otherwise applicable out-of-state law to instances in which application of that law would be seriously at odds with fundamental forum public policy.\textsuperscript{42} As such, the doctrine tacitly encourages courts to be mindful of the need for good interstate and international relations.

In light of the importance that courts' choice-of-law methodologies, particularly since Babcock, have assigned to interstate and international


\textsuperscript{39} SECOND RESTATEMENT, supra note 32, § 6(2)(a).

\textsuperscript{40} Id. § 6 cmt. d.

\textsuperscript{41} Leflar, supra note 34, at 285-87.

\textsuperscript{42} See, e.g., Loucks v. Standard Oil Co., 120 N.E. 198, 202 (N.Y. 1918); FIRST RESTATEMENT, supra note 11, § 612.
needs, one reasonably would assume that those needs would be featured in a substantial number of high court opinions. Courts' practices in this regard, however, have diverged substantially from what their formal approaches would lead one to expect. As others have observed, courts rarely invoke the needs of the interstate and international systems. Moreover, on the rare occasions when they do, their reliance on the needs often seems more superficial than real.

Ironically, an opinion that may well be the best-known invocation of international needs in a choice-of-law decision by a U.S. court exemplifies this type of token reliance. The opinion is not simply by the supreme court of a jurisdiction but by the Supreme Court of the United States. It is Justice Robert Jackson's opinion in 1953 for a majority of the high court in **Lauritzen v. Larsen.**

Since 1941, when the Supreme Court decided **Klaxon v. Stentor Electric Manufacturing Co.,** it has been clear that state courts are, by far, the primary source of the law of choice of law in the United States. Under **Klaxon**, in cases where federal jurisdiction is based on the parties' citizenship in different states, a federal court must apply the choice-of-law rules of the state in which it is sitting. Federal jurisdiction in **Lauritzen**, however, was not based on diversity of citizenship. Instead, it was based on the federal question of whether the injured plaintiff seaman had a cause of action under the federal statute, the Jones Act, that established a federal cause of action for maritime torts or whether the plaintiff's rights were governed entirely by foreign-nation law. **Lauritzen** therefore was the rare post-**Klaxon** case in which a federal court was using federal, rather than state, principles of choice of law.

While briefly in New York, Larsen, a Danish seaman, joined the crew of a Danish ship when it docked in New York. As the ship passed through Cuban waters, Larsen suffered injury in the course of his employment. Alleging negligence, he sued Lauritzen, the Danish shipowner, under the Jones Act, which gave injured seamen a right of action comparable to that enjoyed under federal law by railroad workers. Lauritzen countered by arguing the applicability of Danish law, which provided less generously than the Jones Act for compensation for a

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44. 345 U.S. 571 (1953).
45. 313 U.S. 487 (1941).
46. Id. at 496.
47. For discussion of the sizable body of federal choice-of-law rules that had developed prior to **Klaxon**, see Baxter, *supra* note 25, at 29-31.
permanent disability when negligence could be proven. The New York federal court hearing the case held that the Jones Act applied and, based on the jury's verdict, entered judgment for the plaintiff for almost $4,300. After a federal appeals court affirmed, the Supreme Court by a 7-1 margin reversed.

Writing with his customary eloquence and flair—who else, in denying the significance to choice of law of the seaman's place of contracting, would think to justify doing so with the quip, "A seaman takes his employment, like his fun, where he finds it"—Justice Jackson prefaced his "weighing of the significance" of seven "connecting factors" with a statement of background principles that drew heavily on the needs of the international system. Thus, according to Jackson, the applicable maritime choice-of-law approach is "designed" to fulfill the international need "to foster amicable and workable commercial relations." In addition, the approach "aims" at meeting the international need for "stability and order," and it recognizes the importance of not being "unmindful" of the "necessity for mutual forbearance if retaliations are to be avoided."

Ultimately, however, the Jackson opinion is baffling at best in linking the articulated international needs with the weighing-of-connecting-factors approach to which, by Jackson's account, the needs purportedly give rise. Indeed, if the Court's weighing approach in fact reflects recognition of the articulated needs, Jackson's opinion is singularly unhelpful in explaining the connection. In disposing of one after another factor as entitled to little weight either in general or in the case at hand, Jackson says little or nothing with regard to the international needs identified earlier in his opinion.

For example, in sweeping aside the place-of-wrong connecting factor as largely irrelevant to choice of law in cases, like Lauritzen, involving maritime torts, Jackson is content simply to rest on the fortuitous operation of the place-of-wrong rule in maritime cases. As Jackson puts it, "The test of location of the wrongful act or omission, however sufficient for torts ashore, is of limited application to shipboard torts, because of the varieties of legal authority over waters she [the ship] may navigate." By the same token, in characterizing the law-of-the-flag connecting factor as presumptively controlling both in the case at hand and perhaps in maritime cases generally, Jackson explains his strongly

49. Id. at 582. For Justice Jackson's analysis of the factors, see id. at 583-92.
50. Id. at 582.
51. Id.
52. Id. at 583.
positive weighting of this factor simply in terms of the factor’s longevity and general recognition.\textsuperscript{53}

The choice-of-law approach that the Court applied in \textit{Lauritzen} did not fit neatly into the traditional mold. To the extent that the Court’s approach evidenced recognition of the shortcomings of the traditional approach, it may be seen as quite forward-looking. To similar effect are intimations in the Court’s opinion that the Court is being guided to some degree by a sense of governmental interests.\textsuperscript{54} However, with regard to the Court’s incorporation of the needs of the international system into its choice-of-law approach, there is much less happening of any consequence than meets the eye.

In short, Justice Jackson’s lofty rhetoric notwithstanding, \textit{Lauritzen} evinces no more than an abstract commitment to serving the needs of the international system. As discussed further below, the international needs identified by Justice Jackson are eminently defensible as important needs of the international system. Nonetheless, the disconnect between the needs and the Court’s actual reasoning strongly suggests that the Court was giving only lip-service to those needs.

II. \textsc{Priority for Interstate and International Needs or for the Needs of the Forum State?}

As indicated in this Part and Part III, I regard serious consideration of the needs of the interstate and international systems as an essential component of any sound choice-of-law methodology. I part ways, however, with the drafters of the Second Restatement when they suggest that a court’s primary obligation in choice of law is to serve interstate and international needs. In my view, a court’s primary obligation is to serve the needs of the forum state, and a court properly acquits itself of that obligation in practice by proceeding in choice of law with a presumption in favor of applying forum law.

Although it may seem enlightened for a court to think first about needs that transcend those of the forum state, state courts are not

\textsuperscript{53} Id. at 584-86.

\textsuperscript{54} As discussed \textit{infra} Part VI, although Currie was responsible for developing the concept of governmental interests into a generally applicable choice-of-law approach, the concept did not originate with him. The U.S. Supreme Court had made the concept a central ingredient of its approach to constitutional limitations on choice of law. \textit{See} Pac. Emp’rs Ins. Co. v. Indus. Accident Comm’n, 306 U.S. 493 (1939); Alaska Packers Ass’n v. Indus. Accident Comm’n, 294 U.S. 532 (1935). Several years prior to authoring the majority opinion in \textit{Lauritzen}, Justice Jackson commented in a law review on this development in the Court’s case law. Robert H. Jackson, \textit{Full Faith and Credit—The Lawyer’s Clause of the Constitution}, 45 COLUM. L. REV. 1, 26-29, 33-34 (1945).
interstate or international fora acting on behalf of the United States or the collective nations of the world. They are agents of the states in which they sit. Whether popularly elected or appointed by popularly elected officials, state judges derive their authority from the people of the state, and they act responsibly and legitimately in so far as their decisions further the best interests of the people of the state.

Of course, reasonable judges may differ in particular cases as to what choice of law best serves the welfare of a state's citizens, but for a few reasons, forum law is the logical place to start. First of all, regardless of whether one or more of the litigants in a particular case is a citizen of the forum state, the forum state always has an important stake in the court's doing justice in the case at hand. As the best available evidence of the state's lawmakers' considered judgment as to the fairest or socially most beneficial way of resolving cases limited in their elements to the forum state, forum law is a natural choice to help ensure that the court fulfills its justice-dispensing role. A choice of forum law also serves the forum state's best interests by minimizing the court's risk of error. Very simply, because a court is more familiar with forum law than out-of-state law, it is less apt to misapply it. Lastly, because forum law is more readily ascertainable than nonforum law, a court serves the state's interest in conserving judicial resources by proceeding with a forum law presumption.

When the forum law potentially applicable in a conflicts case is a forum-state statute, principles of legislative supremacy and separation of powers reinforce the wisdom of proceeding with a presumption in favor of forum law. Forum statutes are fairly understood as expressing the state legislature's view of the optimal resolution of the competing considerations in intrastate cases. If so, then judicial respect for the legislature's preeminent role in state policymaking calls for judicial adherence to the policy balance struck by the legislature for intrastate cases unless the multistate nature of the case brings into play a factor that significantly changes the policy balance.

When the forum law at issue in a multistate case is court-made law, the validity of a forum-law presumption is reinforced by principles of judicial consistency and evenhandedness. Forum common law reflects the state judiciary's assessment of the balance best struck in intrastate cases. Unless the court can identify a factor in the conflicts case that calls for striking a different balance, the court cannot choose nonforum

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law without violating its obligation to decide cases over time in a consistent and evenhanded way.

III. SITUATING INTERSTATE AND INTERNATIONAL NEEDS IN A FORUM-CENTERED METHODOLOGY

Under the above reasoning, courts are correct not to give the needs of the interstate and international systems the primacy that the Second Restatement and some commentators maintain that they deserve. The needs of the forum, not those of the interstate and international systems, should occupy center stage. However, as the preceding discussion also suggests, fulfillment of the needs of the forum calls for serious attention in multistate cases to factors, such as the needs of the interstate and international systems, that presumably did not figure prominently in the lawmakers' contemplation when, with the intrastate context foremost in mind, they formulated forum law.

To put the matter somewhat differently: If courts in multistate cases apply forum law without considering the possibility that the needs of the interstate or international system strongly support a choice of nonforum law, they risk overextending the reach of forum law. Mechanical application of forum law in multistate cases without regard to interstate and international needs gives the balance struck by lawmakers in

56. Unlike the needs of the interstate and international systems, some factors that a court should consider in deciding whether to apply forum law in a multistate context are not peculiar to multistate cases. They may arise in both intrastate and multistate cases. However, because they may take on special significance in a multistate context, a court needs to be sensitive to whether they should be understood as altering the policy balance struck with intrastate cases foremost in mind.

One such factor is justified expectations. Justified expectations is often a factor that lawmakers take into account when, with intrastate cases paramount in mind, they formulate forum law. However, the multistate nature of a case may implicate justified expectations in a way that they would not be implicated if the case were confined in its elements to the forum state. See SIMSON, supra note 8, ch. 4 (“Protection of Justified Expectations”); Simson, supra note 38, at 291-92.

Another factor of this sort is the interests of the forum state. Unlike justified expectations, forum state interests do not simply figure in the formulation of forum law on occasion; they do so all the time. Like justified expectations, however, this factor may take a very different form in a multistate case than it would take if the case were limited in all respects to the forum state. Although maximizing enforcement of the forum state's interests in the long run is only sensibly served in intrastate cases by applying forum law, it calls for a more varied strategy in multistate cases. I disagree with Currie both as to how "interests" should be understood and determined and as to the appropriate means of implementing a decision to maximize forum state interests in the long run. See id. at 280-91. However, I very much share his assumption—implicit, if not explicit (see id. at 295 n.44)—that maximizing enforcement of forum state interests in the long run should be a key objective in choice of law.
adopting forum law a significance and scope that the lawmakers, with their attention focused on intrastate cases, cannot fairly be assumed to intend.

Consider, for example, Ciprari v. Servicios Aereos Cruzeiro, a case decided in 1965. Alleging negligence, a New York resident sued a Brazilian airline for injuries that he suffered in a plane crash in Brazil. While New York adhered to a rule of full compensation for injury, the Brazilian Air Code sharply limited airlines' liability in aviation accidents to approximately $100 per person. In holding applicable the Brazilian ceiling on recovery, the New York federal district court hearing the case underlined Brazil's powerful interest in protecting its airlines. According to the court, Brazil's airlines were at the time "an infant industry of extraordinary public and national importance," and the airlines' success was, for Brazil, "a matter not only of pride and commercial well-being, but perhaps even of national security."

In formulating its no-ceiling-on-recoveries rule, the New York legislators presumably were thinking, consciously or subconsciously, in terms of the wholly intrastate case: New York plaintiff, defendant, and accident. Weighing the relevant competing considerations for limited and unlimited recovery in this intrastate context, the lawmakers concluded that unlimited recovery was the fairest or socially most beneficial rule. The international need to decide cases in a way that would not generate serious friction between New York and another jurisdiction—a need that would not arise in purely intrastate cases—was not in the lawmakers' immediate contemplation.

However, in Ciprari, a case that transcended not only state but national lines, the international need to minimize friction between nations emerged as a relevant consideration. Indeed, given Brazil's apparently powerful stake in protecting the defendant airline from significant loss, the need to avoid international friction seemed to militate strongly in favor of Brazilian law. Under the circumstances, a New York court could very reasonably conclude that the New York legislators who opted for an unlimited recovery rule with intrastate cases primarily in mind would nonetheless favor the selection of Brazilian law in the international case at hand.

57. 245 F. Supp. 819 (S.D.N.Y. 1965), aff'd per curiam, 359 F.2d 855 (2d Cir. 1966).
58. Id. at 824-25 (quoting Tramontana v. S.A. Empresa de Viacao Aerea Rio Grandense, 350 F.2d 468, 471 (D.C. Cir. 1965)).
59. For a thoughtful and colorful articulation of lawmakers' natural tendency (1) to frame their prescriptions in a way that does not explicitly differentiate between intrastate and multistate cases, but (2) simultaneously to have in their minds the "undeveloped image" of the "wholly domestic case," see CURRIE, supra note 20, at 81-82.
Conceivably, the New York legislators may have felt so strongly about the policy preference expressed in the unlimited recovery rule that they would be unlikely to favor a choice of Brazilian law in Cipriari. However, absent evidence to this effect in the legislative history of the unlimited recovery rule, a court most reasonably would infer that the lawmakers would have wanted to give precedence to the potent international need crying out for attention in the case.

IV. IDENTIFYING INTERSTATE AND INTERNATIONAL NEEDS

Although courts and commentators regularly talk about “the needs of the interstate and international systems,” they seem remarkably untroubled by, or inattentive to, the inherent vagueness of the phrase. To be usable in any analytically rigorous way, it requires substantial clarification in two respects.

First, in deciding whether or not something is a need of the interstate or international system, whose perspective counts? To qualify as an “interstate” need for purposes of choice of law must the need be one in the eyes of every state in the United States? Of most states? Similarly, what degree of consensus is required among nations for a need to qualify as an “international” need for purposes of a choice-of-law decision? Is it necessary or sufficient or both that the need qualify as an “interstate” or “international” need in the eyes of the forum state?

Second, what falls within the concept of an interstate or international “need”? What constitutes a “need” and what does not, and why?

I suggest that both sets of questions are best answered in terms of the role that the policy of serving the needs of the interstate and international systems plays in choice of law. That role varies according to the particular choice-of-law methodology within which the policy operates. For example, as noted earlier, the needs of the interstate and international systems are of quite limited significance to governmental interest analysis because that approach leaves little room for considering them.60 In contrast, those needs are highly relevant to choice-of-law decisions based on the Second Restatement,61 the Leflar approach,62 or the forum-centered methodology outlined above in Part II, but the needs may figure differently into the choice-of-law decision depending on which of these three methodologies is being used.

As indicated in Part II, I believe that the optimal choice-of-law approach is one that has a forum-law presumption at its core but that

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60. See supra text accompanying notes 37-38.
61. See supra text accompanying notes 39-40.
62. See supra text accompanying note 41.
recognizes the validity of departing from forum law in order to further policies, such as serving the needs of the interstate and international systems, that would not be materially implicated if the case were limited in its elements to the forum state. In exploring below how the concept of the needs of the interstate and international systems may be refined in a functionally effective way, I will do so within the context of my proposed approach to choice of law. The validity of the suggested refinement therefore depends in part on the validity of the approach within which it would operate. For present purposes, and out of regard for current space limitations, I refer anyone wishing a fuller account and defense of that approach to the 1991 article in which I proposed it.

A. The Relevant Perspective

Under my proposed choice-of-law approach, the answer to the question of whose perspective counts is clear: the forum state's. If the case at hand does not implicate a need that the forum state regards as a need of the interstate or international system, then the court cannot reasonably conclude that the state lawmakers would regard the policy of serving the needs of the interstate or international system as an adequate basis for departing from the policy balance that, with intrastate cases foremost in mind, they struck in adopting the potentially applicable forum law. The fact that most states or nations may regard that need as one entitled to weight in choice of law as a need of the interstate or international system is beside the point.

Under a different methodology, a court might well be justified in taking seriously a need that the forum state does not regard as a need of the interstate or international system. For example, under the Leflar and Second Restatement approaches, the perspective of the need that counts is probably most logically seen as that shared by a majority of the relevant government actors, meaning a majority of the states of the United States in multistate cases and a majority of the nations of the world in multinational cases. Both approaches explicitly authorize courts to take into account the needs of the interstate and international systems, but neither expressly indicates whose perspective determines whether something qualifies as such a need. Moreover, although both

63. As indicated supra note 56, two other policies that warrant serious consideration in multistate cases as potentially justifying a departure from forum law are protecting justified expectations and maximizing enforcement of forum state interests in the long run. I have suggested that the latter policy calls for a two-step approach for resolving choice-of-law problems: an initial "choice of jurisdiction" followed by a choice of law. See Simson, supra note 38, at 280.

64. Simson, supra note 38.
approaches call for consideration of the forum state's interests, they de-emphasize the importance of those interests by calling, with no lesser force, for consideration of nonforum interests.

B. The Essentials of an Interstate or International Need

The fact that a term may clearly encompass certain things does not preclude the possibility that it is undesirably vague overall. For example, no one would dispute that a statute criminalizing "activities dangerous to others" covers someone who plants a bomb to go off at noon in a busy marketplace. However, "activities dangerous to others" obviously also has a vast gray area that is highly problematic.

The "needs of the interstate and international systems" similarly has a certain core of clear meaning. As discussed below, few would question that the smooth and efficient operation of interstate and international commerce falls within it. Nonetheless, the "needs of the interstate and international systems" also includes a large realm of uncertain application.

To diminish substantially this realm of vagueness and to establish a closer fit between the concept of the "needs of the interstate and international systems" and the function that it is designed to serve, I suggest refining the concept in three ways. First, to merit serious consideration in choice of law, a need must be one that can fairly be characterized as important. Assume that a court decides to apply nonforum law based on its perception that to do so would further needs of the interstate or international system. As discussed above, a choice of forum law always entails certain benefits: ease of ascertainment, less risk of error in application, and vindication of the forum state's basic sense of justice. To justify relinquishing those benefits in order to serve an interstate or international need, the need must be sufficiently weighty in the forum state's eyes to warrant description as important.

Second, the need must be one that is distinctive to cases with one or more elements that transcend the boundaries of a single jurisdiction. Consider again a choice of nonforum law based on a determination that a need of the interstate or international system requires it. Forum law presumably reflects the forum state's lawmakers' considered judgment as to the optimal balance to be struck in terms of the policies at stake in purely intrastate cases. For a court logically to reject forum law in order to serve an interstate or international need, the need must be distinct from any taken into account in the policy balance struck in the formulation of forum law.

Assume, for example, that the forum state legislature has long refused to recognize an individual right to be free from unsolicited and undesired publication of facts, however truthful, about one's personal affairs. Also
assume that the court sees this privacy right as a basic human right. Under the circumstances, the court might be tempted to call the right a need of the interstate and international systems and to invoke it as a basis for choosing nonforum law. To do so, however, would be misguided, because the need is in no way distinctive to cases transcending a single jurisdiction. In effect, the court would be using the interstate or international need concept to vindicate a need that the forum state legislature has already taken into account and has decided does not warrant priority over the needs militating in favor of nonrecognition of the privacy right.

Third and lastly, the need should be "systemic" in the sense of being a collective, widely shared need that must be met for the interstate or international system to function effectively. Consider, for example, the smooth and efficient operation of interstate and international commerce—a frequently cited interstate and international need that rather clearly qualifies as "systemic."65 Individual states and nations have mutual interests in satisfying this need, and its satisfaction bears heavily on the effective functioning of the interstate and international systems.

The free movement of individuals across state lines, which has been cited as a need of the interstate system,66 presents a closer question in terms of what qualifies as a "systemic" need. The free movement of people across state lines undoubtedly has economic repercussions for the effective functioning of the interstate system as a whole, but those repercussions appear to be significantly less than the repercussions associated with the need for interstate commerce to operate smoothly and efficiently. In addition, the importance of the need for people to move freely across state lines may be less a matter of the effective functioning of the interstate system than a matter of individual rights. In a federal system consisting of various states that have significant autonomy but that, above all, are parts of a single nation, the right to travel freely from state to state is readily understood as a right of national citizenship.

Ultimately, however, in terms of the choice-of-law policy of serving the needs of the interstate system, the relevant question is not whether the

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65. For a sampling of the many sources that have cited the smooth and efficient operation of interstate and international commerce as a need of the interstate and international systems or clearly treated it as such, see Lauritzen v. Larsen, 345 U.S. 571 (1953), discussed supra Part I; Lilienthal v. Kaufman, 395 P.2d 543, 546 (Or. 1964); SECOND RESTATEMENT, supra note 32, § 6(2)(a) & cmt. d; Leflar, supra note 34, at 285-87.
need for people to move freely from state to state is as clearly or purely a systemic need as the need for the free flow of interstate commerce. Rather, the question is whether this need has significant repercussions for the interstate system as a whole. I believe that it does and that therefore a court reasonably may regard it as a “systemic” need and treat it as a possible basis in choice of law for departing from forum law.

Lastly, to avoid possible misunderstanding, I should note that even if I am wrong and the interstate repercussions of this need are too fragmentary for the need to be fairly regarded as systemic, the need is not necessarily irrelevant to choice of law. It may well warrant serious consideration in choice of law for other reasons—specifically, as an important individual need that arises as a result of the interstate character of the case. For the sake of clarity, consistency, and analytical precision, courts should take care in thinking about the needs of the interstate and international systems to screen out needs that cannot fairly be characterized as systemic. In doing so, however, courts also should be alert to the possibility that there are individual, nonsystemic needs arising out of the interstate or international nature of the case that merit attention in the choice-of-law decision.67

67. Gore v. Northeast Airlines, Inc., 373 F.2d 717 (2d Cir. 1967), provides an interesting example of such a need. Gore was a wrongful death action brought in New York for a New Yorker’s death in an airplane crash. The law of Massachusetts, where the accident occurred and the airline had its principal place of business, limited wrongful-death recoveries to $15,000; New York law had no such ceiling on recoveries. Soon after the accident and before the filing of the suit, the decedent’s widow and their two young children moved from New York to live with her mother in Maryland.

Applying New York conflicts law, the lower court held that the Massachusetts ceiling on recovery applied. In its view, the survivors’ move to Maryland deprived New York of the interest it otherwise would have had in applying, for the survivors’ benefit, the full compensation policy underlying its no-ceiling rule. The appellate court reversed, holding that the New York interest persisted despite the family’s move. Citing as authority a New York case from 1900, it explained that, for purposes of determining the existence of a New York interest, “the time of death is the crucial time” because “New York considers the rights of beneficiaries in wrongful death actions to be property rights which vest as of the date of death.” Id. at 723.

Even aside from the anomaly of invoking a rule announced in 1900 to determine the workings of an approach adopted more than sixty years later, the appeals court’s reasoning left much to be desired. The court would have been far more persuasive if it had explained that a choice of New York law was appropriate in light of the family’s need to move to Maryland, where the widow’s mother could help cushion the economic and emotional blow that the widow and children suffered from the decedent’s death. Although the post-accident move eliminated any New York interest in applying the policy behind its no-ceiling rule, New York plainly did have an interest in applying a choice-of-law policy arising out of the multistate character of the case: a policy of deciding choice of law in a manner that does not deter individuals from leaving the forum state when to do so would satisfy important personal needs.
C. A Proposed Presumption

In deciding whether particular needs meet the three criteria described above, courts generally can be expected to have the most difficulty with the criterion that the need be "important." "Important" is obviously a highly relative term. As noted earlier, however, "important" is only sensibly discussed in this context as meaning at least important enough that the benefits that accrue from serving the need outweigh the benefits that always accrue from simply applying forum law. In addition, in a democratic society in which the importance of state interests is generally thought to be measured in terms of significance to the well-being of the people of the state, it seems appropriate to think about the importance of serving a particular need from a similar perspective.

Although these general guideposts provide some structure to determinations of importance, more seems desirable. Past practice implicitly suggests a useful possibility. On the relatively rare occasions that courts and commentators have identified specific needs of the interstate and international systems, they have mentioned the following three needs much more often than any others: (1) the smooth and efficient operation of interstate and international commerce; (2) good relations between the states of the United States and between the United States and foreign nations; and (3) the free movement of people across state lines.68 I suggest that the high level of consensus that has developed in favor of recognizing these three needs is largely explicable in terms of the significant degree of recognition that federal and international law accord them.

The need for interstate commerce to operate smoothly and efficiently is recognized by several federal sources. Most notably, these include: the Commerce Clause of Article I, Section 8 of the U.S. Constitution, which grants Congress the power to "regulate Commerce ... among the several States";69 numerous statutes enacted by Congress over the years pursuant to its commerce power;70 and the many "dormant" Commerce Clause cases in which the federal courts have invalidated state legislation as violating a tacit federal constitutional prohibition on states'
imposing unreasonable burdens on interstate commerce. The need for the smooth and efficient operation of international commerce is acknowledged in the Commerce Clause insofar as the clause vests Congress with power not only over interstate commerce but also over “Commerce with foreign Nations.” This need also is recognized by a variety of international agreements designed to facilitate international trade.

Recognition of the need for good relations between the states of the United States is implicit in several constitutional provisions. These include, for example, the prohibitions in Article I, Section 10 on state activities, such as “enter[ing] into any Treaty, Alliance, or Confederation,” that are apt to prove nationally divisive. They also include the requirement that Article IV, Section 1 imposes on each state to give “Full Faith and Credit” to the “public Acts, Records, and judicial Proceedings of every other State” – a requirement plainly intended to have a unifying effect on the states. For recognition of the need for good relations between nations, one has to look no further than the United Nations charter.

Lastly, federal law recognizes in a few ways the need for individuals to be free to move from state to state within the United States. Although the Constitution does not explicitly guarantee a right to be free from state-imposed restraints on interstate travel, the Supreme Court has recognized such a right as implicit in the nature of the federal system created by the Constitution and as an aspect of the national citizenship protected by the Privileges or Immunities Clause of the Fourteenth Amendment. In addition, some federal legislation pursuant to the Commerce Clause has proceeded on the premise that practices that deter individuals' interstate movement may have significant negative

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72. U.S. CONST. art. I, § 8, cl. 3.
73. For discussion of various such agreements, see ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW (2d ed. 2008).
75. U.S. Const. art. IV, § 1.
77. See U.N. Charter arts. 1 (purposes of U.N.) & 2 (principles to which U.N. and members are committed).
78. See United States v. Guest, 383 U.S. 745, 757 (1966) (“The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union.”).
repercussions for the national economy. Most memorably, in testimony before congressional committees, federal executive officials relied heavily on this premise in defending the Civil Rights Act of 1964 and its ban on racial discrimination in places of public accommodation, and the U.S. Supreme Court opinions that upheld the act relied on this premise as well.80

Drawing on the support that exists in federal and international law for the three needs discussed above, I suggest that courts be guided strongly in their determination of a need's importance by whether the need is substantially rooted in federal or international law. More specifically, I propose that a need's substantial connection to federal or international law is presumptive proof of the need's importance and that the absence of such a connection is presumptive proof of the need's unimportance. I believe that this use of a presumption strikes a good balance between promoting objectivity in judicial decisionmaking and allowing judges adequate flexibility to take relevant differences into account.

I suspect that this proposed presumption, and perhaps my three proposed refinements in general, may seem to some readers to err on the side of promoting objectivity. They may see my proposals as unduly restrictive of judicial decisionmaking, as too much of an attempt to impose structure on a decision best left more to judges' discretion and good judgment. In anticipation of this possible response, I should make explicit an assumption about judicial decisionmaking in choice of law that informs my thinking and that, in my view, justifies the degree to which my proposals impose structure on judges' decisions whether to recognize new interstate and international needs.

Very simply, although I have no doubt that, in adjudicating cases of almost every variety, judges at times consciously exploit ambiguities in the applicable rules and approaches to reach results that they prefer for reasons not articulated in their opinions, I believe that such judicial manipulation is especially pronounced in choice of law. Indeed, judicial manipulation has long been so commonplace in choice of law as to amount to a sort of time-honored, though less than honorable, tradition. Consider the methodology of place of wrong, place of making, and the like that monolithically dominated choice of law in courts throughout the United States until the 1960s. That approach is so inviting of manipulation in its multiple ambiguities and lack of firm grounding in any substantial choice-of-law objective that some of its defenders have gone

so far as to cite its amenability to judicial manipulation as a reason to continue to use it.\textsuperscript{81} Though offered and often hailed as methodologies providing courts with more meaningful direction, states' "modern" approaches—most notably, governmental interest analysis, the Second Restatement approach, and Leflar's five-factor test—are themselves more than sufficiently malleable to encourage courts to continue to abide by their longstanding tradition of manipulation in choice of law.\textsuperscript{82}

D. A Case Study in Innovation

\textit{Bledsoe v. Crowley,}\textsuperscript{83} a 1988 decision by the U.S. Court of Appeals for the D.C. Circuit, is one of the very rare cases in which judges rely on an interstate or international need and the cited need is not one of the three discussed above. As such, it provides a rather unique opportunity to examine judicial invocation of interstate or international needs in an innovative way.

\textit{Bledsoe} involved a malpractice suit brought in a federal district court in the District of Columbia. The plaintiff, Bledsoe, was a physician living in D.C., and the two defendants, Crowley and Friedman, were psychiatrists living and practicing in Maryland. Bledsoe alleged that the defendants had been negligent in failing, during the twelve years in which he received psychiatric care from them, to recognize that he had a brain tumor. He further claimed that if the defendants had recognized the tumor in timely fashion, he would not have suffered the harm from the tumor—permanent brain damage and loss of vision—that he did.

If Maryland law applied, Bledsoe's suit would be dismissed. By statute, Maryland required any malpractice claim seeking more than a certain minimum amount to be submitted initially to arbitration. Bledsoe's claim exceeded the statutory minimum. Nonetheless, he had gone directly to court.

The District of Columbia had no arbitration requirement. Under the District's traditional common-law negligence approach to malpractice liability, Bledsoe was free to go directly to court as he had done.

\textsuperscript{81} See, e.g., Paul v. Nat'l Life, 352 S.E.2d 550, 555-56 (W. Va. 1986) (affirming the court's continued adherence to the place-of-wrong rule and explaining that "if we are going to manipulate conflicts doctrine in order to achieve substantive results, we might as well manipulate something we understand").

\textsuperscript{82} For brief discussion of the malleability of: (a) governmental interest analysis, see Simson, supra note 8, at 99-100, and Simson, supra note 38, at 283-84; (b) the Second Restatement approach, see Simson, Leave Bad Enough Alone, supra note 17, at 650-51; and (c) the Leflar approach, see Gary J. Simson, Resisting the Allure of Better Rule of Law, 52 Ark. L. Rev. 141, 146-51 (1999).

\textsuperscript{83} 849 F.2d 639 (D.C. Cir. 1988).
With federal jurisdiction based on the parties' diversity of citizenship, the D.C. federal district court applied the interest-balancing test that the District of Columbia's high court used in choice of law. The federal district court held that Maryland was the only interested jurisdiction and that therefore Maryland law applied and the suit should be dismissed. In an opinion by Judge Edwards that the two other judges who heard the appeal joined, the federal appeals court unanimously affirmed. The court maintained that even if the D.C. interest was not nonexistent, it was not as strong as the Maryland interest and that therefore Maryland law prevailed.

Of principal importance for present purposes is Judge Williams's concurring opinion. Although he joined Judge Edwards's opinion, he wrote separately to highlight that in his view the same result could have been reached by a very different route: attention to the needs of the interstate system. According to Judge Williams, the District's courts "often turn for guidance" in choice of law to the Second Restatement, and it therefore is very appropriate in the case at hand to think about interstate needs—the "shared, non-parochial interests" that the Second Restatement treats as very important.84

Judge Williams maintained that Bledsoe and medical malpractice cases in general implicate two such "systemic interests": first, states' shared interest in "states' being able to develop coherent policies governing medical malpractice liability"; and second, states' shared interest in "individuals' being able to take advantage of medical services outside their home jurisdictions." He then went on to argue that if a court carefully takes into account these systemic needs, it will realize that choice of law in medical malpractice cases should be governed by a rule of "applying the law of the state where the services are provided." Under the facts of Bledsoe, that would mean applying the law of Maryland and dismissing the suit—the same result that Judge Edwards had reached under a very different approach.

Though not identical to the systemic need, discussed above, in individuals' free interstate movement, the second interest identified by Judge Williams may reasonably be viewed as a subset of that need. For present purposes, I will focus on Judge Williams's first interest, which is substantially more problematic.

As an initial matter, I note that this interest seems to lack the substantial connection to federal law that I have suggested should determine whether an interstate need is presumptively important or

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84. Id. at 646 (Williams, J., concurring).
85. Id.
86. Id. at 647.
unimportant. If indeed there is such a connection, Judge Williams's opinion offers no insight into what it might be.

It is also questionable whether the interest at issue has the "systemic" nature that I have argued is essential. Phrased as Judge Williams phrased it, this interest in "states' being able to develop coherent policies governing medical malpractice liability" certainly sounds like a "systemic" interest. After all, what reasonable state isn't in favor of coherence over incoherence? Similarly, isn't every state happy to see its sister states--its partners in the larger enterprise of the U.S. federal system--reap the benefits of developing coherent policies? The reality, however, is considerably more complex than it at first appears.

Consider, for example, the different perspectives of Maryland and the District of Columbia as reflected in the conflicting laws in Bledsoe. In adopting its compulsory arbitration statute, Maryland presumably was seeking to reduce the size of medical malpractice recoveries against Maryland providers and, thereby, to lower the costs of health care for its citizens in general. Furthermore, as Judge Williams explained, "a state that seeks to reduce medical costs by reducing the burden of malpractice liability must be able to assure providers that the state's rules will actually apply to all (or virtually all) cases."87

In other words, for Maryland and other states attempting (by an arbitration requirement, recovery ceiling, or other means) to limit medical malpractice recoveries overall, it is essential that the means adopted be implemented in a predictable and consistent--i.e., "coherent"--way. Otherwise, insurers will be unable to calculate with any real confidence the likely reduction in the total amount recovered in malpractice actions against Maryland providers. If insurers find themselves in that predicament, they almost certainly will respond by refusing to lower, or by lowering insignificantly, Maryland providers' liability insurance premiums, with the result that Maryland will not realize any meaningful reduction in its citizens' health care costs.

In contrast, the District of Columbia and other jurisdictions that have not adopted means of limiting medical malpractice recoveries are not nearly so dependent, for the achievement of their goals, on the "coherent" implementation of their approach. In forgoing an arbitration requirement and other means of bringing down health care costs in malpractice cases, the District of Columbia cast its lot with those states that assign priority to compensating fully the victims of medical malpractice and deterring medical malpractice.

87. Id. at 646.
88. Id.
Let us assume that in medical malpractice cases in the coming year involving a choice between Maryland and D.C. law, some D.C. victims of medical malpractice will not be permitted to enjoy the direct access to court promised by D.C. law. Instead, they will be required to proceed in accordance with the Maryland arbitration requirement. The fact that the District is unable to give some D.C. victims the benefit of D.C. law does not detract from its ability to give others—those allowed to proceed under D.C. law—the full benefit of the District’s policy of ensuring that malpractice victims are made whole for their loss (or at least as “whole” as money can make them). In addition, even if the D.C. law is not applied in a predictable and consistent—i.e., “coherent”—way, its deterrent capacity is probably not materially impaired. Indeed, in terms of deterrence, unpredictability and inconsistency in the choice of D.C. law can be assets insofar as they help ensure that the possibility that D.C. law will be applied is always a credible threat.

In short, despite its inclusive sound, the articulated interest of ensuring states’ ability to develop coherent policies on medical malpractice liability is not the “systemic,” “shared, non-parochial interest” that Judge Williams claims it to be. Instead, it is an interest to which individual states subscribe or do not subscribe depending on whether or not their paramount objective in the medical malpractice area is reduction of health care costs. In terms of realization of medical malpractice goals, the District of Columbia simply does not need predictable and consistent application of D.C. medical malpractice law nearly to the extent that Maryland needs predictable and consistent application of Maryland law. Moreover, as a jurisdiction that apparently believes that full compensation of medical malpractice victims and deterrence of malpractice are more important than reduction of the health care costs associated with medical malpractice cases, the District presumably is only too happy to throw a wrench in the efforts of Maryland and other states to develop coherent contrary policies.

All in all, Judge Williams’s opinion is admirable for his willingness to think outside the box of the three most commonly cited needs of the interstate system. However, it also illustrates the problems that may arise as judges become more innovative in this realm. I suggest that my proposed criteria and presumption are necessary refinements of an inherently vague concept and that they provide judges with valuable tools for identifying new needs that can withstand close examination.

89. Id.
V. ASCERTAINING DIFFERENCES IN DEGREE

If a court finds that an important need of the interstate or international system is implicated in the case at hand, it must then determine how strongly the need militates in favor of one or another choice of law. At a minimum, before giving a need substantial weight as a factor in the choice-of-law decision, the court must be satisfied that the need significantly militates in favor of a particular choice of law. A 1985 California Supreme Court decision, Wong v. Tenneco, Inc.,\textsuperscript{90} nicely illustrates the difficulties that may arise in making such a determination.

The litigation in Wong arose out of the contracts between Lee Wong, a California resident who grew green onions on land that he owned in Mexico, and H-M-T, a California subsidiary of Tenneco, Inc. that marketed produce. In response to restrictions imposed by Mexican law on land ownership by foreigners, Wong had put title to his Mexican land in the name of Mexican citizens whom he had hired to grow, pack, and ship the produce under his name and label. As Wong's financial situation deteriorated, H-M-T stopped dealing with him and instead began sending any sales proceeds to the Mexican growers. Ultimately, the farming operation collapsed completely, and Wong sued on breach-of-contract and other grounds. The defendants—Tenneco, H-M-T, and another Tenneco subsidiary—successfully defended in the trial court on the ground that Wong's land ownership violated Mexican law. With one judge in dissent, the California Supreme Court affirmed.

The choice-of-law question presented by Wong was unusual to say the least. The laws of Mexico and California appeared to be in agreement on the principle that a contract based on an illegal transaction was unenforceable.\textsuperscript{91} They differed, however, in their tolerance for land ownership by foreigners. The Mexican Constitution expressly barred foreigners from owning land in Mexico. Although Mexican statutes established more latitude for foreign investment in Mexican land than a reading of the Mexican Constitution alone would lead one to expect,\textsuperscript{92} and although the dissenting judge in Wong maintained that Wong's land ownership did not violate Mexican law,\textsuperscript{93} the majority's holding that Wong indeed had overstepped Mexican law was, at a minimum, quite

\textsuperscript{90} 702 P.2d 570 (Cal. 1985).
\textsuperscript{91} Although the court did not explicitly make a finding to this effect, it seemed to do so implicitly. \textit{See id.} at 576.
\textsuperscript{92} The relevant provisions of Mexico's constitutional and statutory law are set forth in a lengthy footnote in the court's opinion. \textit{Id.} at 571 n.2.
\textsuperscript{93} \textit{Id.} at 578-79 (Mosk, J., dissenting).
plausible. In contrast, California law provided that nonresidents are no less entitled to own land than residents.  

Arguably, the conflict in Wong between the laws of California and Mexico was entirely superficial. Perhaps the provisions of California law guaranteeing non-Californians no less right to own land than Californians were intended only to apply to land in California. If so, then Mexican law was the only law that could sensibly be applied to decide the legality of Wong's ownership of the Mexican land.

It is by no means clear, however, that California's prohibition on discriminating against foreigners in land ownership was intended to apply only to transactions involving California land. If the relevant prohibition had been one barring discrimination on the basis of race, religion, or sex, I suspect that few people would infer that California would have wanted to limit its applicability to cases involving California land. Even assuming, as seems plausible, that California regarded discrimination against out-of-staters as less invidious than discrimination on the basis of race, religion, or sex, California nonetheless may still have regarded discrimination against out-of-staters as sufficiently invidious to call for application of California law to a California resident's claim to own out-of-state land.

The majority in Wong assumed that the case presented an actual conflict of laws: if California law applies, Wong wins; if Mexican law applies, he loses. The court then proceeded to resolve the conflict by a line of reasoning that anyone familiar with the California Supreme Court's choice-of-law decisions of the prior two decades had to find rather surprising, to say the least. In 1967 the California Supreme Court in Reich v. Purcell\(^\text{95}\) had become one of the first state supreme courts to reject the traditional place-of-wrong rule and undertake an analysis of governmental interests. Moreover, in subsequent cases, the California high court had cemented its role as a leading court in choice of law with a series of opinions applying, and working through the complexities of, governmental interest analysis.  \(^\text{96}\) Nonetheless, Justice Reynoso's majority opinion in Wong in 1985 relegated the application of govern-

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94. Id. at 576 & n.10 (majority opinion) (quoting both the provision in the California Constitution guaranteeing noncitizens the "same property rights" as citizens and the provision in the California Civil Code to the same effect).

95. 432 P.2d 727 (Cal. 1967).

96. See Offshore Rental Co. v. Cont'l Oil Co., 583 P.2d 721 (Cal. 1978) (addressing, among other things, the relevance to interest analysis of a statute's "current status"); Bernhard v. Harrah’s Club, 546 P.2d 719 (Cal. 1976) (adopting a "comparative impairment" approach for resolving true conflicts); Hurtado v. Superior Court, 522 P.2d 666 (Cal. 1974) (holding forum law applicable in cases in which no states have an interest, and clarifying the nature of deterrent interests).
mental interest analysis to a footnote near the end of the opinion.\footnote{Wong, 702 P.2d at 577 n.13.} Instead, it focused on the situs rule traditionally used in real property cases, traditional notions of comity, and California Supreme Court cases predating—by as much as seventy years—the high court's explicit break with tradition in \textit{Reich v. Purcell}. Indeed, with the exception of its solitary footnote discussion of interest analysis—a discussion that has all the markings of something tacked on after the fact in response to the dissent—the majority opinion could cause the reader to wonder if he or she had somehow entered a time warp and was reading an opinion written in 1925 rather than 1985.

Aside from being rather anachronistic, the majority's reasoning is less than a model of clarity and requires some degree of reconstruction. It essentially appears to proceed as follows: The \textit{Wong} case implicates considerations of "comity" because one of the key "factors" comprising the "philosophy behind the comity doctrine" comes into play.\footnote{Id. at 575.} This factor is "respect for the sovereignty of other states or countries,"\footnote{Id.} and in the instant case, it counsels that:

\begin{quote}
Consistent with our duty to respect Mexico's right to determine her own internal policies, we should defer to her laws implementing those policies when they are directly implicated in the case at hand. To do otherwise would unnecessarily upset the relationship of friendship and mutual respect we enjoy with our southern neighbor.\footnote{Id. at 576-77.}
\end{quote}

Moreover, Mexico's policies meet the above-stated condition for deference of being "directly implicated in the case at hand," because the situs rule traditionally applied in real property conflicts cases calls for the application of Mexican law. Very simply, "the land with which we deal is situated in Mexico, and it is a fundamental principle of the law of conflicts that questions relating to control of real property are to be determined by the law of the jurisdiction in which the property is located."\footnote{Id. at 576-77.}

If, as the majority opinion seems to suggest, the court in \textit{Wong} was trying to make the choice of law most likely not to "upset the relationship of friendship and mutual respect we enjoy with our southern neighbor," it made the obviously correct choice. After all, how could Mexico possibly feel that its sovereignty had been disrespected by a California court's choosing Mexican law?

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Wong, 702 P.2d at 577 n.13. & 97 \\
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Id. at 576-77. & 101 \\
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There is good reason to question, however, whether the Wong court should have given good relations with Mexico as much weight in its choice-of-law decision as it apparently did. By setting its sights on making the choice of law most conducive to good international relations and selecting Mexican law, the court implicitly gave priority to the policy of serving international needs over competing choice-of-law policies that militated in favor of a choice of California law. Under the facts of the case, the priority that the court assigned to serving international needs may well have been undeserved. At the very least, to be persuasive in its choice of law, the court needed to make a much more candid and explicit assessment of the weight to which the various choice-of-law policies competing for application were entitled.

On the one hand, the court essentially ignored several choice-of-law policies that in combination militated strongly in favor of California law. Most obviously, these policies included the policies that always support a choice of forum law—ease of ascertainment, avoidance of judicial error in application, and vindication of the forum state's basic sense of justice. In addition, the policies included one of effectuating California's discrete interest in Wong in applying its nondiscrimination principle to a controversy involving a Californian invoking the protection of that home-state principle and California corporate entities seeking to escape the liability that this principle of their home state would impose upon them.

On the other hand, the court tacitly assigned great weight to the choice-of-law policy of maintaining harmonious international relations without making any serious attempt to gauge the magnitude of the threat to good relations posed by a choice of California law in the case at hand. At a minimum, unless a choice of California law was reasonably likely to have a significant adverse effect on good relations with Mexico, it is hard to imagine that the court was justified in giving priority to the policy of maintaining harmonious international relations over the policies that militated in favor of choosing California law. Moreover, by all indications, the likelihood that a choice of California law would have a significant adverse effect on good relations with Mexico was slim at best.

First of all, as the majority in Wong acknowledged but seemed to assign little significance, Mexico was hardly unalterably opposed to foreigners' acquiring interests in Mexican land. To be sure, the relevant Article of the Mexican Constitution of 1917 begins with a sentence that sounds like a categorical prohibition on foreign ownership of Mexican land: "Only Mexicans by birth or naturalization and Mexican companies..."

102. Id. at 575.
have the right to acquire ownership of lands, waters, and their appurtenances . . . .”103 The Article goes on to provide, however, that if certain conditions are met, Mexico “may grant the same right to foreigners.”104 Moreover, a Mexican statute enacted in 1973—one entitled “Law for the Promotion of Mexican Investment and Regulation of Foreign Investment”—leaves no doubt that, despite longstanding and historically justified concerns about possible foreign exploitation of Mexican resources, Mexico recognizes the value of, and need to make room for, foreign acquisition of interests in Mexican land.105 Whether or not the dissenting judge in Wong was correct when he maintained that Wong’s land ownership arrangement was entirely legal under Mexican law,106 that arrangement was almost certainly not as offensive to Mexican policy as the majority seemed to assume.

Second, the decision in Wong promised to have so little impact on any Mexican national interests that the probability that Mexico would be seriously offended by the California court’s choice of California law was especially remote. Regardless of whether the court treated Wong’s land ownership as lawful or not, nothing that the California court might say could possibly bind Mexico. Mexico was not a party to the litigation, and its ability to enforce its land ownership policies against Wong by whatever means it saw fit was not arguably before the California court for resolution. Furthermore, even assuming, for purposes of argument, that Mexico’s national interests would be materially implicated if a Mexican resident stood to win or lose in Wong, Mexico still had no significant stake in the choice of law. Wong was a California citizen, and H-M-T and Tenneco were based in California as well.

VI. CONCLUSION: CURRIE REVISITED

In closing, I would like to return briefly to the esteemed Mercer graduate and highly influential scholar for whom the lecture series that inspired this Article is named. A nagging question remains: If the needs of the interstate and international systems are indeed deserving of serious consideration, how can one explain Currie’s failure to give them a significant place in his approach? A number of explanations are possible. I consider below the three that seem most plausible.

103. MEX. CONST. art. 27, § 1.
104. Id.
105. Key parts of the statute are quoted in Wong, 702 P.2d at 571 n.2.
106. Id. at 578-79 (Mosk, J., dissenting).
First, the explanation may simply be limited time. From 1958, when Currie published the first of his pathbreaking articles on choice of law, to 1965, when Currie died much too young at age 52, Currie was immersed in the formidable task of razing the age-old edifice of the traditional rules, while simultaneously erecting an interest-analysis alternative to take the old rules' place. Under the circumstances, perhaps Currie was simply so preoccupied with the task at hand that he never took the time, during the relatively few years that he was able to devote to the task, to give interstate and international needs the thought that they deserve.

To be sure, in taking on that task, Currie was hardly starting from scratch. In attacking the traditional rules, Currie could draw on scholarly criticisms prior to the First Restatement and since. In addition, in developing his signature approach, Currie plainly benefited from Justice Stone's introduction of the concept of "governmental interests" in Supreme Court opinions in the 1930s addressing constitutional limitations on choice of law.

Nevertheless, even if Currie's task was not as monumental as it might have been, it was surely sufficiently demanding of his time to support the notion that limited availability of time may explain his inattention to the complications that the needs of the interstate and international systems pose to his approach. Whatever the force of prior scholarly attacks on the traditional rules may have been, those attacks had not succeeded in persuading even a single state high court to disavow allegiance to even a single traditional rule. It was not until several years after Currie began unleashing his blistering attacks on the rules in law reviews across the country that the tide of state-court decisionmaking finally turned.

Similarly, whatever the importance of Justice Stone's contribution to the development of the interest-analysis approach may have been, Currie's contribution was nothing less than enormous. It simply could not have happened without a huge commitment of time and energy on Currie's part. Stone's attention to governmental interests was surely a major breakthrough in thinking about choice of law. It was Currie, however, who had the genius and the perseverance to transform Stone's insight from a means of defining full-faith-and-credit and due-process

108. See Latty, supra note 3, at 2.
109. See, for example, the sources cited supra note 23.
limitations on choice of law to a methodology for resolving problems spanning the entire realm of choice of law.

A second possible explanation for Currie's inattention to interstate and international needs is that, notwithstanding his obvious brilliance, Currie had simply reached his limit in terms of capacity to reconceptualize the field. After all, by 1958, when Currie published the first of his "revolutionary" choice-of-law articles, Currie's thinking about choice of law had already come a long way from the traditional-rules mindset with which he, like any law school graduate of the mid-1930s, necessarily began. It was no mean feat to go from a perspective of choice of law as essentially about territoriality and the protection of vested rights to a perspective that sees the field as essentially about the reconciliation of competing governmental policies and interests.

In effect, Currie had gone from conceptualizing choice of law as a quintessential private-law problem—one closely akin to everyday problems of contract, property, and the like—to conceptualizing it much more as a problem of federalism or public law. Under the circumstances, Currie surely had stretched his conceptual abilities enough that he could be forgiven if, rather than attempt to rework his approach to make room for the needs of the interstate and international systems, he subconsciously rebelled and instinctively refused to stretch some more.

A third possible explanation is more strategic: that Currie's failure to revise his approach to include consideration of interstate and international needs reflected a conscious decision on his part to avoid complications that might scare off courts from adopting his approach.\textsuperscript{111} Courts have long cited simplicity in application as one of the major attractions of the traditional rules.\textsuperscript{112} Whether or not those rules are as simple to apply as proponents have claimed is a matter on which reasonable people may differ.\textsuperscript{113} Currie could not help but be well aware, however,

\textsuperscript{111} Writing a decade after Currie's death, Professor von Mehren made a suggestion along these lines. According to von Mehren, Currie paid little attention to "policies that emerge because of the multistate nature of a transaction or situation" because "perhaps he perceived that the required line of analysis could endanger the relative simplicity of his approach." von Mehren, supra note 38, at 938.

\textsuperscript{112} See, e.g., Friday v. Smoot, 211 A.2d 594, 596 (Del. 1965); Dowis v. Mud Slingers, Inc., 279 Ga. 808, 811, 816, 621 S.E.2d 413, 416, 419 (2005); White v. King, 223 A.2d 763, 766-67 (Md. 1966); see also GEORGE W. STUMBERG, PRINCIPLES OF CONFLICT OF LAWS 199 (3d. ed. 1963) (discussing the advantages and disadvantages of the traditional place-of-wrong rule, and characterizing its "greatest virtue" as "its simplicity, the facility of its application").

\textsuperscript{113} In particular, the traditional rules are simple to apply if by "simple to apply" one means no more than "can quickly be applied to yield an answer." If, however, by "simple to apply" one means "can quickly be applied to yield an answer that one can rationally defend as better, in some functional sense, than another answer," then those rules are far
that courts generally accepted that the old rules were simple to apply and that courts would be very slow to abandon the traditional rules in favor of his approach unless they were persuaded that his would not be materially, if at all, more difficult to apply.

Ultimately, regardless of which of the above explanations comes closest to the truth, Currie's interest analysis affords the needs of the interstate and international systems far less attention than they deserve. Altogether, the needs of the interstate and international systems occupy a curious place in U.S. choice of law. With the notable exception of interest analysis, the choice-of-law methodologies adopted by courts that have departed from the traditional rules generally recognize that these needs deserve serious consideration in choice of law. Indeed, the most widely adopted methodology—that of the Second Restatement—strongly suggests that these needs are the paramount consideration in choice of law. Nevertheless, in practice, the needs of the interstate and international systems have figured only marginally in courts' decisions on choice of law. Even on the rare occasions that the needs are mentioned in the courts' opinions, they often play no meaningful role in the final resolution.

Although the needs of the interstate and international systems do not deserve priority over the needs of the forum, they do deserve more careful and systematic consideration than they generally have received to date. The difficulties inherent in identifying important interstate and international needs and in gauging how strongly those needs militate in favor of a particular choice of law are not insubstantial. Whether or not this Article is fully successful in resolving those difficulties, I am hopeful that, at a minimum, it paves the way for others to do so.

Consider, for example, Levy v. Daniels' U-Drive Auto Renting Co., 143 A. 163 (Conn. 1928), a classic case involving a suit against a Connecticut car rental company by a Connecticut resident injured in Massachusetts as a result of negligent driving by another Connecticut resident to whom the company had rented a car in Connecticut. Determining, as the traditional rules require, whether the case should be characterized as one in tort or contract is certainly simple in the sense that it can be answered quickly, with no expectation under the rules of any sort of explanation. Determining the appropriate characterization is far from simple, however, if one is obliged to provide some type of rational explanation in terms of one or another legitimate objective.

In Levy the Connecticut high court held that the case was a contract case. Applying the place-of-making rule, the court found that Connecticut law applied, which, unlike Massachusetts law, imposed liability on car rental companies for the renter's negligent driving. Although the court's choice of law is easily defended in terms of interest analysis and other nontraditional approaches, any attempt to defend the choice of law in terms of the greater logic of a contract characterization than a tort one is difficult, to say the least.