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Currie’s Governmental Interest Analysis—Has It Become a Paper Tiger?

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It is difficult to imagine a branch of American law where scholars have exerted greater influence than in conflicts, or to imagine a more influential conflicts scholar than Brainerd Currie. This helps to explain the attention paid in this Symposium to Currie. What is puzzling is that his ideas are still capable of generating so much controversy. Except in a biographical sense, the plans Currie had for American conflicts law over twenty years ago are no longer of great importance. What is important is how, or whether, courts have responded to his ideas. The purpose of this Comment is to suggest that, contrary to what the contributions of Professors Lea Brilmayer and Friedrich Juenger1 might indicate, there is little in Currie’s governmental interest theory left to attack. The two most significant aspects of Currie’s theory were: (1) appreciation of interest analysis as a choice of law technique,2 and (2) the conclusion that an interested forum must always apply its own law.3 The first aspect has enjoyed such widespread acceptance in modern choice of law theory that it is hard to regard it as controversial. The second aspect, though controversial, has been greeted by such a lack of judicial acceptance that it no longer poses a concern.

Currie’s writing on interest analysis was his principal contribution to the development of modern conflicts theory. He was chiefly responsible for the analytic technique of determining state interests from an examination of the substantive policies of the rules vying for acceptance. His contributions can be seen as part of a larger movement away from formalism and toward instrumentalism in procedural jurisprudence.4 With others,5 he questioned the formalism of the original Restatement of Conflicts and its blindness to the substantive content of rules.6 He articulated the

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3. Currie regarded courts to be ill-suited to choose which of two interested states might possess the more deserving interest. He advocated the application of forum law whenever “the court finds the forum state has interest in the application of its policy.” B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS, supra note 2, at 184. Currie subsequently offered a more subdued version of his test. See Currie, The Disinterested Third State, 28 Law & Contemp. Prob. 754, 763 (1963). However, he never retreated from his position that the truly interested forum should always apply local law. Discussions of Currie’s approach, more extensive than space here permits, may be found in Cavers, Contemporary Conflicts Law In American Perspective, 131 Recueil des Cours 75, 146-49 (1970), and E. Sciles & P. Hay, CONFLICT OF LAWS 16-20 (1982).
6. B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS, supra note 2, at 86-87.
“true” conflict, where the substantive policies of each rule were at stake on the facts of the case. Currie’s ideas of interest analysis have had widespread judicial and academic acceptance. By whatever name, all modern choice of law approaches include in their design some mechanism for probing the interests of the forum and other jurisdictions by investigating the extent to which policies accounting for substantive rules will be advanced through their application in the particular case.

In contrast, Currie’s approach to forum favoritism has seldom been adopted by courts. Courts have rarely been willing to dismiss the law of another apparently interested jurisdiction on the ground that, because the forum is interested, forum law must apply. Courts may have balked not so much because invariable application of the law of the interested forum is unprincipled as because the sweep of Currie’s rule deprives courts of the opportunity to sound principled. Moreover, Currie’s approach may not have given courts enough to work with. His methodology stressed the important concern of interest analysis to the neglect of two other concerns: problems of judicial administration and party fairness. Currie’s approach has not been able to compete with other modern approaches in the judicial marketplace. Courts unwilling to relinquish the idea of forum neutrality opt for the Second Restatement of Conflicts. Courts willing to favor forum law, but wishing to sound principled while doing so, prefer Leflar’s ostensibly neutral but eminently malleable choice-influencing considerations.

Today, Currie’s governmental interest analysis is scarcely more than a paper tiger. His view that the interest of a jurisdiction in the advancement of its substantive policies is a valid choice of law concern is accepted by most as a basic tenet of modern

7. E. SCOCLES & P. HAY, supra note 3, at 17-18.
8. This feature has a central place in the modern choice of law methodologies which have gained greatest judicial acceptance. See Restatement (Second) of Conflict of Laws § 6 (1971); Leflar, Choice-Influencing Considerations in Conflicts Law, 41 N.Y.U. L. Rev. 267 (1966). It has also figured prominently in the work of the most influential modern commentators. See A. VON MEHREN & D. TRAUTMAN, THE LAW OF MULTIPLE PROBLEMS—CASES AND MATERIALS ON CONFLICT OF LAWS (1965); R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS (2d ed. 1980).
9. The most famous example may be Lilienthal v. Kaufman, 239 Or. 1, 395 P.2d 543 (1964). Lilienthal is summarized in R. WEINTRAUB, supra note 8, at 370-71. As Professor Weintraub notes, the Oregon Supreme Court subsequently appears to have recanted in Casey v. Manson Constr. and Eng’g Co., 247 Or. 274, 428 P.2d 898 (1967). Id. at 371.
10. Since Currie’s approach required the truly interested forum to always apply its own law, see supra note 3, it created no need or opportunity for a court to say that the forum was the more interested of two interested jurisdictions. Yet, courts seemed to want credit for that point when they felt they could make it. It follows that they would prefer a choice of law approach which attaches legal significance to the fact that the forum is the more interested. This may explain in part the Currie methodology’s lack of judicial popularity. It may also explain the California Supreme Court’s marriage of Currie analysis with the essentially incompatible interest-comparing concept of “comparative impairment” in Bernhard v. Harrah’s Club, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215 (1976).
12. The Second Restatement “is written from the viewpoint of a neutral forum which has no interest of its own to protect and is seeking only to apply the most appropriate law.” Reese, Conflict of Laws and the Restatement Second, 28 Law & Contemp. Probs. 679, 692 (1963).
13. See Leflar, supra note 8. Elsewhere, I have attempted to demonstrate that the migration of courts to Leflar’s approach can be explained, at least in substantial part, by the fact that his choice-influencing considerations technique has offered a means of advancing forum interests which, if less chauvinistic in appearance than Currie’s approach, is no less efficient. Shreve, supra note 11, at 342.
In terms of judicial acceptance, his more controversial ideas were still-born. It is understandable that continental scholars like Professor Dimitrios Evrigenis express polite wonder over the amount of time American conflicts scholars still spend rehearsing points of governmental interest debate. This Symposium would be exceedingly valuable if it did no more than lay to rest many of the scholarly antagonisms over Currie's work. Other topics, such as the relationship between conflicts and personal jurisdiction and developments in the codification of conflicts doctrine, deserve our attention.

15. In contrast, true believers may still be found in the academic community. See, e.g., Kanowitz, Comparative Impairment and Better Law: Grand Illusions in the Conflict of Laws, 30 HASTINGS L.J. 255 (1979); Kay, The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience, 68 CAL. L. REV. 577 (1980).