Choice of Law and the State's Interest in Protecting its Own

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This article examines the premise, widely invoked in modern American choice-of-law theorizing, that a state has a greater interest in protecting its own citizens or residents than it has in protecting others. (Usually, we shall see, it is put more strongly—to the effect that a state's interest in protecting people extends only to protecting its own.) Recently this premise has come under some attack, notably by Professors Brilmayer and Twerski and Judges Bergan and Breitel of the New York Court of Appeals. This article is an attempt to evaluate the extent to which the criticism is valid—at present it is somewhat undifferentiated—and what its...
implications must be for future choice-of-law theorizing.

The classic statements of the premise are from the godfather of modern interest analysis, the late Brainerd Currie. Discussing the Massachusetts married women's statute involved in *Milliken v. Pratt* Currie wrote:

Massachusetts . . . believes . . . that married women constitute a class requiring special protection. It has therefore subordinated its policy of security of transactions to its policy of protecting married women. . . . What married women? Why, those with whose welfare Massachusetts is concerned, of course—i.e., Massachusetts married women. In 1866 Maine emancipated (its) married women. Is Massachusetts declaring that decision erroneous . . . ? Certainly not. . . . All that happened was that in each state the legislature weighed competing considerations, with different results. Well, each to his own. Let Maine go feminist and modern; as for Massachusetts, it will stick to the old ways—for Massachusetts women.

Of the Wisconsin wrongful death statute at issue in *Hughes v. Fetter* he had this to say:

How should the statute be applied to cases that are not wholly domestic in order to effectuate the community's policy? Rather clearly, its benefits should be made available whenever those who are the objects of its protection are members of the community—i.e., residents or domiciliaries of the state.

His verdict on the New York "no damage ceiling" rule involved in *Kilberg v. Northeast Airlines, Inc.* was the same:

New York had no interest in applying its law and policy merely because the ticket was purchased there, or because the flight originated there. New York's policy is not for the protection of

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3. There were important precursors, including my colleagues David Cavers and Paul Freund, but Currie's was certainly a more complete system of interest analysis: his work is among the most formidable corpora in all of legal theory. (As we shall be noting, Cavers' thought has evolved considerably since his early work. Freund, of course, has migrated to another field, albeit one he could hardly have supposed to be free of landmines of its own.)

4. 125 Mass. 374 (1878).

5. B. Currie, *supra* note 1, at 85-86.


all who buy tickets in New York, or board planes there. It is for
the protection of New York people.\footnote{9}

When one asks why this should be so, there is a tendency in fash-
ionable conflicts circles to respond that that’s just Currie talking,
that statements like this do not reflect the sophistication that in-
terest analysis has since achieved. This attempted dissociation is
understandable, but it is neither accurate as description nor possi-
ble as prescription.

It is certainly true that most interest analysts are far from buy-
ing Currie’s system lock, stock, and barrel. In particular, his rec-
ommendation for “true conflicts”—that where more than one state
turns out to have an interest in seeing its law applied the forum
should simply apply its own law—is one that has had almost no
takers.\footnote{10} Rejecting that approach to true conflicts, however, is
by no means the same thing as rejecting Currie’s basic method of de-
ciding which states are interested (and consequently whether the
conflict is true or false). Indeed, without Currie’s basic method-
ological premise—that states are interested in protecting their own
residents in a way they are not interested in protecting
others—interest analysis is largely impotent.

The modern learning’s proudest boast—one joined by virtually
every contemporary writer on the subject—is that in a significant

\footnote{9. B. Currie, supra note 1, at 705 (footnotes omitted). Cf. D. Cavers, The Choice-of-
Law Process 151 (1965) (“New York has a measure of damages for wrongful death which is
designed to give full financial protection to the dependents of New Yorkers wrongfully
killed.”) (footnote omitted)). See also B. Currie, supra note 1, at 270:
So far as appears, Minnesota had no interest in the application of its nonfor-
feiture policy in the Walsh case. That policy was for the protection of purchas-
ers, and the purchaser, being a resident of North Dakota, was not within the
ambit of Minnesota’s governmental concern. See also, e.g., id. at 228 (“In the Head case the Court held, quite properly, that the state
had no legitimate interest in the application of its policy to nonresidents.”); id. at 417, 724
(“The guest statute expresses a policy for the protection of defendants. The defendant here,
however, is not a citizen or resident of Ontario . . .”)).

\footnote{10. See Currie, The Disinterested Third State, 28 Law & Contemp. Prob. 754, 755-59
(1963). See also Kanowitz, Comparative Impairment and Better Law: Grand Illusions in
the Conflict of Laws, 30 Hastings L.J. 255, 259 (1978); Sedler, Weintraub’s Commentary on
the Conflict of Laws: The Chapter on Torts, 57 Iowa L. Rev. 1229, 1230 (1972). Unexpected
recent support for much this approach has come from Arthur von Mehren, who has sug-
gested that a forum resolve an otherwise irresolvable conflict as it would an “analogous
domestic situation.” von Mehren, Choice of Law and the Problem of Justice, 41 Law & Con-
temp. Prob. 27, 33-36 (Spring 1977).}
percentage of the cases (many say most), analysis of the interests of the states apparently involved will generate the conclusion that in fact only one state is interested (and the conflict therefore dismissible as "false") or if not that, the interests of one state will so overwhelmingly predominate that there can be no serious doubt that its law should be applied. \textsuperscript{11} Faith that this is so is needed to maintain faith in interest analysis generally, since there is general agreement that no one has come up with a very convincing way of coping with genuine conflicts. \textsuperscript{12}

Let's assume a case with two potentially interested states, however. Ignore the questions where the accident or whatever took place, where the parties are from, where the suit is brought, and so forth: the point I want to make does not depend on such particulars. The conflicts issue will arise, obviously, from the fact that one of the states has a rule that in one or another way is more favorable to the plaintiff (and the other has a rule that is correspondingly favorable to the defendant). \textit{If, however, the state with the plaintiff-protecting rule is taken to have an interest in protecting the plaintiff irrespective of where he is from, and the state with the defendant-protecting rule is taken to be interested in protecting the defendant irrespective of where he is from, both states will necessarily be interested and the conflict will thus necessarily be true.} Indeed, without the device of discounting one or the other state's interest because the party its law would protect is not local, it is difficult to discern a principled basis for concluding that the interests of the two states in applying their own laws are in other than essential equipoise.

Now this could be avoided by refusing to define interests in domiciliary terms at all. The dilemma arises only if we assume, say, that a state with a plaintiff-protecting rule is interested in applying its rule in cases where the plaintiff comes from that


\textsuperscript{12} See, e.g., von Mehren, Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology, 88 Harv. L. Rev. 347, 366 (1974).
state—at which point we will begin to wonder, at least we should, whether the state shouldn't be claiming an interest in protecting nonlocal plaintiffs as well. Why, then, don't we define interests other than in terms of protecting this or that party and say instead, for example, that the state of injury, or perhaps the state of the alleged wrongful conduct, is the "interested" state? In fact, I think that's about where we ought to end up in all of this. The problem is that despite my procrustean imposition of the label "interest" this isn't what is ordinarily meant by interest analysis; indeed, it seems to amount to nothing other than a quite old-fashioned territorial rules approach.

This isn't to say that interest analysts don't recognize that there can be interests in influencing local behavior. In fact they do—though we'll see that when it comes to the actual analysis of cases such interests tend to get ignored, or at any rate receive short shrift, as compared with the asserted interests of states in protecting their resident litigants. And, indeed, when they describe their systems in the abstract, such analysts are likely to place little or no stress on the extent to which interests will be defined in terms of protecting local parties: in such summaries the reference will probably be to "interested" (or "concerned") states without going into detail about what it is that makes them interested. When they get down to the actual analysis of cases, however, the premise that states have an unusual interest in applying their rules so as to benefit their own citizens will typically be quite quickly and matter-of-factly wheeled into action.

The reason for this is easily understood when one considers the alternatives. If, on the one hand, the residences of the parties are left out of account and "interests" are defined entirely in terms of the geographical locale of one or another critical event—that obvi-

13. See note 60 infra.
14. E.g., R. Cramton, D. Currie & H. Kay, Conflict of Laws 216-17 (3d ed. 1981) (statement of B. Currie); A. von Mehren & D. Trautman, The Law of Multistate Problems 76-77 (1965). (It should be noted that when it comes to the application of their system, Professors von Mehren and Trautman are less relentless than other interest analysts, taking the view that whether or not a state's interest extends only to protecting its own residents is a function of the policies found to underlie the particular law in issue. But see note 69 infra. The premise may therefore be invoked only intermittently in their work; when it is, however, it is likely to be with a vengeance. See, e.g., text accompanying note 18; notes 44 & 64 infra.)
ously is the only real alternative—it will soon become plain that what is being recommended is just another version of the "bad" old territorial learning. If one goes to the other extreme, however, and holds that the state with, say, the plaintiff-protecting rule is "interested" in generating a victory for the plaintiff not simply when he or she is a local resident, but also when he or she hails from another jurisdiction, it will become plain just as soon that all states with any connection with the case must be counted as interested and that the case therefore cannot be waved aside as involving a false or trivial conflict. Thus, the only way the system can operate, without reducing itself to a set of old-fashioned territorial rules, is by assuming that states are interested in applying their rules so as to generate victories for their own people in a way they are not interested in generating victories for others.

One would naturally expect writers whose analysis has hewed close to Currie's original line to follow him here, and they do. This, from Robert Sedler, is typical: "The plaintiff's home state is interested in applying its own law allowing its resident to recover, while the defendant's home state is equally interested in applying its own law to protect the defendant and the insurer."\(^{15}\) Since the premise that states are unusually interested in promoting the fortunes of their own people turns out to be prerequisite to any real progress by analysis of the interests, however, one would also expect to find it in the work of those whose methodology does not so nearly parallel Currie's. And, again, one does. The premise is shared, and enunciated, by analysts as independent of Currie and of one another as, for example, Paul Freund ("The invalidating law of Pennsylvania may fairly be regarded as designed to protect Pennsylvania borrowers; New York borrowers, on the other hand, are not given that kind of protection by their own internal law");\(^{16}\) William Baxter ("X lawmakers want X law to apply in cases involving X food processors, and Y lawmakers want Y law to apply in cases involving Y consumers");\(^{17}\) and Donald Trautman ("If the

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17. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 7-8 (1963). See also, e.g., id. at 14 ("Involvement of an X borrower of the protected class is a necessary
purpose of a guest statute . . . were seen as one solely to protect the driver . . . such a statute in the place of accident should ra-

tionally have little bearing on a case in which the driver comes from . a liability state . . . "). 18 Professor Baade thus does not

overstate badly when he asserts:

If state A has [a married women's] disability and state B does not, all cases where the wife is domiciled in B will be false-conf-

lict cases, for the application of the law of A will frustrate an interest of B without really advancing an interest of A.

So far as I can determine, most commentators—with the sig-

nificant exception of Professor Ehrenzweig and his follow-

ers—have come to accept this basic proposition. 19

I intend in this article to evaluate the constitutionality and sense

of the premise that states have a greater interest in advancing the

interests of their own than they have in advancing the interests of

outsiders. Having cast what seems to me significant doubt on it, I

shall take a more careful look at its functional importance and con-

clude that it actually may not have a great deal—that in fact most

of what appear on the surface to be conflicts of law are just that,

and cannot be dissolved either with or without the premise that

states are unusually interested in helping their own. Interest analy-

sis, I shall suggest, has an important contribution to make only in

condition to the application of X law . . . ").

18. Trautman, Rule or Reason in Choice of Law: A Comment on Neumeier, 1 VT. L. REV. 1, 6-7 (1976). See also note 69 infra.

19. Baade, supra note 11, at 144 (footnote omitted). See also J. MARTIN, CONFLICT OF

LAWS 256 (1978) ("Most, but not all, current commentators accept Currie's concept of and

resolution of false conflict cases."). For further examples, see Kay, Comments on Reich v.

Purcell, 15 U.C.L.A. L. Rev. 584, 592 (1968) ("[T]he defendant is not a member of the class

of local domiciliaries whom Missouri sought to protect by limiting damages . . . "); D. Cur-


whose purpose, if any, was the protection of Arizona estates was simply not applicable to a
dead Californian." (footnote omitted)); Hill, Governmental Interest and the Conflict of

Laws—A Reply to Professor Currie, 27 U. CHI. L. Rev. 463, 490 (1960); Ratner, Choice of


[T]he purpose of the Missouri rule, to avoid the imposition of excessive financial burdens on Missouri defendants, would not be implemented by applying the rule on behalf of a defendant not from Missouri, while the purpose of the Ohio rule, to accord full recovery to its injured residents, would be im-

plemented by applying the rule on behalf of the Ohio plaintiffs.

See also sources cited notes 62, 63, & 64 infra.
cases—and actually only a subset of these—where the plaintiff and defendant hail from the same state (or states whose laws are identical). All others, I shall argue, can sensibly be resolved only by what will doubtless strike many as hopelessly old-fashioned choice-of-law rules.

I. THE CONSTITUTIONAL FRAMEWORK

Brainerd Currie used to argue, in essence, that the Supreme Court had constitutionalized his system, which meant, among other things, that the Court had indicated that states had no constitutionally legitimate business regarding out-of-staters as within the scope of their protective policies.20 This claim is so plainly the result of wishful thinking that it does not merit extended rejoinder. The recent cases have indicated that essentially any contact with a case, certainly including those to which the traditional territorial rules were geared, will constitutionally support a state's application of its own law,21 and the older cases on which Currie relied (apparently on the theory they somehow trumped the newer ones) turn out on analysis, and I must say unsurprisingly, to be if anything even less Currian in method.22 Whether the Court should have constitutionalized the premise that states are legitimately interested in protecting only their own is a different question, one included within the subject of this article. That it has not in fact done so seems entirely clear.

Indeed, it is the contrary proposition—that it is unconstitutional for a state to take the position that its protective policies extend only to its own citizens—that seems more likely to strike the contemporary observer of the constitutional scene as plausible. The clause that thrusts itself forward, here, of course, is that first resort

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20. B. CURRIE, supra note 1, ch. 5.
of constitutional argument, the Fourteenth Amendment's Equal Protection Clause. Limiting the protection of local laws to local people is obviously "rational" under traditional tests, but somehow that seems unsatisfying. Classifications that distinguish locals from out-of-staters seem somehow, well, suspect, and therefore appropriately subject to a demand for a defense that is more than rational. Since the special constitutional vulnerability of such distinctions is established quite directly by Article IV's Privileges and Immunities Clause, however, it is this clause that I shall proceed to consider.

The guarantee of Article IV that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States" was plainly intended to prevent discrimination against out-of-staters: "It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." And indeed, with minor and soon-corrected diversions, that is precisely the spirit in which it has been interpreted for the two centuries it has been in the Constitution. For example, in Toomer v. Witsell, decided in 1948, the Court invalidated a South Carolina statute imposing a higher shrimping license fee on nonresidents than on residents, using language that made very clear its disposition to subject local/nonlocal distinctions to intensive scrutiny. Doe v. Bolton, decided in 1973, was equally serious in its scrutiny when the subject was medical care:

23. There is an initial if little noticed question whether the Equal Protection Clause—whose protection, unlike that of its sister Due Process and Privileges and Immunities Clauses, is limited to persons "within [the state's] jurisdiction"—was meant to protect out-of-staters at all. In 1898, the Court ruled that a Virginia corporation (a person for equal protection purposes) not doing sufficient business in Tennessee to be subject to process there, did not, simply by suing in Tennessee, bring itself within that state's "jurisdiction" sufficiently to enable it to raise an equal protection objection to a Tennessee law. Blake v. McClung, 172 U.S. 239, 260-61 (1898). This holding has obviously been eroded by expanding notions of suability, and it appears to have been quietly overruled in Kentucky Fin. Corp. v. Paramount Auto Exch. Corp., 262 U.S. 544 (1923). See Western & S. Life Ins. Co. v. State Bd. of Equalization, 101 S. Ct. 2070, 2079 n.12 (1981). Cf. Doe v. Plyler, 628 F.2d 448, 454-56 (5th Cir. 1980), cert. granted, 49 U.S.L.W. 3819 (May 5, 1981).

24. For good reason. See text accompanying note 47 infra.

25. Toomer v. Witsell, 334 U.S. 385, 395 (1948). The distribution of state largess generally has been assumed to constitute an exception to the general command of the clause. The exception is obviously troubled, if apparently necessary: in any event it does not touch the subject matter of this article.

26. Id. at 396-99.
"Just as the Privileges and Immunities Clause . . . protects persons who enter other States to ply their trade . . . so must it protect persons who enter Georgia seeking the medical services that are available there." 

A different note was struck in 1978, when the Court indicated that the clause protected against discrimination regarding only "fundamental" rights, and upheld a state law imposing a higher elk hunting license fee on out-of-staters than on locals in Baldwin v. Montana Fish & Game Commission. The significance of the shift was attenuated by the fact that in the course of its opinion the Court articulated an alternative ground—that residents contribute to the support of hunting areas through other sorts of taxes (to which nonresidents are not subject) —and in any event Baldwin appears to have been gutted a month after it was decided by Hicklin v. Orbeck, which invalidated an Alaska law requiring that local residents be hired in preference to equally qualified nonresidents for all local employment resulting from oil or gas leases. I certainly don't mean to suggest that no responsible person could distinguish the facts in Baldwin from those in Hicklin; that would be nonsense. The reason I suggest the latter may have "gutted" the former has to do instead with the fact that Justice Brennan’s opinion for the (unanimous) Court in the later case is strikingly similar to the dissent he wrote for himself and Justices White and Marshall in the earlier one, and relies heavily on Toomer v. Witsell, which is difficult responsibly to distinguish from Baldwin.

Whether or not Baldwin is here to stay is beside the present point, however, because the cases we are talking about involve not simply something on the order of the right to hunt elk (let alone the amount of the license fee for doing so), but rather questions such as whether a given state’s guest statute or contractual immunity law is to be applied in a given case, and therefore whether the defendant will or will not be held liable for the damages he or she

30. Id. at 388-89. See also L. Tribe, American Constitutional Law 38 (Supp. 1979).
inflicted. *Baldwin* or no *Baldwin*, it is not likely to be suggested that such decisions implicate rights so unimportant that they can be dismissed as beyond the coverage of the Privileges and Immunities Clause. It is true that in our "conflicts" context we will not ordinarily be dealing with laws that on their face limit their protection to locals. However, the methodology under discussion, which counsels that in order to avoid or minimize conflict state laws should be interpreted as if they contained precisely that limitation, amounts for constitutional purposes to the same thing. A judicial assurance that "Of course California law would protect you fully, but because you do not come from California its law will not be applied in your case" is plainly the equivalent of a holding that you are outside the protection of California law, and thus equally in apparent violation of the Privileges and Immunities Clause.

In one of his early articles, Currie noted in passing that adoption of an interest analysis methodology "would give a new importance" to the Privileges and Immunities Clause. It should be clear by now that that is putting it mildly. In fact few interest analysts seem prepared to take the issue seriously—the prevailing assumption seems to be that nothing so sensible could possibly be unconstitutional—but, characteristically, Currie was an exception. In two lengthy articles published in 1960 and written in collaboration with Professor Herma Kay, herself a distinguished interest analyst, Currie took the privileges and immunities attack very seriously indeed, in fact so seriously as to overcomplicate it substantially.

The key device Currie and Kay recommended for coping with the constitutional problem was the so-called "intermediate solution" of extending the protection of forum law to an out-of-stater if, but only if, he or she was similarly protected by the law of his or her home state. That solution was subject to several restrictions, among them that it not be employed if it ended up generating a

32. B. Currie, *supra* note 1, at 185.
34. B. Currie, *supra* note 1, chs. 10 & 11. The latter is technically about equal protection, but the authors did not significantly distinguish the two attacks: both articles are about the constitutionality of defining protective interests as running only in favor of locals.
35. *See, e.g.,* id. at 504-05. *See also* D. Cavers, *supra* note 9, at 200.
true conflict, and indeed the restrictions underwent significant alteration between the first article and the second. Paradoxically, however—and here the overcomplication took its toll—the intermediate solution turns out on close analysis to be a mere paper alteration, without functional significance. For if the law of a party's home state would decide the case for him, then by standard interest analysis canons that state has an interest in the application of its law. If no other state has an interest in a contrary result, the conflict is "false" and the courts of all states are instructed to find for him; no "extension" of another state's law to protect him is needed to reach that result. If on the other hand another state does have an interest in a contrary result, there exists a true conflict between the law of that state and that of the home state of the party in question. Different commentators have different ways of dealing with true conflicts, but for none will the consideration that the party is protected not only by his home state's law but also by an "extension" of another state's law make a difference. At first blush it might seem that it could make a difference for Currie, if the law whose "extension" is in issue is that of the forum. For his recommendation, not widely accepted, was that in case of a true conflict the forum, if it has an interest, apply its own law. And the "extension" of the forum's law to protect an out-of-stater will convert it from a disinterested forum into an interested one. But again, no outcome will be influenced. For Currie's recommendation was that a disinterested forum confronted with a true conflict between the interests of two other jurisdictions decide the case in accord with the law of that interested state whose law is the same as its own. The same result would therefore be reached whether or not the extension of the intermediate solution was made.

It may be, however, that the linchpin of that little demonstration—the realization that the party's home state has an interest in protecting him or her whether the forum does or not—provides a more direct route out of our privileges and immunities dilemma. Perhaps we have been focusing our attention too narrowly, on the recommendation that we construe a particular state's protective

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36. See, e.g., B. Currie, supra note 1, at 495, 498, 508.
37. Id. at 568 n.174, 572.
38. See Currie, supra note 10.
policies as protecting locals only. Viewed that narrowly, it's quite true that the discrimination seems just what the Privileges and Immunities Clause forbids, one between locals and nonlocals. If we widen our horizon, however, the recommendation of the interest analysts is not simply that Californians receive the protection of California's protective policies and everyone else be denied them, but rather that everyone receive the benefit of the protective policies his or her own state has seen fit to legislate. Of course that may turn out not to be possible, if two or more states wish to protect their own in ways that cannot coexist: that is the classic true conflict situation. Currie would in that event tell the forum to apply its own law.\textsuperscript{39} Most commentators reject that solution, however, refusing in their various processes of accommodation to discount the presumptive entitlement of an interested state to the application of law on the ground that it is not the state in which suit was brought. And if that is the approach, the system can be viewed not as one that flatly distinguishes locals from out-of-staters, but rather as one that "simply" sorts people out according to the states from which they hail. Whether or not they are accorded benefits equivalent to those accorded by local law, therefore, will depend on what their local legislators have seen fit to do for them, and that, the argument would run, is not a violation of the Privileges and Immunities Clause.

The argument does not run smooth, at least so far as the case law is concerned. For if it satisfied the Privileges and Immunities Clause to deny someone the benefits of local law so long as he is getting what his home state's law would give him, the proper

\textsuperscript{39} Despite its rather flagrant "locals-first" attitude, this does not seem to raise any (large c) constitutional problems that more "balanced" brands of interest analysis do not. When the forum resolves a true conflict by applying its own law, the foreign party loses, but he obviously would have lost even if he had been local: he therefore is not being discriminated against because he is an out-of-stater. Now it is true that if his opponent had been from the same state he was from, the conflict would probably have been denominated false and he would have won (under his home state's law): the basis on which he is being discriminated against can thus be characterized as the residence of his opponent, specifically the fact that his opponent does not come from the same state he does. Cf. Ely, The Irrepressible Myth of Erie, 87 Harv. L. Rev. 693, 712-13 (1974). Whether that should count as a denial of equal protection—it obviously would have to trigger special scrutiny to do so—drives us straight to the general question under discussion, one with equal implications for non-Currian brands of interest analysis, whether it is permissible to make choice-of-law determinations turn on the residences of the parties.
course, before voiding any law under that clause, would be to in-
quire where the complainant is from and whether he would be en-
titled at home to the benefit he now seeks. If he wouldn’t, his priv-
ileges and immunities challenge should be rejected (though the
challenges of others from other states would succeed). Yet we know
perfectly well that this is not the way the Court has proceeded
under Article IV: indeed I am not aware of a single instance where
it has asked what the challenger would be entitled to at home.

The Court’s assumption that the content of the challenger’s
home state law is irrelevant to a privileges and immunities chal-
lenge was demonstrated even more forcefully, albeit still with ap-
parent inadvertance, in its 1975 decision in *Austin v. New Hamp-
shire*.40 Invalidated in *Austin* was the New Hampshire Commuters
Income Tax, which applied to the New Hampshire-derived income
of nonresidents, but exempted the income of residents similarly
earned within the state. It thus seems like a straightforward privi-
leges and immunities case—until we add two facts, that the law
imposed a ceiling on the tax rate of whatever rate would be im-
posed by the taxpayer’s home state on income he earned there, and
included a provision that in the event the home state refused to
credit the taxpayer for the taxes paid to New Hampshire they
would not be imposed. The net effect, therefore, was to tax an out-
of-stater at the rate his home legislature had selected. Of course it
can be argued that this is something other than treating him as his
home legislature would, since taxes paid at home will be spent at
home whereas New Hampshire will spend its revenues, under-
standably enough, in New Hampshire. The Court did not so much
as mention this, however—unsurprisingly, I think, since New
Hampshire is a place where the commuting taxpayer spends a good
deal of time even if he doesn’t sleep there, and as noted the home
state was given the option, which in the event was not exercised, of
ensuring that the money *would* be spent at home. *Austin* thus
seems to stand rather directly for the proposition that it is *not* suf-
ficient under the Privileges and Immunities Clause to treat people
as the laws of their home states would treat them.

The importance of this conclusion should not be underesti-
choice-of-law theory is unconstitutional. The threat is by no means simply to Brainerd Currie's dictum that in cases of true conflict the forum should apply its own law; the point is much more devastating. It undercuts the entire methodology by indicating that whenever a state would claim an interest in enforcing its protective policy on the ground that the party its law would protect is a local resident—and that much is common to all "interest" or "functional" analysts—it is obligated by the United States Constitution to claim a similar interest in protecting out-of-staters, irrespective of what their home states' law provides. That, for reasons we have canvassed, spells the end of "interest analysis" in any recognizable sense of the term and insists instead that we direct our choice-of-law references to that state which will most often bear the strongest relation to the issue in question—relation, however, not being defined in terms of who lives where.  

_Austin_ was decided only six years ago, and surely the Court has cast nothing resembling explicit doubt on it. Reason to suppose its implications were not fully considered, however, is supplied by the more recent decision in _Allstate Insurance Co. v. Hague_, where seven members of the Court, while they did not explicitly say that the residence of the party to be benefited could alone form the constitutional basis for the application of local law, did seem to imply that and surely indicated, as the Court had in the

41. At first blush it might seem that a choice-of-law rule geared to the parties' common domicile would be immune to _Austin_. That is obviously a possible outcome, but not, I think, the most logical. Assume that the rule in question is one I rather like, see text accompanying note 101 infra, that the damage ceiling rule of the common domicile should apply, and assume further that the plaintiff is a resident of the forum, which has a damage ceiling so low that any defendant would like to take advantage of it. A local defendant obviously will be able to under my proposed rule. A defendant from a state without a damage ceiling probably won't be, depending on what the rest of our choice-of-law rules look like (and on some facts I haven't specified). Assume in any event he won't be: obviously there will be some such cases. This defendant plainly is in a position to complain that he is being denied the benefit of a local protection because he isn't local: someone exactly like him in every respect except that he was local would be protected. If, as _Austin_ seems to hold, it is no answer to his claim to note that his home state does not protect him, it appears that he has been treated unconstitutionally even though the choice-of-law rule that victimized him was geared to common domicile.  


44. The plurality mentioned three contacts supporting the application of Minnesota law: that the deceased worked there, that the defendant insurance company does business there,
past, that such residence is a factor on which a state may constitutionally rely in applying its own law. The opinions in *Hague* did not even mention *Austin*.

and that the plaintiff widow now lives there. It "express[ed] no view" on whether the first two contacts without the third would have been sufficient, *id.* at 644 n.29, and noted as well that "respondent's bona fide residence in Minnesota was not the sole contact Minnesota had with this litigation." *Id.* at 643. This latter statement might suggest a doubt about the sufficiency of the third contact standing alone, were it not for the fact that it was made in the context of, and seems to be limited by, an argument over whether residency acquired after the accident (as the widow's was) should be sufficient.

In context, therefore, I take the plurality to have implied that residency predating the accident and continuing to the present would have been sufficient to support the application of favorable local law. *See also* note 46 *infra*. Actually, that conclusion is not ultimately critical: if it is unconstitutional to favor residents over nonresidents it should be equally unconstitutional to make local residence "one of the reasons" for favoring someone. For it is in the nature of a balance that any one factor can tip it: if local residence can be considered positively some out-of-staters will lose who would have won had they been locals. (This is one reason the frequently articulated position on affirmative action that one "doesn't mind blackness being a factor just so it isn't the only factor" is giberish: try substituting "whiteness" for "blackness." For the other reasons, see J. Ely, *supra* note 28, at 257 n.102.) *But see* A. von Mehren & D. Trautman, *supra* note 14, at 162-63 n.66 ("Recognition of this kind of community concern [because 'one of the members of its community is involved'] might superficially seem analogous or in some way related to Professor Currie's view . . . . It may be true . . . that the kind of concern we are discussing can tip the scales in a case of true conflict, but this fact should not in any way be confused with Professor Currie's analysis.").

45. *See* Watson v. Employers Liab. Assur. Corp., 348 U.S. 66, 72 (1954); Home Ins. Co. v. Dick, 281 U.S. 397, 408 (1930). Neither of these says that local residence on the part of the party to be benefited is *sufficient* either. "No court has squarely held that the sole factor of plaintiff's domicile . . . is enough to support application of forum law for the purpose of imposing liability upon a nonresident defendant not otherwise liable." Kay, *The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience*, 68 CAL. L. REV. 577, 597 (1980) (footnote omitted). In fact it is *Hague* (decided after the publication of Professor Kay's article) that comes closest to enunciating such a proposition. Interestingly, Professor Brilmayer's recent article on *Hague* seems to assume that the local residence of the party to be benefited is a contact that is sufficient constitutionally to support the application of local law, Brilmayer, *supra* note 21, at 231, even though, at least on my understanding of her theory, it probably shouldn't be. The consistency of such an assumption, which I agree the Court does seem to make, with its recent decisions respecting adjudicatory jurisdiction also seems problematic. *See* Silberman, *Can the State of Minnesota Bind the Nation? Federal Choice of Law Constraints After Allstate Insurance Co. v. Hague*, 10 HOFSTRA L. REV. 103 (1981.)

46. 101 S. Ct. at 643-44. The plurality and the dissenters disagreed over whether it was proper to take this into account given that the plaintiff had moved to the state after the accident. But seven of the eight justices participating agreed that her local residence would have been a relevant (and constitutionally legitimate) contact had she lived there all along. (The eighth was Justice Stevens, who concurred in upholding Minnesota's application of local law but whose precise position on the issue under discussion seems unclear.)
It seems, therefore, that the one hand is not keeping up with what the other is up to, that for some reason Austin did not strike the Court as "a conflict of laws case" and, more surprisingly, did not even set off alarms suggesting a consideration of the implications of what the Court was saying for more run-of-the-mill conflicts cases. For if Austin is right as written, and it violates the Privileges and Immunities Clause to grant everyone the benefits of his or her home state's law, then interest analysis of the sort approved six years later in Hague—permitting states to apply local law to benefit local citizens under conditions where they would not do likewise for nonlocals—seems unconstitutional. Which should give?

A cheap-shot sort of answer to the Austin inference, variations of which one encounters with distressing frequency, would run that it is the office of the Privileges and Immunities Clause, as it is the office of Article IV generally, to promote interstate harmony, and, after all, such harmony will not really be threatened so long as people are accorded the protections of their home states' laws. It is true that under such circumstances officials of the home state of the individual in question are unlikely to respond by vowing that "Tennessee, suh, will be ruhvainged." But no approach to conflict of laws is likely to have that effect, not even, to focus on the relevant comparison, out-and-out discrimination against out-of-staters without regard to where they are from. Friction and the threat of retaliation may not be the real point, however.

I argued in Democracy and Distrust that the Privileges and Immunities Clause was an early statement of a central concern of our Constitution, the representation of the unrepresented. Discrimination against out-of-staters is not likely to have been singled out for prohibition in the original constitutional document because the framers supposed it to be a uniquely invidious form of discrimination: under the circumstances that would have been quite perverse. The perceived distinguishing characteristic seems instead quite clearly to have been the unique political powerlessness of those with no voice in the local political process.\(^47\) (The franchise has constituted a classic conundrum for the clause: countless courts and commentators have wondered how on earth it can be, as it

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47. J. Ely, supra note 28, at 83.
plainly must be, that the clause permits a state to deny nonresidents the right to vote in local elections? In fact this conundrum seems responsible in part for the "fundamental rights" dodge we saw in Baldwin — though it plainly forms a bizarre basis for distinction, voting being counted in most constitutional contexts as the paradigmatic fundamental right. The conundrum dissolves after a moment's reflection on the purpose of the clause, however: unless one started with the assumption that a person would be able to vote in only one state, there would be no occasion for the clause to begin with.)

Now if this account is correct, and the point of the clause is to protect people from being disadvantaged by legislatures they lack any say in electing, it should be satisfied so long as the individual is provided whatever protections his local legislature has seen fit to provide. (Of course the person may have little effective clout at home, but it's as much as a local will have locally, and locals plainly are not protected by the clause.) And while one wouldn't want to place anything resembling principal stress on a basis as shifting and questionable as eighteenth century conflicts thinking, the view that it is constitutionally sufficient to accord everyone the protection of his home state's law is corroborated at least slightly by the fact that at least one influential conflicts thinker whose work was widely noticed in this country around the time the Constitution was framed—namely Ulrich Huber—had expressed the view that questions concerning a person's "capacity" were to be decided by the law of his domicile. The relevance of that historical observation is trivial, however, compared with that of the argument that really matters, that the apparent central purpose of the Privileges and Immunities Clause is served so long as everyone is accorded the benefits of his or her home state's law. And if that is

48. The connection is made at 436 U.S. at 383.
49. See, e.g., Nadelmann, Some Historical Notes on the Doctrinal Sources of American Conflicts Law, in Ius et Lex—Festgabe zum 70. Geburtstag von Max Gutzwiller 263 (1959); cf. Emory v. Grenough, 3 U.S. (3 Dall.) 369, 370 (1797); note 102 infra.
50. The "right to travel" cases certainly contain no suggestion that what would otherwise be violations of that right can be cured by giving new residents whatever benefits they were receiving in the state they just moved from. And indeed that is as it should be, as the case is entirely different. The local political process is the only one to which the new resident, having moved, can turn. The Court's point, I guess, was that new residents—or at least (and this helps justify the Court's recent twists more powerfully than its ill-fitting talk of "penal-
right, it is Austin that should give way. Certainly I don’t see any pressing need to rush out and overrule it, but it probably should be limited by a fact of which the Court took no visible notice, that paying taxes to another state is not quite the equivalent of paying them at home, even assuming the rates are identical.

Obviously this conclusion is short of self-evident, and one might well side with Austin in supposing that the fact that a person is being treated as he would be treated at home is irrelevant to the constitutionality of treating him less well than locals are treated. (Even without resort to the fiction that interstate harmony will be significantly threatened, one might maintain that Article IV’s general goal of making us more one nation is sufficiently disserved by gearing choice-of-law determinations to residence in one or another state to justify invalidating such references under the Privileges and Immunities Clause. My own instinct, as we are about to see, is to classify that as a “small c” constitutional argument, but that classification too is surely debatable.) If it is your inclination to accept Austin, however, I think there is no escape from the conclusion that an interest analysis approach to choice-of-law problems, whereby a state must be granted a greater interest in applying its law so as to generate a victory for a local resident than it has in applying its law so as to generate a victory for an outsider, is unconstitutional. For reasons that will become obvious, this is not a conclusion that would throw me into a tailspin. But for reasons I have indicated, it seems to me the less sound line of inference from the central purpose apparently informing the Privileges and Immunities Clause. It is therefore incumbent on me, though it may not be on you, to proceed further in considering the merits of the axiom that states have an unusual interest in protecting their own.

ties“) new residents of the economic class that needs welfare benefits—are a “group” that seems unusually unable to influence that process. In any event new residents, unlike visitors, do not have another recourse even in theory. Of course it is true that while the recent cases have concerned new residents and thus what is essentially a right to relocate, older cases establish that it is also a right to pass through, to traverse. E.g., Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868). See also J. Ely, supra note 28, at 177-79. It is difficult to suppose, however, that the Court would find that right unduly burdened by a choice-of-law rule giving the traveler the benefit of his or her home state’s law.
II. The Sense of a Policy of Construing Local Protections as Protecting Locals Only

Despite what has been said, something continues to nag: isn't there something somehow out of accord with at least our "small c constitution"—out of accord in particular with the reasons we as a nation decided to supercede the Articles of Confederation—in adopting what amounts to a system of "personal law" wherein people carry their home states' legal regimes around with them?

Personal law was perhaps appropriate in the era following the barbarian invasions of Italy, when a Lombard or Roman in the Kingdom of Alboin obeyed only the law of his own people, largely no doubt because ethnic differences were great and because the royal authority was too weak to impose uniformity. In the modern setting there seems little reason to magnify artificially the difference between citizenship in one or another of the American states.\(^5\)

It's true that Huber and undoubtedly some others thought that personal law was appropriate to questions of "capacity," and it's also true that clever counsel can slap the label "capacity" on just about any legal issue under the sun, but that should not be enough to legitimate a general regime of personal law. It is further true that the Court has done little to enforce Article IV's Full Faith and Credit Clause, which plainly is devoted to the idea that at least in a significant set of contexts conflict of laws questions should be determined, in all states, by some uniform reference. Perhaps it is just as well that it hasn't, as the early candidates for uniform imposition would have been gross, clumsy rules of the First Restatement variety. What's more, the need for uniform treatment in some areas is at least debatable, and a principled line between those occasions on which uniformity is essential and those on which it is not has proved elusive. To admit that, however, is surely not to concede that all is harmony between the unifying spirit of the Full Faith and Credit and Privileges and Immunities Clauses and a system that takes as its starting point the protection

No "principled" cut-off has been found for the Commerce Clause either, yet I trust we remain free to object, indeed to object in the name of the constitution, to a theory of federalism that takes as its starting point the proposition that the central government can and should regulate anything it pleases.

This point too is surely less than clear as crystal, as I would suppose claims of small c unconstitutionality inevitably are. It is well to move on briskly, therefore, to consider the sense of the premise that state protective policies are appropriately extended only to the state's own citizens. We must ask, to begin with, exactly what it means to assert that states are "interested" in protecting their own in a way they are not interested in protecting others. Occasionally the suggestion is that this is the likely legislative intent, that states are unusually interested in protecting their own citizens because their own citizens are the only people the lawmakers intend to be covered by their various protective policies. This claim need not be tarried over, since it has so recently been pulverized by Professor Brilmayer, whose search of state statutory choice-of-law provisions turned up none that were geared to benefiting forum residents.

Legislators probably seldom think about the choice-of-law implications of what they are doing. Their commands generally are phrased in universal terms and so, frequently, must be their thoughts: such-and-such a practice is simply bad (or good) and it is probably the legislators' intention simply to eradicate (or encourage) it—at least insofar as it is constitutional for them to do so. Or they may be thinking in terms of the conflict of laws rules

52. Indeed, those not so hopelessly mired in positivism as I am often accused of being would do well to consult their Bibles, in particular Leviticus 24:22: "Ye shall have one manner of law, as well for the stranger, as for one of your own country: for I am the LORD your God."


54. Brilmayer, supra note 2. Borrowing statutes do sometimes make the statute of limitations longer for local plaintiffs. However, Professor Brilmayer's distinguishing explanation, in terms of the avoidance of interstate forum shopping, seems valid. Id. at 427.

they learned in law school, likely quite traditional ones. Or they may simply be assuming that such questions are for the court to decide. What we don’t find, in either the statutes or the legislative history, are expressions of intention to protect only locals.

The legislative intent line thus cannot be pursued seriously for very long, and it is not. Its defects become obvious so early that the argument for a local-protection premise must soon verge into the normative assertion that states have no business protecting anyone but their own citizens, that they are intermeddling when they protect anyone else. We’ve seen that this isn’t supported by the constitutional case law, and I suggest it isn’t supported by good sense either. In the first place, states have various “interests” that are indifferent to the residence of either or both parties to a lawsuit—interests, for example, in shaping behavior that affects the environment within the state, or interests in protecting the state’s judicial system in various ways. Generally speaking, these interests will not be keyed to which litigant comes from where, and it would be quite consistent with the vindication of an interest, say, in reducing dangerous behavior within the state to apply a rule whose effect in the case at bar would be to render a verdict for a foreign plaintiff.

Interest analysts do recognize the theoretical existence of these behavior-shaping and process-protecting interests, at least some of them do, sometimes. They have an annoying habit, however, of “putting such interests to one side for purposes of analysis” or, more commonly, simply ignoring them. The reason for this is not

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56. Cf. D. Cavers, supra note 9, at 135.
57. In fact, to prefigure somewhat the ensuing discussion, I can see no reason to suppose that to the extent legislators are focusing particularly on the fortunes of local people, they must be thinking solely in terms of vindicating the litigative efforts of such people—ensuring them recoveries on the one hand, protecting them from unjustifiable liability on the other. Why is it not sensible to assume that legislators are just as concerned with the “flip sides” of these interests, with ensuring on the one hand that the people they have in mind (by hypothesis, locals) make recompense when they have wronged others, and on the other hand that they not be afforded recoveries they do not deserve?
58. E.g., B. Currie, supra note 1, at 228, 420, 621.
59. E.g., id. at 210 n.84, 294 n.51, 488 n.148, 495 n.172.
61. It has long been recognized in the literature, as it was to a degree by Currie himself, that
his devices of "rational altruism" and "restraint and enlightenment in the definition of interests" provided ways of ignoring or submerging potentially competing state interests and thereby alchemizing true conflicts into "false" ones. E.g., D. CAVERNS, supra note 9, at 75; B. CURRIE, supra note 1, at 604-05; Currie, supra note 10, at 763. For a graphic demonstration, compare B. CURRIE, supra note 1, at 167, with Currie, supra note 10, at 759.

Currie also was not above simply dismissing apparent interests as either too attenuated to merit consideration—see, e.g., B. CURRIE, supra note 1, at 277, 343, 497-98, 540 n.63, 701-02; see also Tooker v. Lopez, 24 N.Y.2d 569, 575, 249 N.E.2d 394, 397-98, 301 N.Y.S.2d 519, 523-24 (1969)—or "illegitimate" (though not among the set of interests that have been declared constitutionally impermissible). E.g., B. CURRIE, supra note 1, at 322. See also D. Currie, Suitcase Divorce in the Conflict of Laws: Simons, Rosenstell, and Borax, 34 U. Chi. L. Rev. 26, 45-46 (1966); Kay, supra note 19, at 587-89; Trautman, supra note 18, at 7-8 (policy discounted because not "wise and just").

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Currie also is sometimes quite candidly resorted to "fictions," see B. CURRIE, supra note 1, at 590—such as the fiction that all the deceased's dependent relatives live where he lived at the time of his death, id. at 145-46, 292-93; see also, e.g., D. Currie, supra note 19, at 600, and the fiction that the insurance company (and thus its states of incorporation and/or principal business) have no interest in the application of a liability-limiting rule. B. CURRIE, supra note 1, at 143 n.61. (Obviously insurance companies are not able to pass all the costs on, since they lobby very hard for such rules). In each case, however, it should be noted that Currie (and on his premises this only compounds the sin) effectively retained discretion to look behind the fiction to the actual interests when it seemed desirable to do so. Id. at 160, 210, 292-93.

Somewhat more subtle devices for accomplishing the same result, i.e., making interests disappear, were (and sometimes are) invoked, however. For example, and this relates closely to the uses of "fiction" just alluded to, there is always a question whether to "conventionalize" a case—that is, to analyze it in terms of the interests that might, or might ordinarily, be implicated by the sort of situation at bar—or rather to look at the particular facts more closely and ask whether the interest in question in fact is implicated in this very case. Compare Carroll v. Lanza, 349 U.S. 408, 413 (1955) (Douglas, J., for the Court) with id. at 420 (Frankfurter, J., dissenting). Compare also, e.g., Baade, supra note 11, at 166, with, e.g., Sedler, Conflict of Laws Round Table, 49 Tex. L. Rev. 224, 225 (1971). The former course is obviously preferable in terms of administrability, but the latter can sometimes turn an apparent conflict "false." Professor Currie appears to have left himself discretion to go either way. B. CURRIE, supra note 1, at 371. But see Brilmayer, supra note 2, at 412-14.

Apparent interests also can be eliminated by the questionable premise that no more than one jurisdiction can have a "homelike" interest in the welfare of a given litigant. Compare B. CURRIE, supra note 1, at 232, with Record at 10, Home Ins. Co. v. Dick, 281 U.S. 397 (1930). For other examples, see Reich v. Purcell, 67 Cal. 2d 551, 555-56, 429 P.2d 727, 730-31, 63 Cal. Rptr. 31, 34-35 (1967); M. Traynor, Conflict of Laws: Professor Currie's Restrainted and Enlightened Forum, 49 Cal. L. Rev. 845, 850-51 (1961). Cf. Brilmayer, supra note 21, at 231. But see Cavers, "Habitual Residence": A Useful Concept?, 21 Am. U.L. Rev. 475, 482-84 (1972). (In my opinion any rule geared to the parties' common domicile, see, e.g., text accompanying notes 100 & 101 infra, should be applied with a constant recognition that domicile, residence, and home are neither clear nor necessarily unitary concepts, and that consequently where a plausible argument can be mounted that more than one jurisdiction has a "homelike" interest in one or both of the parties—and the laws of the "homelike"
analysis lies in its ability to dismiss apparent conflicts as false—that is, as implicating the genuine interests of no more than one state—and a candid recognition of such litigant-independent interests will almost inevitably ensure that something that looks on the surface like a case involving a “conflict of laws” (a case, for example, where the situs of the critical events is not the residence of both parties) will on analysis turn out to be just that.

It is not this sort of potentially competing state interest that I want to focus on, though, if only because the point is recognized in theory. I want to focus instead on that aspect of the local-protection premise that holds that a state can be interested only in helping its own by applying its rules so as to assure that they will win their lawsuits, that consequently it can have no interest in causing a local to lose his or her case. Of course this conclusion is entailed by the definitions of “interest” quoted above, but lest you think I am seizing on an unintended implication I tender some specifics: “New York has no particular interest in holding its own people liable for injuries to foreigners.”

jurisdictions differ on the question at issue—recourse should probably be had to another rule, not geared to domicile. See text accompanying note 102 infra).

Currie yielded himself further discretion by condemning “unprincipled eclecticism,” by which condemnation he seemed to mean that interest analysis should not be employed issue-by-issue in a way that ended up generating a result that would not be generated by the domestic law of at least one of the states involved. “Issue-by-issue analysis should not result in the cumulation of negative policies to produce a result not contemplated by the law of either state.” D. Cavers, supra note 9, at 38 (written by Currie, id. at 17). He didn’t quite mean this, though, as is evidenced by his approval of Scheer v. Rockne Motors Corp., 68 F.2d 942 (2d Cir. 1934), insulating from liability a New York bailor whose automobile was taken to Ontario, where by virtue of the bailee’s negligence it injured the plaintiff under circumstances where the bailor would have been liable had the case been wholly domestic to either New York or Ontario. D. Cavers, supra note 9, at 39. The reasons he distinguished Scheer seem opaque to me, as they did to Professor Cavers. Id. at 40-43.

Still further play in the true faith seems to have been created by Professor Kay’s recent declaration that “California’s desire to compensate [resident] tort victims is limited by its recognition that liability should be imposed only upon those whom it regards as tortfeasors”—which may mean, she goes on to suggest, that it may not extend to cases where the defendant is from elsewhere and the tort took place outside California! Kay, supra note 45, at 597. That sounds suspiciously territorial.

61. Text accompanying notes 4-9 & 15-19 supra.

62. B. Currie, supra note 1, at 63. “Such a state would not be expected to apply its law to any case in which the creditor is a local resident and the married woman a foreigner . . . .” Id. at 89.

So far as appears, Minnesota had no interest in the application of its nonfor-
terest in insulating a defendant from liability.”

It seems evident that New Hampshire's protective policy is directed to the protection of New Hampshire buyers. One could scarcely expect its extension to a Massachusetts buyer even though the seller's place of business was in New Hampshire.

This strikes me as simply wrong. Even assuming that there can be no state "interest” in what happens to a given litigant unless he or she is a local resident, it hardly follows that states can be interested only in generating victorier for such persons. A state law providing P a cause of action against D (or otherwise promoting such a cause of action) would seem to serve an interest not simply in compensating P but also in assessing D. (In all likelihood it also serves some interests transcending the fate of the immediate litigants, but for now we are leaving those aside.) Such a law indicates that P ought to be paid, but it also indicates that it is D who ought to do the paying—perhaps because he misbehaved, at all events because it is felt to be right under the circumstances that he be the

feiture policy in the Walsh case. That policy was for the protection of purchasers, and the purchaser, being a resident of North Dakota [though the vendor was from Minnesota], was not within the ambit of Minnesota's governmental concern.

Id. at 270. See also, e.g., id. at 503; passages cited note 66 infra.


64. Cavers, The Conditional Seller's Remedies and the Choice-of-Law-Process—Some Notes on Shanahan, 35 N.Y.U. L. REV. 1126, 1140 (1960). (Given the facts of Shanahan, one could certainly defend Cavers' verdict on it without recourse to the quoted opinion—in a sense, therefore, it is dictum—and surely it does not represent his present thinking. Cf. D. Cavers, supra note 9, at 144. It remains, however, an unusually clear statement of the view under discussion.) See also, e.g., Hurtado v. Superior Court, 11 Cal. 3d 574, 581, 522 P.2d 666, 670, 114 Cal. Rptr. 106, 110 (1974) (“Since it is the plaintiffs and not the defendants who are the Mexican residents in this case, Mexico has no interest in applying its limitation of damages—Mexico has no defendant residents to protect and has no interest in denying full recovery to its residents injured by non-Mexican defendants.”); von Mehren, supra note 10, at 35 (“From New York's perspective, the New York defendant's claim is stronger than that of the Ontario plaintiff as no New York interest in compensating a resident or his estate [under its host liability rule] is present.”); Ratner, supra note 19, at 830 (“Because the Mexican plaintiffs are not members of the [class that the] California [unlimited] recovery rules are designed to benefit (i.e., injured residents) California has [no] interest in the application of its recovery rule to resolve the case [against a California defendant.”); Sedler, The Contracts Provisions of the Restatement (Second): An Analysis and a Critique, 72 COLUM. L. REV. 279, 305 (1972) (“New Jersey, in contrast, had no interest in denying protection to a New Jersey corporation against a New Yorker broker.”).
one to bear the cost.\(^6\) (Absent this last impulse, of course, the law could be structured so that the government picked up the tab.) This would suggest—still accepting for the sake of argument the assumption that a litigant-affecting interest can attach only when the relevant litigant is local—that a state is as "interested" in applying a liability-promoting law when the defendant is local as it is when the plaintiff is local.\(^6\) Not proper, somehow impermissible, to claim an interest in sanctioning the state's own citizens? The tiniest peek beyond the four corners of the traditional turf of conflicts scholars, in particular a peek at the state's criminal code, should allay forever any suspicion that states either do not mean to impose liability, or behave improperly when they do mean to impose liability, upon "the state's own" when it is felt that such liability would be just.\(^8\)

The converse situation may not be quite so clean. Usually a decision that the defendant shouldn't pay in a given situation is at the same time a decision that the plaintiff shouldn't collect.\(^8\) Surely this seems true respecting refusals to follow other states in recognizing particular causes of action. However, there may be some special defenses regarding which the point is not entirely clear.\(^9\)


66. Professor Currie was unusually myopic regarding such "flip side" interests. For example, having noted that wrongful-death statutes generally are modeled on Lord Campbell's Act, whose preamble had recited that "it is oftentimes right and expedient that the Wrongdoer in such Case should be answerable in Damages for the Injury so caused by him," Currie went on to opine that the application of such a statute should be reserved for situations where the plaintiff is a local resident. B. Currie, supra note 1, at 292. He was equally blind to flip side interests (this time in denying certain classes of plaintiffs recovery) where defenses were concerned. For a graphic example, compare id. at 399, 405, with id. at 506.

67. Indeed, the Supreme Court has come close to indicating that the local residence of the defendant is enough to give a state jurisdiction to prosecute him or her for an act committed elsewhere. Skiriotes v. Florida, 313 U.S. 69, 76-77 (1941). See also Blackmer v. United States, 284 U.S. 421, 436-47 (1932). Cf. United States v. Bowman, 260 U.S. 94 (1922). But cf. Bigelow v. Virginia, 421 U.S. 809, 824 (1975). Of course this proposition does not have to be right for the point in the text to be.

68. See also J. Martin, supra note 19, at 256; Twerski, supra note 2, at 110.

69. This sort of determination in my opinion can validly be made only categorically, not state by state. I therefore think Professors von Mehren and Trautman are engaging in wishful thinking (again in the direction of alchemizing genuine conflicts into false ones) when they posit that where a given rule can plausibly be supported by two or more separate ratio-
When a state enacts a spendthrift statute, it may well be that no judgment is implied that the plaintiff shouldn’t recover, only that the defendant shouldn’t be held liable. (Of course, if the feeling were strongly held that the plaintiff should be compensated in such situations, the government could pick up the tab. We must therefore hypothesize further that the lawmakers are either indifferent to, or only mildly in favor of, the plaintiff’s collecting.) Charitable and sovereign immunities may furnish other examples of the same configuration, though there it seems more arguable, since there may at the time such rules were common have been some feeling that “it just isn’t right” for people to recover from charities or from “their” governments. In any event such immunities are rare, and decreasing, and today the burden must surely be on one who asserts that a state that seeks to insulate defendants from liability in a certain situation is not also trying to keep plaintiffs from recovering in that situation. Certainly the general proposition, that a state simply has no “interest” in invoking a liability-thwarting or liability-limiting rule so as to protect a foreign defendant from a local plaintiff, seems indefensible.

III. WHAT DIFFERENCE DOES IT MAKE?

One thing that should be reiterated, if only because it is so often denied, is that the damage inflicted by the foregoing discussion is not simply to Brainerd Currie’s “apply the law of the forum” answer to true conflicts. The criticism strikes at interest analysis generally, in particular at its crucial claim that by eliminating states from the calculus (because applying their law will not result in a victory for one of their residents) it can demonstrate that most or at least many apparent conflicts are false. By focusing on the various possible configurations of law and party residence, however, we shall see that in most cases it will not in fact make any difference at all whether we accept or reject the assumption that states are

nares, it will be possible, if a court will only think about it hard enough, to determine that whereas state A passed the rule for two entirely compatible reasons, m and n, state B passed the selfsame rule only for reason m and not for reason n. von Mehren, supra note 12, at 369; Trautman, supra note 18, at 6-7. See also Brilmayer, supra note 2, at 399-400. But see Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L.J. 1205, 1213-14 (1970).
interested only in promoting verdicts for their own people, that cases that would find themselves in equipoise without that limiting assumption are likely to remain in equipoise even if the assumption is made.

In a two-party situation there are three possible law/party residence configurations.70 Shunning the usual labels in order to shed the usual baggage, I shall call these three configurations the “head-on” configuration, the “criss-cross” configuration, and the “common domicile” configuration. The “head-on” configuration is the classic “true conflict,” where the plaintiff comes from a state with what is in context the plaintiff-favoring rule and the defendant comes from a state with the defendant-favoring rule. By standard interest analysis canons, each state has an interest in applying its own law because the party that would be favored by doing so is local. Obviously, this stalemate will not be broken or even alleviated by departing from the standard canon and holding that a state can be interested in applying its law so as to benefit a non-local party: both states are “interested” already and would simply remain so. This configuration is in any event the classic embarrassment for interest analysis, a situation that is not affected one way or another by limiting the definition of interest to the protection of locals.

The “criss-cross” configuration should be equally embarrassing, but here, by clever cosmetology, the embarrassment is hidden, maybe even from the interest analysts themselves. This is often referred to as the “unprovided” or “unprovided for” case, meaning that neither state is interested in the outcome. (I’m not using that label, in order to leave open the question whether that is necessa-

70. The definitions are indifferent to the number of states whose law is potentially applicable. (The set of all possible two-party cases will be exhausted, no matter how many states are involved, by the subsets of cases (a) where the laws of the parties’ home states are identical, and (b) where they are not. Subset (a) is the “common domicile” category. Subset (b) will be exhausted by the “head-on” and “criss-cross” categories.) It also seems clear that the addition of further parties would complicate the analysis but not affect the conclusions. Of course the likely presence of “interests” geared not to which party wins or loses, but rather to more general behavior-shaping or process-protecting concerns, significantly multiplies the number of possible configurations of interests. However, that realization only serves to underscore my ultimate point, that interest analysis will not on full and candid application be able to fulfill its crucial boast by identifying significant numbers of false or inconsequential conflicts.
The "criss-cross" is, in any event, the case where the plaintiff comes from the state with the defendant-protecting rule and the defendant comes from the state with the plaintiff-protecting rule. It surely does seem true that by ordinary interest analysis canons neither state has an interest in having its law applied and that the case is for that reason in equipoise. However, if this is admitted—and added to the confessed lack of a rational interest analysis resolution of head-on cases—the case begins to mount up that interest analysis isn't a great deal of help. As Professor Twerski put it:

In an unprovided for case . . . we face a situation where there are no domiciliary interests to protect on the part of the contact states. New York has no domiciliary interests to protect by its pro-compensation rule since the plaintiff is not a New Yorker. Ontario has no domiciliary interests to protect by its anti-compensation rule because the defendant is not an Ontario domiciliary. Thus, the entire structure of interest analysis crumbled. Having defined the interests as domiciliary oriented when you run out of domiciliaries to protect you run out of interests. The emperor indeed stands naked for all to see.71

Criticism like this understandably has sent the interest analysts scurrying for fig leaves. Most frequently invoked is the "common policy" doctrine, which is exemplified by Professor Sedler's discussion of Neumeier v. Kuehner,72 a 1972 case which understandably hastened the New York Court of Appeals' retreat from an interest analysis approach. (Neumeier is the case Twerski was talking about as well.) It involved a suit by a passenger-guest from Ontario, which has a guest statute (barring recoveries by guests in cases of ordinary negligence), against, you guessed it, a driver-host from New York, which doesn't have a guest statute. (The accident, if anybody else cares—and it turned out the court did—occurred in Ontario.) Professor Sedler wrote:

It is unfortunate that Neumeier, presenting the unprovided for case, was the rock on which New York's "stormy affair" with interest analysis founndered. If the unprovided for case is ap-

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71. Twerski, supra note 2, at 108 (footnote omitted).
72. 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).
proached with reference to the common policies of the involved states, sound solutions readily appear and would have appeared to the court in Neumeier. . . . An analysis of the policies and interests of the involved states may reveal, as in Neumeier, that neither state has an interest in applying its law on the issue of guest-host immunity, but when the common policies of both states are considered, this will furnish guidance on the question of whether the defense of guest statute immunity should be allowed.

Approaching the problem from this perspective, I would submit that Neumeier is an easy case. All states have a common policy of compensating automobile accident victims for harm caused by the negligence of a driver. . . . Whether the purpose of the guest statute immunity is to protect the host from ungrateful guests . . . or to protect insurance companies from collusive suits, or simply to remove this category of cases from the insurer’s liability . . . it is clear that the only state interested in extending such protection is the defendant’s home state, where the vehicle is insured and where the consequences of imposing liability will be felt. If that state does not have a guest statute, this means that the only state interested in protecting the defendant and his insurer does not do so, and the common policy of both states in allowing accident victims to recover from negligent drivers should prevail, causing the court to disallow the defense. 73

But just what sort of entity is this “shared” interest or policy supposed to be? We are told that New York shares an interest in allowing recovery even though (and this an interest analyst should surely stumble over) the plaintiff is not from New York (or any other place that allows recovery in such situations) and the accident did not take place there. Then we are told that Ontario also shares the interest in providing recovery even though (and this everyone should stumble over) the cause of action is of a sort that Ontario refuses to recognize! 74 Is it any less plausible to assert that


74. See also Twerski, supra note 2, at 109; cf. D. Cavers, supra note 9, at 39 (“Judge” Currie, labeling a state’s policy of deterrence “non-existent” in cases where state law provides an exemption); B. Currie, supra note 1, at 152 (similar reaction). Rare defenses may
the two jurisdictions share a "common policy" of not imposing liability except in certain designated situations? This, for New York, is not one of those situations, the argument would continue, and thus recourse must be had to the shared policy of nonrecovery.75

It is therefore understandable that the "common policy" doctrine was not Brainerd Currie's only answer to the criss-cross configuration. He did suggest it, but he had two others he seemed to like as well.76 His apparent favorite, that courts here (as in head-ons) simply apply the law of the forum,77 was admittedly a Gordian knot cutter—he once analogized it to flipping a coin78—and it understandably has not had many takers. He also sometimes invoked a so-called "altruistic interest" in extending the protection of a state's law to parties who did not live there.79 Obviously that is no solution if one plays it straight and "altruistically" extends the protections of both laws: if the deadlock is to be broken it is necessary to "extend" one law but not the other. Naturally this is what Currie did: unfortunately he didn't tell us how to decide which law to "extend" and indeed gave little sign of awareness of the problem.80 (Of course this method can be collapsed into the method of deciding the case in accordance with the "common policy" the two states share, and undoubtedly the two did merge somewhat in Currie's mind. We have seen, however, that that too is likely to entail an essentially arbitrary choice, so recognition of the connection is

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75. See also R. Weintraub, Commentary on the Conflict of Laws 320 (2d ed. 1980).
76. Cf. note 74 supra. He rejected three other possible solutions. See generally B. Currie, supra note 1, at 152-56.
77. Id. at 156, 189 n.3. This appears to be Arthur von Mehren's view as well, as the recent suggestion for "true conflicts" reported in note 10 supra was made in the context of a discussion of Neumeier.
78. B. Currie, supra note 1, at 120-21. See also id. at 609, 721.
79. E.g., id. at 488-89; D. Cavars, supra note 9, at 33 ("Judge" Currie).
80. Cf. Trautman, supra note 18, at 19.
not much progress.)

There therefore does not appear a principled basis for "stretching" the interests said to underlie the one law so as to cover the out-of-state party without comparable "stretching" of the other law. To extend them both in this way is, of course, to reject the assumption that states are interested only in promoting verdicts for their own people. We return, therefore, to the question with which we began, whether it makes any functional difference whether or not we embrace the protect-locals-only premise, and the answer again seems to be no. Rejecting it will simply convert a situation in which neither state is "interested" to one in which they both are: an unprovided case will be converted, if you will, to an "overprovided" case, and the deadlock will persist, albeit at 1 to 1 rather than 0 to 0.

In fact I think thus far the discussion of the criss-cross case has been a little unfair to the interest analysts. We have been assuming, as the passage from Twerski and the several saving dodges all assume, that there exists no "interest" on the part of any state in anything other than promoting a victory for one or the other litigant. This assumption is surely understandable, on the part of critics and defenders alike, for we have seen that interest analysts often leave litigant-independent (behavior-shaping or process-protecting) interests out of account in their analyses of cases. That doesn't mean we have to, though, and factoring them in does seem to make a difference.

In some cases it is quite true, of course, that such interests don't exist, and what's more Neumeier seems to have been such a case. (Guest statutes arguably serve to protect forum processes by discouraging collusive perjury, but in Neumeier it was the forum that did not have a guest statute. Conversely, a failure to enact a guest statute may possibly help to make hosts more careful drivers, but in Neumeier it was the situs that had such a statute. All in all a textbook vacuum.) Not all criss-crosses are Neumeier, however,

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81. Configurations comparable to that of the spendthrift statute discussed at text following note 69 supra are too rare to provide the basis for a principle that will be of more than trivial help in dealing with criss-crosses. See note 74 supra. Nor, indeed, am I aware that anyone has suggested that line.

82. At least to the extent of recognizing a state's interest in disadvantaging its own. See text accompanying notes 89-94 infra.
and there will be cases where the plaintiff comes from the state with the pro-defendant rule and the defendant comes from the state with the pro-plaintiff rule, and one or the other state also has some interest in applying its rule that is not geared to promoting or thwarting recovery. You might expect that exchanging the locations of the accident and the lawsuit in *Neumeier* would generate such a case, but it's not that simple. Remember that it's a perfect vacuum: such an exchange would give the situs a behavior-influencing interest and the forum a process-protecting interest, and thus generate what seems another deadlock.

Instead let's alter the *Neumeier* pattern, keeping it criss-cross, by putting both the accident and the lawsuit in the state without the guest statute (New York, in fact). Finally we have built a case in which it can at least be argued that it makes a difference whether one accepts or rejects the premise that states are interested in promoting victories only for their own people. (It can be argued, that is, on the assumption that the lack of a guest statute will make drivers more careful. I don't find that assumption very powerful, but let's make it for the moment in order to make the example work.83) Without the locals-only premise, the situs has, if you will, “two interests” in applying its law—increasing the local safety level and generating a victory for the (nonresident) plaintiff against the (resident) defendant—whereas the plaintiff's residence has one interest, in protecting the (nonresident) defendant from liability to the (resident) plaintiff. If, on the other hand, we adhere to the premise that protective policies extend only to locals, there is but one “interest” in the case, that of the situs in increasing the local safety level. Since the score is 1 to 0 (not 2 to 1), the argument presumably would run, the conflict is false: interest analysis has made good on its crucial claim that it can uncover “false conflicts” whose appropriate resolution will be obvious.

The point is right, up to a point. The appropriate resolution of a

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83. *But cf.* text accompanying note 91 *infra.* To the extent the assumption is unrealistic, and I think it is, that serves more forcefully to underscore my broader point that there will be a few real cases in which the locals-only premise will make a difference. Hurtado v. Superior Court, 11 Cal. 3d 574, 522 P.2d 666, 114 Cal. Rptr. 106 (1974), is a case the court described as involving much the configuration I am describing here, though the behavior-shaping interest in that case seems if anything more questionable than that in our hypothetical.
2 to 1 case may indeed be questionable (depending on what the 2 and the 1 comprise), but the appropriate resolution of a 1 to 0 case—a case where no interest whatsoever supports the application of the nonsitus law—does indeed seem obvious. And sure enough, it is the locals-only premise that makes the case 1 to 0 rather than 2 to 1. Thus, although I'm not aware that the incidence of such cases will be statistically significant, a criss-cross with a single litigant-independent interest does indeed seem to be a case where the premise makes a difference. The problem is that it's also a rather good case to demonstrate the infirmity of the premise. Even ignoring any constitutional overtones, it makes no sense to assert that the defendant's home state in such a case has no interest whatever in making him pay up when his carelessness has killed or injured an out-of-state guest, or that the plaintiff's home legislature loses all "interest" in denying recovery (to what by its lights is an "ungrateful guest") simply because the person-to-be-recovered-from is an outlander.

Does that mean that it's wrong, in our hypothetical, to apply the (no guest statute) rule of the situs? Obviously that is not my point—what is wrong is the denial of any state interest in promoting a verdict for an out-of-stater against a local—and in fact I think the situs rule should apply. Why? Because two interests beat one? Just as obviously a mechanical counting system would be simplistic. I think, instead, the result is right because we should adopt a choice-of-law rule providing (where the parties come from states with different rules) for the application of the situs's rule relating to guest-host liability. I'm getting ahead of myself, however, and want now to turn to the third possible law/party residence configuration.

The "common domicile" configuration is often referred to as a "false conflict," a term I'm avoiding not simply because it announces a conclusion, but also because it is used, at least by some people, to cover criss-cross cases too. It designates a situation where the parties come from the same state or from states whose law is identical respecting the issue in question. (Obviously the la-

84. See text accompanying note 100 infra.
85. E.g., R. WEINTRAUB, supra note 75, at 352; Comment, False Conflicts, 55 CAL. L. REV. 74, 77 (1967).
bel doesn’t fit the second situation as well as the first, but you get the idea.) This is another, and more common, situation in which it will sometimes make a difference how broadly we define “interest.” It is obvious on ordinary interest analysis canons that the state from which both parties hail will be interested in having its law applied, since no matter which party its law favors one of its residents will be benefited. (If the parties are from two states with the same law, one of those states will be interested.) Since, by hypothesis, the case has been pigeonholed as a “conflicts” case, there must be at least one other state, whose law is different, that has some connection with it: presumably it is the forum or the situs of some part of the events giving rise to the lawsuit. It will often appear on fair-minded reflection that one or more of these states whose contacts are based on something other than residence also has a significant interest in seeing its law applied—so as either to protect its judicial processes or to influence behavior that will affect the local environment. As I’ve said, interest analysts tend to ignore or downplay interests that are based on something other than party residence: if attention were paid them it would become even more difficult to dismiss substantial numbers of apparent conflicts as not genuine.

Again, however, let’s assume a case in which there are no significant litigant-independent interests: there are some such cases, if not an abundance. And in such a case it does make a difference whether we stick with the standard assumption that states are interested only in promoting the fortunes of their own people, or abandon it in favor of an approach that holds that any state with a contact sufficient to give it constitutional standing to apply its law should be deemed to be “interested” in applying it irrespective of whether the party to be benefited is local. With the usual “protect-locals-only” assumption (and the further assumption that there is no state with an interest based on something other than party domicile) a common domicile case truly is a “false conflict”; if, however, the nondomicile state is also granted an interest, the case deadlocks.

86. See text accompanying notes 87 & 88 infra.
IV. An Overdue Distinction

This seems to present us with an unfortunate dilemma. On the one hand, I have argued that the premise that states are “interested” only in generating verdicts for their own citizens—even assuming no constitutional infraction—is out of accord with any sensible notion of what lawmakers either are or should be doing. The infirmity of the premise seems to make a difference in two situations. The first is the criss-cross case where one (and only one) of the two states involved has a litigant-independent interest favoring the application of its law. I have suggested, however, that for precisely the same reasons it is wrong to deny a state an interest in promoting a victory for an out-of-stater against a local it is wrong to treat such cases as false conflicts. Rejection of the premise will therefore make an (occasional) difference in cross-cross situations, but it should: interest analysis does not work there, and we should not pretend it does by ignoring interests in assessing or thwarting locals.

The dilemma adverted to arises, rather, from the common domicile case, where common sense does not seem to require—and indeed it seems perversely complicating to insist—that a contact state from which neither party comes (and which has no litigant-independent interest either) must nonetheless claim an “interest” in applying its own law, thereby transforming a situation that seems to shriek for the application of the parties’ common home law to one where the choice is deadlocked. Some common domicile variations on the guest statute situation should help make the point. In the first the plaintiff-guest and defendant-host both come from a state that has a guest statute (or from two states that both have guest statutes) barring liability, but the situs of the accident does not. Unless we insist that the situs assert an interest in applying its law so as to help the out-of-state plaintiff recover, the sensible resolution of such a case seems fairly obvious. This is not, as is sometimes asserted, a “false conflict” in the sense that the situs has no interest whatever in a verdict for the plaintiff. Assuring recoveries even when both host and guest come from another state might make some incremental contribution to the level of caution generally exercised within the state; it might also help facilitate collection by local medical creditors (if there are any) who treated the plaintiff-guest after the accident. But these “interests” seem
speculative, at least to me, when compared with the interest of the parties' home state (or agreeing home states) in seeing to it that "its" guests not collect from "its" hosts in cases of ordinary negligence.\footnote{87}

The reverse case, where the parties come from a liability state (or states) and it is the situs that has the guest statute, seems even clearer. For here the situs's behavior-shaping interest is not only speculative, it is barely articulable. The notion that if the guest can't collect the host will be left with more assets against which others who may be hurt in the same accident can proceed, is one that seems quite hypothetical, though again I suppose it's enough to keep the conflict from being 100\% false.\footnote{88} The forum would seem to have a process-protecting interest of sorts in applying its guest statute (assuming it has one)—to wit, an interest in avoiding collusive perjury by the parties. But that too is at least arguably insubstantial by comparison, and in any event it is an interest of the forum, which will be the situs only coincidentally. Thus once again it is possible to articulate other possible interests that will sometimes attach, but it seems reasonably clear that it is the law of the domicile of both parties that should prevail. In any event it would seem a pity were the possibility of such a resolution to be barred by a felt obligation to require the situs to assert an interest in applying its law so as to deny recovery.

The way out of the dilemma is to make explicit a distinction with which we have thus far been only flirting, to recognize the existence of a middle ground between the usual, crabbed "protect-locals-only" approach and a free-swinging obligation on the part of every contact state to claim an interest in the welfare of every party for whom application of its law would generate a victory. In order to deal rationally with the common domicile guest statute cases just canvassed, it is not necessary to cling to the indefensible proposition that states can be interested only in promoting victories for their own people. Such cases remain tractable\footnote{89} on the

\footnote{87. Of course guest statutes are in decreasing favor, which may unconsciously disincline an observer to suppose any state is ever interested in applying one.}

\footnote{88. At least if "conventionalizing" is permitted. See note 60 supra. (The encouragement of carpooling cuts both ways: to the extent there is any effect at all, a guest statute will encourage hosts but discourage guests from entering into such arrangements.)}

\footnote{89. It is, however, much of the point of this article that this redefinition will not render}
much more sensible view that a state generally should be regarded as "interested" in having its law applied whenever such application would serve a substantial litigant-independent interest (in shaping local behavior or protecting local processes) or either party—he who is advantaged or he who is to be disadvantaged by the application of local law—is local.90

Thus the parties' common domicile would be interested in applying its guest statute on two separate grounds, that of protecting "its" host from being gouged by an ungrateful guest and that of thwarting "its" ungrateful guest in his or her effort to collect. (Where the parties are from two states, each with a guest statute, one of the two would be interested in protecting "its" defendant, the other in thwarting "its" plaintiff.) Despite this limited extension of the definition of interest, however, the situs state would remain substantially uninterested in applying its host liability rule, since by hypothesis neither party comes from that state.91 In the other case, the parties' common domicile would be interested in applying its rule of host liability for two reasons, to insure "its" guest's recovery and to see to it that "its" host pay his or her fair way.92 The situs state would not, however, be interested in applying its guest statute to protect a foreign host from a foreign guest. It is thus possible to abandon the crabbed rhetoric of promoting verdicts only for the state's own, without at the same time abandoning the possibility of rationally resolving cases of the common domicile configuration.

What's more, this intermediate definition of interest would seem not to offend either common sense or small c constitutional values, at least not in the same way the usual "victories for locals" definition does. My earlier discussion of "flip side" interests does, I think, argue forcefully for expanding the definition of interest so as

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90. The latter may be subject to a rare exception for situations of the "spendthrift statute" configuration. See text accompanying note 69; notes 74 & 80 supra.
91. I am obviously no longer assuming arguendo that a rule of host liability contributes significantly to the level of driving safety within a state. Cf. note 83 & accompanying text supra.
92. Where the parties are from two states, each with a host liability rule, one will be interested in "its" guest's recovery, the other in "its" host's paying his fair way.
ordinarily to encompass the case where the party who would be disadvantaged by the application of local law is local, but it does not support any definition more sweeping than that. In particular nothing said there suggests that a contact state should always regard itself as interested in promoting a victory for the party its law would favor, irrespective of whether he or his opponent is local.

As for our small c constitution, well, who can really say? I do think, though, that at least on a comparative basis, it seems less offensive to any "spirit of our constitution" to apply to a suit between two people the law of the joint domicile (or even the joint law of the domiciles) of those two people—assuming no other state has a significant behavior-influencing or process-protecting interest—than it does to build a choice-of-law system on the notion that each individual carries around with him his home state's law, which will be presumptively applicable to his case (assuming it favors him) irrespective of whom he gets involved in litigation with. Recall that we are here proceeding on the hypothesis that no actual violation of the Privileges and Immunities Clause or any other is involved, and we are thus in the murkier realm of judicially unenforceable constitutional admonition. And there, I think, it is not the least bit troubling that constitutionality and rationality keep getting mixed up. It simply isn't sensible to suppose that states are not "interested" in generating liabilities for their own citizens. However, applying the law of the parties' common domicile when no other state is substantially interested—which means, of course, that one local will win and another will lose—seems, at least in some cases, so sensible it's hard to conclude it violates even our small c constitution.

V. CONCLUSION

Debates are wont to overpolarization, and this one is no exception. The interest analysts—apparently out of a belief that they have no workable choice—are generally quite forthright about

93. The parenthetical expression, of course, is one of the usual canons of interest analysis, but it turns out it may be without great functional significance. See note 102 infra.

94. This, at least, has been the hypothesis for some pages. See text following note 50 supra. If Austin v. New Hampshire is accepted as written, neither of the approaches indicated is constitutional. See note 41 supra.
pitching their calculus to the assumption that the only people for whom states can be interested in generating litigative victories are their own citizens. The critics rightly sense that this is indefensible, but seem to leap from that to the assumption that they must go the whole hog and hold that every time a state constitutionally can do so it must claim an interest in protecting the party who would win if its law were applied.\(^{95}\) I have suggested a middle ground that avoids the nonsensicality (and arguable unconstitutionality) of the standard crabbed definition without at the same time rendering the system completely unworkable—namely a definition of interest that not only is more sensitive to goals other than generating a victory for one or the other party, but also goes beyond the usual definition by ordinarily claiming an interest in applying local law when the party to be disadvantaged thereby is local.

Unfortunately this isn’t a very helpful breakthrough. On my intermediate definition of interest the only cases that remain manageable are those exhibiting the common domicile configuration (and even in those there are likely to be litigant-independent interests to muck up the works far more often than has heretofore been recognized). The via media I have suggested is no help at all with “head-on” or “criss-cross” cases, which is to say it is no help at all with cases where the parties come from states whose laws differ. All head-ons and most criss-crosses,\(^{96}\) however, are deadlocked however you define interest: as limited to helping the state’s own, as extending to everyone, or as I have suggested. The interest analysts’ “ways out” of these two sorts of deadlock either are admittedly arbitrary knotcutters, or they are delusions.

Where, then, do we turn? Unsurprisingly, I am with those who counsel a return to a more rule-oriented approach. Of course the return should be a careful one: there is little point in formulating a rule unless and until the courts’ experience and past analysis of the


96. Criss-crosses where one (and only one) of the states has a litigant-independent interest are rendered more manageable by the locals-only premise, though I have argued that the premise is particularly unattractive in that context. See text accompanying notes 83 & 84 supra.
area in question can give them confidence that they will get it about right. Where they are possible, though, rules seem as preferable here as they do in other areas of law. The advantages they bring—advantages of predictability, economy, and equality of treatment as between one case and another—seem "worth the price of an occasional doubtful result." In general, however, choice-of-law rules should limit their coverage to fairly discrete issues rather than trying to cover entire areas: a ballet slipper is less likely to crush someone heedlessly than a lumberjack's boot. The quest must therefore be for "that law which, under consideration of relevant policies is the most appropriate to provide the decisions for a problem, generically seen, but narrowly defined." Professor Reese has described well the sort of process contemplated:

Once an issue has been selected as a candidate for rule making, one should seek to determine whether in the great majority of situations a particular state will be that of greatest concern by reason of a particular contact irrespective of all other considerations, including the content of its relevant local law rule. If so, it would usually be appropriate for a rule to provide for the application of this state's law to the particular issue.

Naturally our new rules should draw on whatever valid insights the past decades of interest analysis have been able to generate. Unfortunately, we have seen, those insights will prove valuable only in the common domicile situation. For all the ambitious writing by all the capable men and women this field has attracted, all that interest analysis has really taught us, when you clear away the terminological underbrush and discard the insupportable claims, is that when the plaintiff and defendant come from the same state, or from states whose law is identical, you should think seriously

97. Reese, Choice of Law: Rules or Approach, 57 CORNELL L.Q. 315, 322 (1972). See also B. CARDozo, The Paradoxes of Legal Science 67 (1928). Thus even the "purest" of interest analysts has smuggled some rules into his system, as for example by simply indicating the system's inapplicability to certain problems or by the question-begging concept of foreign law as "datum." For examples of the former technique, see Currie, Comment on Babcock v. Jackson, 63 COLUM. L. REV. 1233, 1241-42 (1963); Currie, Book Review, 1964 DUKE L.J. 424, 427 (real property problems exempted from interest analysis). On the latter, see B. Currie, supra note 1, at 58-74.


99. Reese, supra note 97, at 326-27 (footnote omitted).
about applying that law rather than that which geography or some other "talisman" might otherwise suggest. Of course you may not, and often you should not, end up applying that law, but the interest analysts are surely right that it must at least be one of the candidates.

And indeed it does seem to me that some choice-of-law rules should be framed precisely this way. The rule regarding guest statutes, for example, should in my opinion be geared to the common home law of the parties (when there is one).\textsuperscript{100} I would treat damage ceilings the same way (at least in cases where the forum has no such ceiling).\textsuperscript{101} However, such cases, where the insights that interest analysis have generated do turn out to be of some help, are not very common (though it must be said that the two issues I've just mentioned, guest statutes and damage ceilings, while they may not look like much to an outsider, do account for more and more toward uniform or federal law). In the main the rules necessarily will look somewhat Bealean—not in the sense that they must encompass entire areas at a single bound, but rather in the sense that they will be geared to something other than the residence of the parties.\textsuperscript{102}

\textsuperscript{100} The case where the situs has a host liability rule and a third party defendant is attempting to implead the host probably should be distinguished, however. Cf. Weintraub, \textit{Comments on Reich v. Purcell}, 15 U.C.L.A. L. Rev. 556, 560 (1968).

\textsuperscript{101} Here too there is a process-protecting interest (in minimizing appellate review and retrial occasioned by excessive jury verdicts) which to me at least seems somewhat stronger than that present in the guest statute situation.

In cases where the law of the parties' home states differs and all that is at stake is the amount of recovery—as it would be in a damage ceiling dispute—the suggestion that the difference be split, \textit{e.g.}, M. Traynor, \textit{supra} note 11, at 866; von Mehren, \textit{supra} note 12, at 366-67, becomes tempting. I confess I have trouble rendering the suggestion even coherent in the more common situation, where the disagreement is over whether there should be recovery at all. Unfortunately, even cases that are "simply" about the amount of recovery also resist holding still for splitting. What does one do, for example, when the laws of the parties' home states differ and the forum (which may or may not be one of the two residences) has a/the comparatively low damage ceiling? Or where the situs has a/the comparatively high one, or none? I end up thinking that even where "all" that is in issue is the amount, the only workable alternatives (among those that are legitimate) where the law of the parties' homes differs are references to either the law of the forum or that of the situs.

\textsuperscript{102} A common rule is that referring intestate distribution of moveables to the law of the decedent's domicile at the time of his death. This one is different, of course, not simply in that it seeks to approximate the decedent's likely intent or expectation, but also in that it is
In his comments on *Neumeier v. Kuehner*, Professor Twerski

not geared to the residence of any of the *parties*: it thus does not offend as "personal law."

The rule has still another feature—that it takes the law referred to "either way" and not simply if it favors one or another party, as do the standard canons of interest analysis. It is tempting to generalize this feature and hold that there is nothing wrong with gearing a choice-of-law rule to the residence of a particular party (perhaps "the party whose capacity is in issue," perhaps even "the plaintiff") so long as one takes the law "either way." I didn't pick either of those parenthetical examples at random: it has been a quite frequent suggestion that contractual capacity be determined by the law of the residence of the party in question, *cf.* text accompanying note 49 *supra*, and though it may be wrapped in mythical talk of "marital" domicile, realistically the widespread choice-of-law rule regarding divorce is that the law of the plaintiff's domicile governs. *But cf.* Alton v. Alton 207 F.2d 667, 684-85 (3d Cir. 1953) (Hastie, J., dissenting), *vacated as moot*, 347 U.S. 610 (1954).

In 1960 Professors Currie and Kay observed of choice-of-law rules geared to the law of the domicile of one party that "it has apparently never occurred to anyone to suggest seriously that it is invidious thus to treat persons differently because they have their homes in different states." *B. CURRIE*, * supra* note 1, at 445 (footnote omitted). They were right: the omission was an odd one for critics of their system. It is an omission I would like now to remedy.

We have for some pages been operating on assumptions that imply that such rules do not violate the judicially enforceable or "large c" Constitution. In the divorce situation, for example, all plaintiffs will be accorded the benefits or burdens of their home states' law. Thus on our present assumptions there is no discrimination among plaintiffs on the basis of residence that offends the Privileges and Immunities Clause. *See* text accompanying notes 50 & 51 *supra*. Of course defendants as a class are not accorded such treatment. But even leaving aside the fact that the "treatment" will sometimes be a benefit and sometimes be a burden—and I think it is well to leave it aside, since as a practical matter at least divorce plaintiffs have substantial control over their "residences" for purpose of divorce suits and thus over what law will govern—there is nothing of which I am aware that makes it unconstitutional to discriminate quite systematically in favor of plaintiffs and against defendants. Many statutes and common law rules are adopted with precisely that goal; choice-of-law rules should not be subject to more stringent equal protection requirements in this regard. If, however, *Austin* is right as written, it is hard to see how such rules can survive, that is, how a forum with a particular protective rule can be permitted to deny its benefit to any out-of-stater who notes that if he were a local he would be entitled to it. *See* text accompanying notes 40 & 41 *supra*.

I don't in general think such rules are advisable, since they so flagrantly ignore the interest of the home state of the *other* party—*the* party contracting with the person now claiming incapacity in the one case, the defendant in the divorce case—and very likely of other states as well. Obviously not everyone is convinced on that score, however, so the in-between question must be faced, whether such rules violate our "small c" constitution, or at least common sense, in ways analogous to those I have suggested the usual canons of interest analysis do. I fear it's a mixed and confusing bag. From a "macro" perspective choice-of-law rules of this sort do recognize "flip side" interests: that is, they recognize not only the interests of states with one sort of rule in promoting litigative victories for their residents, but also the interests of states with the opposite sort of rule in holding their residents to account.

Perhaps that should settle the matter: I confess I have swings of mood on the subject. Perhaps, however, this system-wide perspective is not the appropriate one from which to
criticized the rules adumbrated in Chief Judge Fuld's court opinion thus:

There is . . . a need to project a general philosophical position which emphasizes priorities in choice-of-law. The Fuld rules suffer from a basic inconsistency at this level. The first rule projecting common domicile as the controlling factor puts down territorial considerations completely. This is consistent only with pure interest analysis of the Currie variety. The second and third rules emphasize territorialism with the vengeance of the First Restatement by applying the *lex loci delicti* even in the face of strong opposing interests.\(^\text{103}\)

evaluate the sorts of discrimination in which various states should be permitted to engage. The *attitude* of ordinary interest analysis canons may be different, in that states are held to be interested only in advantaging their own and not in holding them to account. *In practice*, however, the results will probably—there are too many versions of interest analysis to be more definitive—not come out very differently system-wide. On an interest analysis approach, if the party in question is from a state whose rule protects him, that state at the very least will be held to be interested and he may very well win (though he may not, if another state's interest is found to predominate). If on the other hand he's from a state whose rule doesn't protect him, that state won't be interested (at least not on that score) and he may well lose (though he may not). Cf. B. Currie, *supra* note 1, at 113.

Assume a state has a choice-of-law rule of the sort under discussion, specifically that it decides questions of contractual capacity by the law of the state of residence of the party whose capacity is in issue. Assume further—it will work the same the other way around—that it has what is in context the defendant-protecting rule of contractual capacity. On what occasions will this state apply its defendant-favoring rule? The answer is a familiar one: whenever the defendant is local (or comes, and here the parallel to interest analysis is extended, from another state with the same rule).

From this "micro" perspective we can see clearly this state's failure to recognize "flip side" interests: in being instructed by its choice-of-law rule to apply its domestic law only when the party whose capacity is in issue is local, this state is in effect instructed to vindi-
cate only its interest in protecting local defendants, and to renounce any interest in thwart-
ing those local plaintiffs who are seeking to collect from (nonlocal) persons in the class its domestic lawmaking authorities have judged incompetent to contract. (Of course other states, with less restrictive capacity rules, are granted by such a choice-of-law rule an interest in disadvantaging some of their own—specifically, defendants. But by reasoning sym-
metrical to that just traversed, those other states are granted no interest in vindicating the interests of those among their own locked in litigation with out-of-staters hiding behind capacity rules their lawmakers have judged too protective.)

Our first state has what amounts to a "protect-locals-only" policy, or more accurately a "protect-only-those-whose-local-law-protects-them" policy. If that is a sort of discrimination our "small c" constitution, or at least common sense, ought to prohibit, and I have argued it is, it does not seem like an answer to note that other states have a "thwart-locals-only" policy. Indeed, as I suggested in the last parenthetical, that may only compound the difficulty. Cf. Shelley v. Kraemer, 334 U.S. 1, 22 (1948).

\(^{103}\) Twerski, *supra* note 2, at 118 (commenting on Neumeier v. Kuehner, 31 N.Y.2d 121,
I think this criticism is misguided. In my opinion Fuld was on just the right track (as indeed David Cavers had been some seven years earlier) in embracing the only solid insight of interest analysis, a presumption in favor of applying the law of a *common* domicile, and as for the rest, leaning toward the old, gasp, territorial learning.

286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).

104. See generally D. Cavers, supra note 9, ch. VI. Professor Cavers would not apply the law of the common domicile when the relation between the parties is “seated” elsewhere. For a particularly attractive example from Cavers’ perspective, see id. at 309. Naturally such authority must exert a pull, but for now at least I’m inclined to stick to my guns. The seat of the relationship seems to speak most directly to the parties’ expectations, which have little relevance to choice of law in tort, and however little actual input into their home state’s political processes the parties in fact have had, they lack even theoretical influence in other states. Whether or not one actually ends up adopting choice-of-law rules geared to the parties’ common domicile—and I’ve actually only suggested a couple—is not the main point of this article, however. What I have wished primarily to demonstrate is that such rules are legitimate in ways an approach geared to the protection of the local party is not. Compare also A. von Mehren & D. Trautman, supra note 14, at 108, with text accompanying note 18; notes 44 & 64 supra.