Brainerd Currie’s Contribution to Choice of Law: Looking Back, Looking Forward

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Brainerd Currie’s Contribution to Choice of Law: Looking Back, Looking Forward

by Kermit Roosevelt III*

I. INTRODUCTION

The subject of this Article is Currie’s contribution to choice of law. There is a historical reason for that because Currie is an enormously important figure in the field, and there is a value to understanding what he said and what it meant. And there is a more practical reason,

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1. As a guide to Currie’s thoughts and choice of law more generally, one cannot do better than Brainerd Currie, Selected Essays on the Conflict of Laws (1963), a book that belongs on the shelf of anyone interested in the field.
because I will argue—or at least suggest—that this insight can answer some questions that still seem unresolved. It can do that if it is properly understood, which I think it generally is not. Currie himself, I will suggest, didn’t quite understand his insight, or at least the implications of it.

The Article will thus start by recounting, very briefly, the story of choice of law—or at least the standard version of it. It will discuss Currie’s place in that story and the nature of his deep insight. Spoiler alert: That insight is, I will suggest, not about the correct outcome in particular cases. It is not about outcomes at all. It is about the structure of the choice-of-law problem. It is about the different steps that a court must go through in answering a choice-of-law question—and who has the power to give answers at those different steps.

After explaining what I think is the deep insight, and briefly canvassing some objections, this Article will then try to demonstrate how the insight solves some problems. First, it will examine some questions that Currie got wrong, which he got wrong because he did not follow his own insight to its logical conclusion. Second, it will discuss something he got right, though he did not quite understand why. Third, the Article will consider how Currie’s insight applies to some recent United States Supreme Court decisions. Most scholars do not think the Court has been deciding choice-of-law cases recently—indeed, the Court itself seems not to think so—but I will argue that some recent decisions are in fact about choice of law, and that the Court has decided them consistently with Currie’s views. Last, the Article will discuss how following the insight a step further might affect the current state of choice of law. Many people think choice of law is a mess. This Article will suggest that, to the contrary, if we accept Currie’s basic insight, the picture is not quite so gloomy.

II. THE STORY OF CHOICE OF LAW

I will start with the history of choice of law. Choice-of-law issues will arise whenever there are interactions between different legal regimes, or people governed by them, and so it is no surprise that choice of law

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is one of the oldest areas of legal thought. But, as far as this Article is concerned, we can start with the early American approaches. We can start with Joseph Story, whose *Commentaries on the Conflict of Laws* were an important early work, something like the nineteenth century's version of a Restatement. Story's basic principle was comity—mutual respect between sovereigns—but he expected comity to be implemented primarily through territoriality. If the courts of Georgia, for instance, were hearing a case about a tort that occurred in Alabama, Story believed they should show respect for the State of Alabama and its laws by applying those laws to decide the case.

After Story came Joseph Beale, who took the idea of comity and gave it a slightly harder metaphysical edge. Beale relied on territoriality as well, but he did not offer it as a nice way to respect the authority of other states. He said it was mandatory. It was part of the nature of law. Law, says Beale, "[b]y its very nature . . . must apply to everything and must exclusively apply to everything within the boundary of its jurisdiction." So to decide what law governs a particular transaction, all you need to do is figure out where it happens. The law of that place creates rights—it vests them in the appropriate parties, which is why Beale's theory is often called the vested-rights approach. And those rights will be transitory—they can be taken to other places and sued upon. So for Beale, when the Georgia court hears a case about an Alabama tort, it has no choice. Alabama law is the only law that creates rights related to that tort, and Georgia must recognize those rights, unless it has some good reason not to.

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3. Reportedly, a choice-of-law code was found in the wrappings of a crocodile mummy dating from Ptolemaic Egypt. See Hessel E. Yntema, *The Historic Bases of Private International Law*, 2 AM. J. COMP. L. 297, 300 (1953). What use the crocodile was intended to make of the doctrine is unknown.


5. The territorial principle, that the laws of a state have force within its borders and not outside them, was for Story "[t]he first and most general maxim" of conflicts. Id. at 19.


8. Id.

9. Id.


11. See id.
Now, this might sound like silly mumbo jumbo—rights magically appear, and then you can carry them around with you in your suitcase. But before ridiculing it, I always like to point out that it is largely the way we think about judgments. An individual who wins a judgment under one state's law can effectively take it into another state and demand that it be recognized—and, in fact, can make that demand in the name of the Full Faith and Credit Clause of the United States Constitution.

But having said that, Beale's theory still actually is silly mumbo jumbo. Law is not by its nature territorial, at least not in any way that states are bound to respect. (Back when people believed this, they also thought that the Due Process Clause of the United States Constitution imposed limits, basically territorial limits, on state legislative jurisdiction. But the Supreme Court has foreclosed this interpretation.) Beale's theory works nicely, for the most part, if everyone accepts its metaphysical premises and acts in accordance with them. For a while they did. For instance, in the well-known case of Alabama Great Southern Railroad Co. v. Carroll, the Alabama Supreme Court, discussing an Alabama tort statute, said that it must be read as if it explicitly limited its scope to injuries received in Alabama. Why must it be read that way? Because asserting the authority to attach legal consequences to an injury occurring outside the state's borders would be unprecedented and "astounding to the profession."

But once people stop believing this, and in particular once courts stop applying the Constitution to enforce it, it does start to look silly. The realization that it is silly is something we generally associate with the

12. Not just transitory rights, but the whole concept of rights, were mocked by the "legal realists" who attacked Beale. In 1933, David Cavers wondered in the pages of the Harvard Law Review, "how any juristic construct such as 'right' could have been accepted as fundamental in the explanation of any important aspect of judicial activity." David F. Cavers, A Critique of the Choice-of-Law Problem, 47 HARV. L. REV. 173, 175-76 (1933).

13. See, e.g., Baker v. General Motors Corp., 522 U.S. 222, 233 (1998) ("Regarding judgments, however, the full faith and credit obligation is exacting. A final judgment in one state, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land."); see also U.S. CONST. art. IV, § 1.

14. U.S. CONST. amend. V.


17. 11 So. 803 (Ala. 1893).

18. Id. at 807.

19. Id.
legal realists, in particular Walter Wheeler Cook.20 Cook, said Currie, "discredited the vested-rights theory as thoroughly as the intellect of one man can ever discredit the intellectual product of another."21 (One aspect of Currie’s greatness was certainly his writing style.)

It is silly because Beale’s incredibly complicated system turns out to be built upon nothing.22 Not nothing, exactly, but jurisprudential assumptions that fell out of favor and that courts stopped enforcing. It is a bit like Spinoza’s ethics,23 and it’s not surprising that it ended up being rejected.

But rejecting Beale is one thing. What do you replace him with? The realists did not have much of an answer—but Brainerd Currie did.

One reason, I have said, that territorialism looks silly is that it’s a tremendously complicated system built upon metaphysics that are not true in any objectively verifiable sense. But it also produces results that seem arbitrary in some cases. Carroll, the Alabama Supreme Court case mentioned earlier, is a good example. In that case, Carroll, who worked for the railroad, was injured when a link came loose as he was riding on the train. Someone—a fellow employee—was negligent in inspecting the link, and Carroll was injured because of that negligence.24

Under the common law, that would create a problem for Carroll if he wanted to recover damages from his employer, which he did.25 At common law, employers were not liable for injuries that one employee caused to another, the so-called fellow-servant rule.26 Luckily for Carroll, Alabama had abrogated that rule by statute.27 Alabama law provided that when an employee was injured by a fellow servant, the employer was liable.28 But, unluckily for him, his injury occurred in

20. For Cook’s critique, see generally WALTER WHEELER COOK, THE LOGICAL AND LEGAL BASES OF THE CONFlict OF LAWS (1942).
22. The territorial principle, as I have described it, may sound deceptively simple. To get a sense of the complexity of Beale’s system, one should spend some time with the RESTATEmENt (FIRST) OF CONFlict OF LAws (1934) or Beale’s three-volume, 2000-page treatise commenting on it. See Beale, supra note 7.
25. Id. at 803.
27. See Carroll, 11 So. at 805.
28. Id.
The place of a tort, Joseph Beale's system prescribed, is
the place of injury, since injury is the last event necessary to make the
tort complete. This tort occurred in Mississippi, and so Mississippi
law governed. And since Mississippi had not abrogated the fellow-
servant rule, Carroll could not recover.

Carroll is a wonderful case for illustrating the perversity of the
traditional approach, because the injury is really the only contact that
Mississippi had with the case. Carroll was from Alabama, as was the
railroad, and he negotiated and executed his contract of employment
there. The railroad lines were 90% inside Alabama. The negligence that
caused the injury occurred, the evidence suggested, in Alabama. So
Mississippi had nothing but the injury, yet that was enough. And that
should seem perverse regardless of what drives your intuitions about a
sensible result.

It did seem perverse to many people, including some judges, and they
began using various techniques to reach results that seemed more
sensible. But this raised the obvious question: if we have some
unstated intuitions about what sensible results are, and if we feel
strongly enough about them that we're willing to use these tech-
niques—what people called "escape devices"—to reach them, why not try
to unpack those intuitions explicitly and come up with a system that
addresses them? That is where Currie comes in.

29. Id. at 804.
30. Id. at 806.
31. Id.
32. Id. at 808.
33. Id. at 803-04, 807.
34. See, e.g., Andrew D. Bradt, The Shortest Distance: Direct Filing and Choice of Law
in Multidistrict Litigation, 88 NOTRE DAME L. REV. 759, 767 (2012) (discussing escape
devices).
35. It is also, I believe, the basic philosophy behind the much-maligned SECOND
RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) [hereinafter SECOND
RESTATEMENT]. The SECOND RESTATEMENT has been subject to much criticism in the law reviews. See, e.g., Larry
Kramer, Rethinking Choice of Law, 90 COLUM. L. REV. 277, 321-22 n.149 (1990) ("no
explanatory power"); Douglas Laycock, Equal Citizens of Equal and Territorial States: The
Roosevelt, supra note 2, at 2466 (stating that the Second Restatement "synthesiz[ed] a wide
range of insights into an indigestible stew"); Gary J. Simson, Leave Bad Enough Alone, 75
"striking and rather frightful resemblance" to territoriality); Joseph William Singer, Real
Conflicts, 69 B.U. L. REV. 1, 77 (1989) ("mystifies rather than clarifies"). But if we view
Section 6 of the SECOND RESTATEMENT together with the presumptive rules set out in later
sections, the overall message seems to contain three elements: (1) territoriality is
frequently sensible; (2) in some identifiable situations, notably allocation of loss between
codomiciliaries, it is not; (3) there may be other cases in which territoriality is not sensible,
If you push people about their intuitions, they tend to start talking about what states would want, what they're trying to achieve with their laws—or, put more simply, their policies. Currie said, let's give policy center stage. Let's be honest about what we're doing and think about choice of law in terms of state policies. This, he said, is a matter of interpreting the laws at issue to determine whether applying them to a set of facts would further their purposes. If applying a law would further its purposes, then the state whose law we are considering is interested. And this means that in any case involving two states, there are three possibilities. One state is interested; both states are interested; or neither state is interested. If one state is interested, the case is what Currie called a "false conflict," and the solution is to apply that state's law. If both are interested, the case is a true conflict, and it cannot be solved by courts. Unable to solve the conflict, the court should simply apply forum law. (Currie modified this view a bit later on, but the modifications are irrelevant to my points here.) If neither state is interested, then we have a bit of a puzzle. But we still have to decide the case somehow, Currie believed, so again a court should apply its own state's law. Forum law is the default choice, the presumption.

37. BRAINERD CURRIE, Notes on Methods and Objectives in the Conflict of Laws, in SELECTED ESSAYS, supra note 1, at 177, 183-84 [hereinafter CURRIE, Methods and Objectives].
39. Peter Kay Westen, False Conflicts, 55 CAL. L. REV. 74, 75-76 (1967) ("The phrase 'false conflicts' which Currie himself never used, has nonetheless been consistently attributed to him by others.").
40. See CURRIE, Methods and Objectives, supra note 37, at 177, 183-84.
41. Id. at 184.
42. Id.
43. See Brainerd Currie, The Disinterested Third State, 28 LAW & CONTEMP. PROBS. 754, 757 (1963) (suggesting that courts may resolve some true conflicts by a "moderate and restrained interpretation" of state policy).
44. Such a case is what Currie called "unprovided" for. See CURRIE, Survival of Actions: Adjudication Versus Automation in the Conflict of Laws, in SELECTED ESSAYS, supra note 1, at 128, 152 [hereinafter CURRIE, Survival of Actions].
45. Id. at 156.
46. See Kramer, supra note 38, at 1302-03.
Carroll, if you look at it this way, presented a false conflict. First, consider Alabama law. Alabama law is designed to allow some employees to recover damages. Which employees? Presumably the ones with whose welfare Alabama is primarily concerned, that is, Alabama employees. Carroll was an Alabama resident, so Alabama was interested in allowing him to recover.

What about Mississippi? Mississippi wants to protect some employers from liability. Which employers? Presumably the ones with whose welfare Mississippi is primarily concerned, that is, Mississippi employers, or maybe those doing business there. But the railroad was not a Mississippi employer, and it did not do a significant amount of business in Mississippi. So, Currie would say, Mississippi was not interested. The case presented a false conflict and obviously should have been decided under Alabama law.

That probably seems like a better outcome. The false conflict is generally considered the crowning glory of interest analysis, so this is the approach at its most persuasive. Indeed, some people would say that the treatment of false conflicts is Currie's great contribution. I would phrase it a little differently, as I will explain, but I do think that false conflicts make interest analysis look good. True conflicts and unprovided-for cases are a bit more problematic, and I will say a bit about them too, later. But I have said enough about Currie now to start considering his insight and its criticisms.

III. CURRIE'S INSIGHT AND HIS CRITICS

First, how should we characterize the analysis I've just demonstrated? What is Currie's contribution here? Some people, I have noted, say it is the discovery of the false conflict. I disagree with that; I will suggest it's a much deeper insight. Some people say it is the idea of promoting state policies—advancing governmental interests. I agree with that, or I could, depending on what is meant by it. Some people, I think, took this idea very much the wrong way. They took Currie to be saying that there were these things out there—government interests—and the task of a court or an analyst was to figure out how to promote them,

47. See Lea Brilmayer & Raechel Anglin, Choice of Law Theory and the Metaphysics of the Stand-Alone Trigger, 95 IOWA L. REV. 1125, 1158 (2010) (“[T]he concept of a false conflict has been hailed as Currie's great contribution to choice of law.”).

48. Id.

49. See, e.g., Erin O'Hara O'Connor, How Modern Choice of Law Helped to Kill the Private Attorney General, 64 MERCER L. REV. 1023, 1044 (2013) (stating that Currie “powerfully argued that the goal of choice of law should be to facilitate state policies”).
regardless of what the government of that state said or wanted. This is the view that produces the idea some scholars suggested, that courts should advance the interests of other states even though the other states don't believe those interests exist—the idea that states can be mistaken about their own interests. That I do not believe.

A third way of describing Currie's insight, which you see most in the work of Larry Kramer, is to say that Currie realized that choice-of-law cases were not fundamentally different from other cases about the scope of state laws. They were not esoteric procedural questions to be decided before getting to the merits of a case (contrary to Erin O'Hara O'Connor's view). They were about the substance of state laws, and they were to be resolved by the same tools as ordinary domestic cases—that is, by ordinary statutory interpretation.

I think this is the right way to characterize Currie's insight—it's what Currie himself said—and in just a bit I will try to explain where I think the insight leads. But I want to pause for a second here to acknowledge some criticisms, because they're powerful, and I think in some ways they're quite correct.

The main criticism, leveled most forcefully by Lea Brilmayer, was that this process of identifying state interests was not statutory interpretation. It was instead a process of constructing state interests from a set of assumptions that did not correspond to actual legislative preferences or intent. In my discussion of the Carroll case, I suggested that the legislatures of Alabama and Mississippi were seeking to benefit certain individuals or entities, and then that those individuals or entities were state domiciliaries—Alabama workers or Mississippi employers. Now, what makes us think that?

50. See id. at 1026.
51. See, e.g., Westen, supra note 39, at 85; see also Herma Hill Kay, Comments on Reich v. Purcell, 15 UCLA L. REV. 584, 589 n.31 (1968).
52. See, e.g., Kramer, supra note 38, at 1302 (“[T]he premise of interest analysis is that multistate cases are not different from ordinary domestic cases. . . .”).
53. See O'Connor, supra note 49, at 1026 (“[C]hoice of law is, or at least should be, a preliminary procedural question to be decided in pretrial hearings.”).
54. See Kramer, supra note 38, at 1302.
55. See CURRIE, Methods and Objectives, supra note 37, at 177, 183-84.
It is plausible—it's a basic tenet of political and constitutional theory—that legislatures look after the interests of those who have a voice in the political process.\textsuperscript{58} Alabama workers can vote in Alabama elections, and out-of-staters cannot, so we would expect the Alabama legislature to promote the interests of Alabama workers. But it is an assumption. And legislatures might care about other things, too. For one thing, they might care about Mississippi workers. Or, more significantly, they might care about predictability; they might care about ease of application. Those systemic considerations might lead them to prefer a different scope to their statute—they might even prefer a territorial scope. But interest analysis does not generally consider this possibility.\textsuperscript{59}

To some degree, the critics are right. This does not look like ordinary statutory interpretation. And there is another, perhaps more persuasive, way of identifying the difference. With ordinary interpretation, if you have a marginal case, you look at the purposes of the statute and ask if application would promote those purposes.\textsuperscript{60} You might have a statute that refers to pedestrians, for instance, and you want to know whether it includes rollerbladers. So you would ask the question: Why does this statute single out pedestrians, and are rollerbladers relevantly similar? Perhaps it's about the speed at which they travel—then rollerbladers look different, because they go faster. Perhaps it is about air pollution—rollerbladers look similar. Perhaps it is about something else entirely. But, whatever it is, there is a reason, and that reason either applies to rollerbladers or it doesn't.

Interest analysis in choice of law is different. There, you have people who are really indistinguishable—a Mississippi employer and an

\textsuperscript{58} This principle is the basic insight of John Hart Ely's process theory, see \textit{JOHN HART ELY, DEMOCRACY AND DISTRUST} (1980), and likewise the famous footnote four of \textit{United States v. Carolene Products Co.}, 304 U.S. 144, 152 n.4 (1938) ("\textit{P}rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."). As that footnote acknowledges, the idea is present in Supreme Court precedent as far back as \textit{McCulloch v. Maryland}, 17 U.S. 316, 428-29 (1819) (noting the problem of Maryland inflicting costs on out-of-staters by taxing a federal instrumentality).


\textsuperscript{60} See, e.g., \textit{EEOC v. Arabian Am. Oil Co.}, 499 U.S. 244, 248-50 (1991) (describing statutory interpretation and the role of legislative purpose with respect to extraterritorial application of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-e17 (2012)). This is not the only approach to statutory interpretation, but it is probably the most common. \textit{Id.}
Alabama employer—except for their domicile. And to figure out whether to treat them differently, we don’t look at the specific law and ask about its purposes; we just assume that laws are for the benefit of locals and not out-of-staters. We do not, oddly, ask whether the lawmaker might have been concerned about systemic values like predictability or ease of application.

But there are things to be said in Currie’s defense as well. First, Currie put forth the selfish-state analysis as an assumption (and a deliberately oversimplified one) to demonstrate how the theory worked. It was not supposed to be a guide to conducting interest analysis in actual cases—though unfortunately it seems to have been taken that way, especially by critics.

Second, and more importantly, even if it is true that this is not ordinary statutory interpretation, it is still statutory interpretation. And this is what I think Currie’s deep insight is. It is statutory interpretation because there is nothing else it could be. We have a state statute. We are trying to figure out to whom it grants rights, and in what circumstances. There is nothing that it could be except a question of interpreting the statute, because there is nothing but the statute that has the power to answer that question. Currie’s fundamental insight is about power. The first step of a choice-of-law analysis is figuring out the scope of the relevant laws—to whom they grant rights. That is a question about the meaning of those laws. And a state, speaking through its legislature in a statute, or its high court in a rule of common law, has the last word on the meaning of its laws.

IV. CONSEQUENCES OF THE INSIGHT

So that is what I take Currie’s insight to be. The first step in resolving a choice-of-law problem is to determine the scope of the relevant state laws—that is what allows you to classify the case as a false conflict, a true conflict, or an unprovided-for case. And the scope of state law is a matter of state law. No one else has the power to determine it.

Why is this an important insight? First, it will tell us some things about how certain kinds of cases should come out. Some of these things Currie realized, and some he did not. I will start with the implications he did not see.

61. See CURRIE, Married Women’s Contracts: A Study in Conflict-of-Laws Method, in SELECTED ESSAYS, supra note 1, at 77, 89 [hereinafter Currie, Married Women’s Contracts].
First, Currie recommended a presumption of forum law. If there was no sufficient reason to depart from the law of the forum, Currie believed that courts should apply it. That makes some sense if you are thinking about choice of law as a threshold procedural issue. But it makes no sense if you think about it (as Currie thought we should) as an issue about the scope of state laws. We do not start out a process of interpretation by assuming that a statute reaches every case. That makes no sense at all.

Second, Currie's analysis of the unprovided-for case concluded with a similar prescription of forum law. And again, this makes some sense if you suppose that choice of law is a threshold procedural issue that must be decided before a court can go on to the merits. The case must be decided under some law, you might think, and if there is no good reason to use some other state's law, we will stick with our presumption of forum law.

But I've already said that the presumption of forum law is a mistake, and this resolution of the unprovided-for case is mistaken for the same reason. Choice of law is not procedural; it is about the merits. And when you find that a case is unprovided-for, you have found that neither state's law grants rights related to this transaction. Neither state gives the plaintiff a right to recover. And in that case, there is no need to turn to forum law. The plaintiff has simply failed to state a claim. In fact, you cannot turn to forum law. We have just said, remember, that the laws at issue do not reach the case. That is what it means to call a case unprovided-for. To then decide the case under forum law is to give that law a scope we have just said it does not have, which is in violation of the basic insight that the scope of state law is a question of the meaning of state law. (This is a point I will claim the Supreme Court has recognized.)

Those are two consequences, which Currie did not see, that follow from his insight. Now I am going to turn to some that he did see, though not always perfectly.

63. Id. at 1302-03.
64. For elaboration of this point, see generally Kramer, supra note 38.
65. See Currie, Survival of Actions, supra note 44, at 128, 156.
66. Indeed, this is essentially Currie's position. See Currie, Survival of Actions, supra note 44, at 156 (stating that "this is the rational and convenient way to try a lawsuit when no good purpose is to be served by putting the parties to the expense and the court to the trouble of ascertaining the foreign law").
First, the easy one, the resolution of false conflicts. What is a false conflict according to my description? It is a case where the events fall within the scope of only one law. Only one law attaches legal consequences. Obviously, then, the case must be decided under that law. To do otherwise is actually unconstitutional. (And this is also something that the Supreme Court sometimes does recognize. This, in fact, is one way of describing the famous case of *Erie Railroad Co. v. Tompkins*, the Supreme Court recognized that only Pennsylvania law reached the events in that case, and that therefore the case must be decided under Pennsylvania law. 

Second, a little more complicated, the true conflict. What Currie said here was that true conflicts could not be resolved by courts.

And I think this is close to right. What he saw was that this question cannot be answered decisively by any one state. So it is another insight about power. And it is an insight about the difference between the two steps in the choice-of-law process. First, said Currie, we need to figure out if there is a conflict. This first step is a matter of determining the scope of the relevant state laws. And that is a question within the sole power of each state to answer and to answer in a way that's binding on everyone else.

Sometimes, this first-step analysis is all we need. If we find a false conflict, I've said, we know we must apply the law of the only interested state, as Currie said. If we find an unprovided-for case, we know the plaintiff simply loses, which is not what Currie said, but it is the consequence of his theory. But what if there is a true conflict? This is not a question about the meaning of either state's law. It's a conflict between the laws of two co-equal sovereigns. Each, presumably, can determine the outcome in its own courts, subject to some constitutional limitations that I am not going to discuss here. But neither can bind the other. So the second insight is that at this second step, no one is authoritative. Each state is free to decide for itself which law should get priority. So too, I have argued elsewhere, is a federal court.

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68. 304 U.S. 64 (1938).
69. Id. at 80.
71. See id. at 729.
72. Id.
73. For an attempt to work out some of the limitations, see Roosevelt, supra note 2, at 2518-33.
74. See Kermit Roosevelt III, Choice of Law in Federal Courts: From *Erie* and *Klaxon* to *CAFA* and Shady Grove, 106 NW. U. L. REV. 1, 21 (2012).
75. Id.
And the last issue that this insight resolves, which Currie did see, though his conclusions were tentative: renvoi.\textsuperscript{77} Renvoi is one of the classic puzzles of choice of law, and probably one of the things that makes people think choice of law is so strange and esoteric. It is the puzzle that arises when one state decides that another state's law applies.\textsuperscript{78} A Georgia court, let us say, decides that a case should be governed by Alabama law. Since Alabama choice-of-law rules are part of Alabama law, the Georgia court starts its application of Alabama law by looking to them. But it might be that Alabama choice-of-law rules tell us the case should be governed by Georgia law.

But Currie's basic insight resolves this problem very neatly.\textsuperscript{79} When does the renvoi problem arise? It arises when two states disagree about whose law applies to some case. Each state thinks its own law does not apply, and the other state's does. But remember the point about power: each state is authoritative as to the scope of its own law. So each state here thinks its law does not apply. And that is correct—it has to be, because each state has the exclusive power to set the scope of its own law. Each state also thinks the other state's law does apply, but on that point they are both wrong. They are wrong because they cannot—they lack the power to—contradict another state about the scope of its law. The conclusion we reach when we look at this situation, keeping in mind who has the power to answer the two different questions involved in choice of law, is simply that neither state's law applies. The renvoi is actually an unprovided-for case, which means, as argued above, that the plaintiff has failed to state a claim.

V. THE CURRENT STATE OF AFFAIRS

Those are what I think are some consequences of Currie's insight. They are not insignificant. They show us the right answer to some cases, and they resolve one of the big, longstanding, theoretical puzzles of choice of law. And everyone agrees, Currie was an enormously important figure in choice of law. All the same, if you look at the current legal landscape, you might not think that Currie is doing that well. Only a few states follow classic interest analysis. The big winner is the Second Restatement.\textsuperscript{80} Now, it is true of course that the Second

\textsuperscript{76} Id.
\textsuperscript{77} See CURRIE, Methods and Objectives, supra note 37, at 177, 184.
\textsuperscript{78} Kermit Roosevelt III, Resolving Renvoi: The Bewitchment of Our Intelligence by Means of Language, 80 NOTRE DAME L. REV. 1821, 1872 (2005).
\textsuperscript{79} For further elaboration of this argument, see generally id.
Restatement incorporates some of Currie's insights, but it is not, I think, faithful to the deep insight, because it doesn't set up the analysis as a two-step process. It has almost nothing about determining the scope of state laws; it seems to assume that all state laws have the maximum scope that is constitutionally permissible, and then it tries to resolve conflicts via the most significant relationship test. And then there are the territorialist holdouts. They do have a lot to say about scope—they say that all state laws are territorial in scope—but they don't have much to say about resolving conflicts—which is fair enough, or at least understandable, because in the territorialist system, conflicts do not arise. (Or so territorialists think.)

To put it briefly, states have adopted different approaches. This strikes people as problematic, primarily because it produces "disuniformity." For the same case, you can file in Georgia and get one answer as to which law applies or file in Alabama and get a different answer. For a while it looked as though modern approaches might replace territorialism entirely, but no convergence appears likely in the foreseeable future. So choice of law is a mess, and Currie's true insight is being neglected.

But now for the good news. There might not be a lot of courts that have followed Currie's insight, but there's one that has: the United States Supreme Court. You might not have heard that. It didn't make headlines. But the Supreme Court has been using Currie's approach.

That should surprise you, but it's true. The Supreme Court has had several cases recently about the extraterritorial application of American law. It has rendered some terrible decisions in some of them—Hartford Fire Insurance Co. v. California, for example—but most recently it has been completely in the Currie camp. Does a federal statute create a cause of action when some relevant events happen outside the United States? That is a choice-of-law question, of course; it is a question about the scope of some sovereign's law in the multijurisdictional context, the first question in any choice-of-law case. The Supreme Court does not recognize this; it does not characterize the extraterritoriality cases as choice-of-law cases. But how does it characterize them? It says that

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81. See Roosevelt, supra note 2, at 2468.
82. See Symeonides, supra note 80.
this is a question of statutory interpretation. It's up to Congress, and we are just interpreting the law Congress wrote. That is Currie’s fundamental insight right there.

And, in fact, the Court is more Currie than Currie himself. What happens if it decides that United States' law does not create a cause of action? Foreign law doesn't either, let's suppose, or at least the parties haven't invoked it. So we have an unprovided-for case. What do we do with it? Currie, recall, said that such cases should be decided under forum law, as that was the most convenient option. But this example should make clear how wrongheaded that suggestion is—if we have just decided that the case does not fall within the scope of federal law, we cannot then say, “but let's decide it under federal law anyway, because that's convenient.” Lower courts, and the Supreme Court in earlier cases, would dismiss for lack of subject-matter jurisdiction, which reflects much the same idea: we can only decide cases under federal law, but federal law doesn't apply, so we can't decide the case. But in its most recent extraterritoriality case, Morrison v. National Australia Bank Ltd., the Court said no—in an unprovided-for case the plaintiff has no claim. The plaintiff loses, just as I've argued he or she should in the unprovided-for case. This is not a preliminary-jurisdictional issue; this is about the merits.

Now, anyone familiar with Morrison (or the effective replay of Morrison in Kiobel v. Royal Dutch Petroleum Co.) might be skeptical of the suggestion that these cases are a vindication of Brainerd Currie. In each of them, the Court says that the federal law at issue is territorial in scope. And territorialism, it is commonly supposed, is anathema to interest analysis. Such cases, Larry Kramer has suggested, are not the acceptance of Currie’s insight; they’re the return of Joseph Beale.

85. See Arabian Am. Oil Co., 499 U.S. at 248.
86. See, e.g., id. (“Whether Congress has [legislated extraterritorially] is a matter of statutory construction.”).
87. See CURRIE, Survival of Actions, supra note 44, at 128, 156.
88. See, e.g., Arabian Am. Oil Co., 499 U.S. at 247.
89. 130 S. Ct. 2869 (2010).
90. Id. at 2877 (“[T]o ask what conduct § 10(b) reaches is to ask what conduct § 10(b) prohibits, which is a merits question.”).
92. See Kiobel, 133 S. Ct. at 1669; Morrison, 130 S. Ct. at 2883.
But this overstates the matter. Territorialism is just a particular choice as to the geographical reach of a statute; it is what I have called a rule of scope.4 The legislature is entitled to set the scope however it wants, as the court in *Morrison* recognized.45 And if it does not make that decision explicitly, the Court will make it—because it has to—as part of the process of statutory interpretation. Now, one might say that territorialism is not a sensible rule of scope. But that is not Currie's insight. Currie's insight is that scope is a question within the power of the legislature.46 It can be territorialist if it wants, and if it doesn't give any explicit direction, a court might decide that territorialism is the best interpretation of its silence.

Currie did not seem to think it was.47 But his selfish-state example, remember, was just an example. And he does seem to have systematically discounted what we could call systemic values like simplicity, predictability, and ease of application. A court that valued those highly might think that territorialism was the best option, particularly if it seemed likely to get the majority of cases right anyway.48

If we view its recent extraterritoriality cases sympathetically, the Court is simply saying that in the absence of any indication that Congress considered the question of extraterritoriality and made some specific decision, the Court will prioritize systemic factors in interpreting federal statutes.49 It could instead use the selfish-state assumption and try to maximize a narrow understanding of American interests, but concerns about foreign relations and international friction are plausible reasons to hesitate. Congress is certainly more competent to assess diplomatic considerations, and separation-of-powers concerns support a moderate and restrained interpretation. All of this is entirely consistent with Currie's insight.

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4. See Roosevelt, supra note 74, at 18.
5. See *Morrison*, 130 S. Ct. at 2877.
7. Currie was frequently harshly critical of territorialism. See, e.g., CURRIE, *Married Women's Contracts*, supra note 61.
8. Like legal education generally, conflict-of-laws classes tend to focus on the hard cases, which may be anomalous. It is true that territorialism can produce strange results—*Carroll* is a good example—but it is also important to ask how frequently it will do so, and the answer may be that it handles the vast majority of cases satisfactorily. New approaches that promise to get the "right answer" in every case tend to demand so much of lawyers and judges that one suspects they will yield a considerable number of errors in practice. See, e.g., Gary J. Simson, Plotting the Next "Revolution" in Choice of Law: A Proposed Approach, 24 CORNELL INT'L L.J. 279, 281 (1991) (expressing skepticism about workability of complicated approaches).
VI. THE ROAD AHEAD

So the first bit of good news is that the Supreme Court has adopted Currie's view. But that is on the international stage; it does not affect state practice. There we still have this troubling disuniformity of approach. But the second bit of good news is that Currie's insight is helpful here, too. Disuniformity of approach is not so troubling—it need not produce as much disuniformity of result as people think—if we keep Currie's insight in mind.

First, though, let me make a point about what we should not do. One of the recent bits of activity in the choice-of-law field has been the entrance of the economists. Economically minded scholars have suggested new directions for choice of law. Essentially, they have suggested that choice of law should stop focusing on sovereign interests and try to maximize efficiency. We should do this, it seems, regardless of what state legislatures want. This is directly contrary to Currie's insight. States have the power to set the scope of their laws. Economists do not, not even if they are really smart and know what is efficient. This is a terrible, indeed unconstitutional, idea, a classic example of economic imperialism (the tendency of economic analysis to impose itself on other fields without any care for their own inner structures).

So Currie's insight tells us that prioritizing efficiency is a bad idea. It also tells us, if we think about it for a moment, that the current state of affairs is not so bad, and that is my main point. Disuniformity in choice-of-law approaches is not as bad as we think.

What, after all, does this disuniformity amount to? Georgia uses territoriality, for instance, while Alabama uses (let's suppose) a selfish-state version of interest analysis. What are they disagreeing about?


101. See Guzman, supra note 100, at 884; O'Hara & Ribstein, supra note 100, at 1152.

102. A test of this theory came with the 2001 revision of the Uniform Commercial Code (UCC). Following the lead of efficiency-minded law professors, the American Law Institute revised the UCC choice-of-law provision to allow parties, with some narrow exceptions, to choose whatever law they wanted to govern their contracts. See U.C.C. § 1-301(c) (2001). This doubtless increased efficiency, but it did so at the expense of various state policies intended to restrict liberty of contract. When it came time for states to adopt the new version, every state rejected the choice-of-law section, preferring to stay with the older one—less efficient, perhaps, but more protective of state interests. See HERMA HILL KAY, LARRY KRAMER & KERMIT ROOSEVELT, CONFLICT OF LAWS: CASES—COMMENTS—QUESTIONS 100-101 (9th ed. 2013).
Why do we get disuniformity of result? We get it because they are disagreeing about the scope of state laws. Georgia is saying that Georgia law is territorial—and so is the law of every other state. Alabama is saying that Alabama law reaches any case in which it might benefit a local—and so does every other state's law.

But this state of affairs should bring to mind our earlier discussion of renvoi. There, too, we had states disagreeing about the scope of state laws. That disagreement turned out not to be troubling, because we know that each state is authoritative about the scope of its own law and not about the scope of any other state's law. The same point holds here. Georgia may say that Georgia law is territorial. It may not say that about Alabama law or the law of any other state. Alabama may say that its law extends as the selfish-state assumption dictates. It may not say that about Georgia law or the law of any other state.

What does this mean? If we incorporate Currie's insight, we get a situation in which all states will agree about the scope of state laws, because each law has one authoritative interpreter. States will still follow different approaches to choice of law, but all that will mean is that they have chosen different scopes for their own laws. That is not a problem. In fact, the adoption of different choice-of-law approaches is really a boon to the analyst. The main problem pointed out by the critics of interest analysis, recall, was that it was hard to figure out what the state wanted the scope of its law to be. That is why Currie resorted to the selfish-state assumption and made little progress thereafter. But it turns out that states do say what they want the scope of their laws to be. They say so through their choice-of-law rules.

Where does this leave us? It implies a fairly substantial revision to current choice-of-law practice. Under current practice, in defiance of Currie's insight, states regularly assert the authority to determine the scope of other states' laws. I have argued elsewhere that this is clearly wrong, in fact unconstitutional under the Full Faith and Credit Clause. Here I argue that it is also something that Currie's teachings should lead states to stop doing.

Will they in practice? Probably not, unless the Supreme Court makes them, which it probably will not. But sometimes ideas do win on their merits; they do affect judicial practice. Choice of law is actually the area in which this seems to have happened the most. And though many people believe that the influence of academics is the reason that the field

103. See Brilmayer, Interest Analysis, supra note 56; Brilmayer, Methods and Objectives, supra note 57.

104. See Roosevelt, supra note 78, at 1874 & n.186; see also U.S. CONST. art. IV, § 1.
is viewed as a disaster, I am a bit more optimistic. If states do follow Currie's insight, things will get simpler and easier.

All states will agree on scope, because they have to. This is Currie's insight, although he did not quite see this consequence of it. Each state has the power to set the scope of its own law and to bind other states on that question. States may not agree on priority. This is also Currie's insight. No state has the power to bind any other on the question of which law should get priority in a conflict. I think they will agree a fair amount—I think that if they understand the structure of choice-of-law analysis, they will agree much more than they currently do—but perhaps not all the time. Stronger constitutional limits, a topic I've explored in other articles, might make them agree more—if we limited permissible rules of priority, then we might find that states agreed more on which laws should prevail in a conflict. However, there will probably be some persistent disuniformity.

That is not a cause for despair, however. That is just the price of federalism. States differ as to their substantive visions of the good, and they may also differ as to their visions of the best approach to resolving conflicts among their laws. If the conflicts prove too intractable, the federal government offers a way out—Congress can give us substantive uniformity and preempt state laws, which it does frequently, or it could resolve particular choice-of-law problems via Full Faith and Credit legislation, which it does much less but should do more often. Or, most ambitious, it could even prescribe a national set of rules of priority resolving all choice-of-law problems. That would be the promised land as far as choice of law is concerned, but it's a topic for another day. My claim here is only that Currie takes us farther than most people recognize. Not all the way to the promised land of uniformity, but close enough to get a glimpse at it. Currie, we could say, took us to the top of the mountain. Getting down is up to us.