Governmental Interests — Real and Spurious — in Multistate Disputes

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INTRODUCTION

Edgar Bodenheimer's professional interests cover a broad spectrum. In addition to jurisprudence, he has taught legal history, constitutional law, equity, international law, introductory courses for freshmen, and — last but not least — the conflict of laws. The wide range of his learning and his perspective as a philosopher, historian, and comparatist have enabled him to keep a critical distance from the ever-changing fashions of our times and to gather insights that escape those who focus more narrowly on their chosen specialty.

In 1952, before interest analysis became popular, Bodenheimer foresaw the advent of a forum-centered approach to the conflict of laws and cautioned that it would "seem to be quite unsound to seek the roots of Conflicts law in the little vanities and susceptibilities of states or governments."[1] He wrote:

> Such an attitude will logically end in a judicial nihilism which regards *any* statutory enactment as an expression of the public policy of the state which, as a manifestation of sovereign will, should in all cases be entitled to exclusive application in the territory in which such sovereign will reigns supreme.[2]

Considering what has since happened in American conflicts law, these words have a prophetic ring.

By now, the habit of analyzing choice-of-law problems in terms of sovereign concerns has become deeply entrenched. Judicial opinions that purport to divine governmental interests fill the state and federal reports,[3] and "the functional core of interest analysis . . . became a

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[1] Bodenheimer, *The Public Policy Exception in Private International Law: A Reappraisal in the Light of Legal Philosophy*, 12 SEMINAR 51, 63 (1954).

[2] *Id.* at 64 (emphasis in original).

[3] A LEXIS search for "(choice law or conflict law) and interest and date aft 1986" yielded 384 federal and 150 state cases. Of course, not all of these are on point. "Inter-

mainstay of choice-of-law theory over the last twenty-five years."[4] Indeed, one commentator has asserted that interest methodology is "firmly rooted in an instrumental and sociological view of law."[5] Most authors seem to find it impossible to think about the conflict of laws without also thinking about sovereign prerogatives. Even among the approach's critics there are those who believe that the analysis of state interests is an important consideration in resolving problems posed by transactions that cross state and national boundaries.[6]

Not only academic writers but the American judiciary as well has embraced the notion that governmental interests ought to control choice-of-law decisions. That notion appeals to judges precisely because its has an inbuilt bias that favors application of forum law, which they know best and which they can readily adapt to the exigencies of interstate and international litigation.[7] Interest analysts concede that "where a court wants to apply its own law, it may 'manufacture' policies and interests."[8] As Bodenheimer put it, "a good legal magician will always be able to pull some preferred interest out of a hat and proclaim it to be the dominant one."[9] In fact, one need not be a magician to perform such legerdemain. Vague and emotive adjectives, such as "intimate,"[10] "vital,"[11] or "strong,"[12] furnish verbal justifications for elevating the forum's concerns over those of another state.

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est" is a polysemantic term; used as a search word it dredges up opinions that deal with matters such as interest rates, security interests, equity interests and parties in interest. But even if only one fourth of the cases uncovered engage in choice-of-law "interest analysis," the statement in the text has ample support.

[4] Shreve, *Interest Analysis as Constitutional Law*, 48 OHIO ST. L.J. 51, 52 (1987).

[5] Von Mehren, *Recent Trends in Choice-of-Law Methodology*, 60 CORNEL L. REV. 927, 941 (1975).

[6] *See* Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, 46 OHIO ST. L.J. 459, 480 (1985); Hill, *The Judicial Function in Choice of Law*, 85 COLUM. L. REV. 1585, 1589 (1985); McDougal, *Comprehensive Interest Analysis Versus Reformulated Governmental Interest Analysis: An Appraisal in the Context of Choice-of-Law Problems Concerning Contributory and Comparative Negligence*, 26 UCLA L. REV. 439 (1979).

[7] *See* Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 AM. J. COMP. L. 1, 46-47 (1984).

[8] Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation*, 25 UCLA L. REV. 181, 203 (1977).

[9] Bodenheimer, *The Need for a Reorientation in American Conflicts Law*, 29 HASTINGS L.J. 731, 737-38 (1978).

[10] Schultz v. Boy Scouts of Am., Inc., 65 N.Y.2d 189, 200, 480 N.E.2d 679, 686, 491 N.Y.S.2d 90, 97 (1985) (New Jersey "intimately interested" in effectuating policy of charitable immunity).

[11] Miller v. Miller, 22 N.Y.2d 12, 18, 237 N.E.2d 877, 880, 290 N.Y.S.2d 734, 739 (1968) (New York "vitally concerned" with the recovery for the wrongful death of a New Yorker).

[12] *In re* Air Crash Disaster Near Chicago, Illinois, on May 25, 1979, 644 F.2d 594,

However well interest analysis may "work"[13] in practice, something is surely wrong with a legal method that permits weasel words to pass for arguments. Several judicial opinions reveal the questionable nature of such an "analysis" by the unwitting and cruel puns it produces. Thus, in a case involving the sexual abuse of minors by a priest, the New York Court of Appeals spoke of "intimate interests,"[14] a turn of phrase even more grotesque than the "vital"[15] and "grave" concerns[16] the same court invoked in wrongful death cases. Such embarrasingly inept metaphors suggest that the judges who use them are not really thinking but are allowing clichés to do their thinking for them. Interest analysis was conceived as a reaction to the "metaphysical apparatus"[17] of the vested rights doctrine, but to explain a choice-of-law decision by reference to sovereign concerns is surely no less mystagogic than to say that rights have vested or obligations have "accrued." As long as similes parade as reasoning, the conflict of laws will remain a "field of sophism, mystery, and frustration."[18]

At this time, there is little hope for change, for the nihilism Bodenheimer[19] and others[20] have condemned bears the Supreme Court's endorsement. Justice Stone first seized upon the notion of state interests in cases dealing with the reach of state worker's compensation laws to justify the application of forum law to interstate accidents.[21] The Court continues to employ state interest analysis, using it in both the choice-of-law[22] and jurisdictional contexts[23] to justify an expansive application of forum law in multistate cases. Since interest analysis bears the im-

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627 (7th Cir. 1981) (Oklahoma's "strong and current interest" in punitive damages).

[13] Sedler, *Interest Analysis as the Preferred Approach to Choice of Law: A Response to Professor Brilmayer's "Foundational Attack"*, 46 OHIO ST. L.J. 483 (1985).

[14] *Schultz*, 65 N.Y.2d at 200, 480 N.E.2d at 686, 491 N.Y.S.2d at 97.

[15] *Miller*, 22 N.Y.2d at 18, 237 N.E.2d at 880, 290 N.Y.S.2d at 739.

[16] Tooker v. Lopez, 24 N.Y.2d 569, 577, 249 N.E.2d 394, 398, 301 N.Y.S.2d 519, 525 (1969).

[17] B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 180 (1963).

[18] *Id.* at 585.

[19] Bodenheimer, *supra* note 1, at 64.

[20] *See* E. SCOLES & P. HAY, CONFLICT OF LAWS 16 (1984).

[21] *See* Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493 (1939); Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532 (1935).

[22] *See, e.g.*, Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985); Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981).

[23] *See, e.g.*, Asahi Metal Indus. Co., Ltd. v. Superior Court, 107 S. Ct. 1026 (1987); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985).

primatur of the nation's highest court, its popularity is not surprising. But even the Supreme Court's power over language is not unlimited. Rights never vested and obligations never "arose," although the Court used to say they did.[24] Constant repetition cannot bestow substance upon an empty figure of speech. A closer look at the interests that supposedly control choice-of-law decisions will show that they are no more real than the vested rights of yore.

I. Spurious Versus Real Interests

No one to date has seen fit to proffer empirical evidence supporting the proposition that a state has governmental interests in effectuating the purposes that may lurk behind its statutes or precedents. Currie, the protagonist of interest analysis, considered the proposition axiomatic; in his legal universe states were driven by the desire to effectuate the policies behind their laws, some ruthlessly — Currie called them "selfish"[25] — others, curbing their baser instincts, in a more "altruistic"[26] vein. But egotism and altruism, words that describe human traits, do not fit the actions of entities such as states or nations.

At a meeting of the Association of American Law Schools, Yntema once asked Currie:

> My erudite colleague did not clarify what "the State of California" means and neither what it is. Is it the territory within its physical boundaries? Or is it a particular legal system enforced in its courts? Or is it the euphoria of its residents induced by its climate and its vineyards? And once the State is defined, how will the courts grapple with *its* interests, and not those of the parties?[27]

Yntema never received an answer, although his point was well taken. It appears impossible to identify the beneficiaries (other than the parties before the court, whose interests, according to Currie, do not count[28]) of an approach that seeks to vindicate local policies. The state's governor is unlikely to commend the judge who favors forum law, nor can the legislature be expected to rise for a standing ovation. Two years ago, the West German Parliament unanimously adopted a conflicts statute

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[24] *See, e.g.*, New York Life Ins. Co. v. Head, 234 U.S. 149 (1914); Slater v. Mexican Nat'l R.R. Co., 194 U.S. 120 (1904).

[25] *See* B. Currie, *supra* note 17, at 89, 447, 592.

[26] *Id.* at 489, 495, 719.

[27] Letter from Dr. Vera Bolgar to Friedrich K. Juenger (Apr. 2, 1986) (on file with *U.C. Davis Law Review*).

[28] "I can find no place in conflict-of-laws analysis for a calculus of private interests." B. Currie, *supra* note 17, at 610.

that is premised on the essential equality of foreign and domestic law.[29] Should all those who voted be impeached for sacrificing the Federal Republic's interests?

To believe that states have interests in effectuating the policies behind their laws requires a leap of faith, a willingness to cast Leviathan as a human being with wants and desires. As ludicrous as such anthropomorphosizing may be, legal minds are prone to accepting imagery as fact. Although Cavers cautioned against the "misleading air of substantiality that the term 'interest' exudes,"[30] courts and scholars use the term as if they were talking about some kind of tangible commodity. Thus, one widely cited article premised a new approach to choice of law on the "comparative impairment" of the "regulatory interests" of different states.[31] The article's author not only believed in the reality of state interests but thought it possible to quantify the harm done to them by application of a foreign law.

In addition to confusing those who use it, the suggestive power of the word "interest" beclouds the distinction between ordinary choice-of-law cases and interstate disputes in which real interests are at issue. States are of course literally and directly "interested" in entitlements to pecuniary stakes, whose vindication administrative agencies, such as tax collectors, pursue with considerable zeal and acumen. These interests can clash with those of other states and when they do, real conflicts arise.[32] On several occasions, the Supreme Court has been confronted with disputes of this nature, and has dealt with them in a revealing manner. Far from permitting state courts to effectuate domestic policies at the expense of sister-states, as is the rule in ordinary choice-of-law cases, when real governmental concerns are implicated the Justices apply hard-and-fast rules to minimize the potential for friction in our federal system.

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[29] Gesetz zur Neuregelung des Internationaleu Privatrechts of July 25, 1986, 1986 BGBl.I 1142 (effective date Sept. 1, 1986).

[30] D. CAVERS, THE CHOICE-OF-LAW PROCESS 100 (1965).

[31] Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963).

[32] The term "real conflict" will be used to connote adverse state claims to pecuniary entitlements. It has been chosen to avoid confusion with the term "true conflicts" which Currie's disciples employ in the ordinary choice-of-law context. *See, e.g.*, R. CRAMTON, D. CURRIE & H. KAY, CONFLICT OF LAWS 234-46 (4th ed. 1987); Sedler, *supra* note 8, at 188-89. It is a thesis of this article that such conflicts are not "true" because no real state interests are at stake.

A. Real Interests: Escheat

One series of cases involved the escheat of abandoned property. Traditionally, states have asserted the power to take unclaimed assets located within their territory.[33] That principle, however, does not work well when applied to intangibles which, by definition, lack a fixed situs. Originally, the Supreme Court attempted to resolve the problem by resorting to the fiction that the obligor's domicile or place of incorporation determines the situs of an intangible.[34] This idea, which is traceable to *Harris v. Balk*,[35] proved to be unsatisfactory because it unduly favored states like New York and Delaware, the preferred headquarters and place of incorporation of nationwide enterprises.

When other states attempted to enhance their revenues by escheating unclaimed funds of foreign corporations, the Supreme Court intervened to prevent multiple escheats. *Western Union Telegraph Co. v. Pennsylvania*[36] established the procedural framework for intervention by allowing the parties to invoke the Court's original jurisdiction to afford "all interested states —along with all other claimants — . . . a full hearing and a final, authoritative determination."[37] But what substantive rules should determine the states' competing claims?

In *Texas v. New Jersey*,[38] a case dealing with unclaimed debts owed by the Sun Oil Company, Texas argued that modern choice-of-law approaches should control, which would take into account the contacts and interests of the states concerned. The Court rejected this argument out of hand:

> The "contacts" test as applied in this field is not really any workable test at all—it is simply a phrase suggesting that this Court should examine the circumstances surrounding each particular item of escheatable property on its own peculiar facts and then try to make a difficult, often quite subjective, decision as to which State's claim to those pennies or dollars seems stronger than another's. Under such a doctrine any State likely would easily convince itself, and hope to convince this Court, that its claim should be given priority . . . . which . . . might in the end create so much uncertainty and threaten so much expensive litigation that the States

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[33] *See In re* Rappaport's Estate, 317 Mich. 291, 26 N.W.2d 777 (1947); State v. American Sugar Ref. Co., 20 N.J. 286, 119 A.2d 767 (1956).

[34] *See* Standard Oil Co. v. New Jersey, 341 U.S. 428 (1951); Security Sav. Bank v. California, 263 U.S. 282 (1923).

[35] 198 U.S. 215 (1905).

[36] 368 U.S. 71 (1961).

[37] *Id.* at 80.

[38] 379 U.S. 674 (1965).

> might find that they would lose more in litigation expenses than they might gain in escheats.[39]

Instead, the Court held that the state of the creditor's last known address and, in the event the creditor's address is unknown or in a state that does not escheat, the debtor's state of incorporation, is entitled to escheat the debt.

Pennsylvania v. New York,[40] a sequel to *Western Union Telegraph Co. v. Pennsylvania*, applied the *Texas* rule to allow New York, the telegraph company's state of incorporation and principal place of business, to escheat the bulk of unclaimed money orders the company had issued. The Court conceded that the rule works some unfairness to the other claimant states when records concerning the creditors' last known addresses are inadequate. It nonetheless adhered to precedent for the reasons stated in *Texas v. New Jersey*, that is, to avoid having "to decide each escheat case on the basis of its particular facts or to devise new rules of law to apply to ever-developing new categories of facts."[41] Although three Justices disagreed with the result, the dissenters also favored a clear and easily applied rule, namely, escheat by the state in which the money order was purchased,[42] as opposed to mere approaches akin to the amorphous modern conflicts doctrines. Thus, the Justices were unanimous in their opinion that real conflicts[43] call for firm precepts rather than *ad hoc* analyses.

Subsequently, Congress enacted a statute dealing with the escheat of unclaimed travelers checks and money orders.[44] This act follows the dissenters' suggestions in *Pennsylvania v. New York*. It selects the state of purchase as the primary connecting factor, and, if that place is unknown, the state of the issuer's principal place of business. In addition, several states have adopted the 1981 Uniform Unclaimed Property Act,[45] which incorporates the principles of the federal statute and extends them to other forms of unclaimed property.

Thus, instead of a vague contacts test or an analysis of competing interests, Supreme Court case law has established hard and fast rules—reinforced by a federal statute and uniform state legisla-

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[39] *Id.* at 679.

[40] 407 U.S. 206 (1972).

[41] *Id.* at 215, citing *Texas*, 379 U.S. at 679. The *Texas* court noted that "[I]t is fundamentally a question of ease of administration and of equity. We believe that the rule we adopt is the fairest, is easy to apply, and in the long run will be the most generally acceptable to all the States." *Id.* at 683.

[42] 407 U.S. at 219-20.

[43] *See supra* note 32.

[44] 12 U.S.C. §§ 2501-2503 (1982).

[45] 8A U.L.A. §§ 1-43 (1981).

tion—which allocate "legislative jurisdiction" among the various states that claim the right to escheat intangibles. This goes to show that when real state interests —especially of a fiscal nature —clash, it is necessary to call upon an ultimate arbiter to settle the matter. To resolve disputes of this kind, the loose standards the Supreme Court has laid down for choice of law[46] are obviously unsatisfactory.

Of course, those wed to interest analysis might argue that the escheat cases are unique in that they deal with situations in which enterprises are exposed to potential double liability. Conceivably, this peculiarity, rather than the fact that the governmental interests at stake have more substance than those supposedly implicated in ordinary choice-of-law decisions, might explain the judicial and legislative preference for rigid rules. Indeed, several Supreme Court cases have emphasized the escheat obligor's dilemma, stating that to subject a party to conflicting claims would violate due process.[47]

This argument, however, is not conclusive. The dilemma of conflicting demands confronts private parties whenever one state imposes liability for conduct that another leaves without civil sanction. For example, suppose that state A provides that the manufacturer of a defective product is strictly liable, whereas state B requires negligence. In an interstate situation the entrepreneur cannot determine the applicable standard unless it is known which of the two conflicting laws controls. Moreover, if double liability had been the Supreme Court's sole concern, it could have avoided this undesirable consequence by requiring full faith and credit to the determination of the state that first escheats a particular intangible, as long as that state had enough contacts with the parties and the transaction to be considered "interested." This, of course, is the solution that the Court had adopted in *Harris v. Balk*,[48] which wrestled with an analogous problem, namely the garnishment of intangibles.[49]

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[46] *See* cases cited *supra* note 22.

[47] *See* Pennsylvania v. New York, 407 U.S. 206, 209 (1972); Texas v. New Jersey, 379 U.S. 674, 676 (1965); Western Union Co. v. Pennsylvania, 368 U.S. 71, 75 (1961).

[48] 198 U.S. 215 (1905).

[49] *Harris v. Balk* held that the mere presence of the garnishee within the state was sufficient to confer *quasi in rem* jurisdiction over the obligation he owed to the principal debtor. In subsequent cases, the Supreme Court allowed any state in which a corporate garnishee is amenable to jurisdiction to garnish the debt. *See, e.g.*, Sanders v. Armour Fertilizer Works, 292 U.S. 190 (1934); Home Ins. Co. v. Dick, 281 U.S. 397 (1930). *Sanders* permitted the garnishment state to impose an inchoate lien on the obligation attached to protect the garnishee against multiple garnishments. Of course,

B. Real Interests: Inheritance Taxation

A line of cases dealing with the estate taxation of movables further supports the conclusion that double liability is not the Supreme Court's overriding concern. According to a rule of long standing, the state where a person died domiciled has the power to impose estate or inheritance taxes with respect to the decedent's intangible property.[50] Up to a point, this rule serves to avoid double taxation.[51] However, the perambulatory habits of wealthy individuals sometimes preclude an unequivocal determination of the decedent's domiciliary status. It therefore happens that different states reach different conclusions—usually in favor of the local fisc—and in consequence the same estate is mulcted more than once. The Supreme Court has refused to take the position that multiple death taxation, like multiple escheats, violates due process. Recognizing that factual evaluations underlying a finding of domicile may vary, the Court countenanced different states taxing the same estate.[52]

In the celebrated *Dorrance* litigation,[53] attempts by the executor and the taxing states to have the Supreme Court resolve conflicting determinations of domicile proved unavailing.[54] Another case, *Worcester County Trust Co. v. Riley*,[55] rebuffed the executor's attempt to interplead the tax collectors on the ground that the eleventh amendment precludes actions against a state. The Court said:

Shaffer v. Heitner, 433 U.S. 186 (1977), has since consigned *Harris v. Balk* and its progeny to legal history. But the Court's disavowal of *quasi in rem* jurisdiction would not preclude recourse to the first-in-time principle established in *Sanders* to resolve conflicting state claims in escheat cases.

[50] *See, e.g.*, Beidler v. South Carolina Tax Comm'n, 282 U.S. 1 (1930); Blodgett v. Silberman, 277 U.S. 1 (1928).

[51] The Supreme Court has held that the domiciliary state's power is not exclusive and that the state of incorporation can levy a tax upon the transfer of shares owned by a nonresident decedent. State Tax Comm'n v. Aldrich, 316 U.S. 174 (1942). Apparently, however, states do not exercise this power. *See* Estate of Banerjee, 21 Cal. 3d 527, 534 n.6, 580 P.2d 657, 661 n.6, 147 Cal. Rptr. 157, 161 n.6 (1978).

[52] *See, e.g.*, Cory v. White, 457 U.S. 85, 89 (1982); Worcester County Trust Co. v. Riley, 302 U.S. 292, 292-99 (1937).

[53] *See In re* Dorrance's Estate, 115 N.J. Eq. 268, 170 A. 601 (1934), *aff'd mem.*, 13 N.J. Misc. 168, 176 A. 902, *aff'd without opinion*, 116 N.J.L. 362, 184 A. 743 (1935), *cert. denied*, 298 U.S. 678 (1936); *see also In re* Dorrance's Estate, 309 Pa. 151, 163 A. 303 (1932).

[54] *See supra* note 53; Hill v. Martin, 296 U.S. 393 (1935) (no federal jurisdiction to enjoin collection of inheritance tax); New Jersey v. Pennsylvania, 287 U.S. 580 (1932) (denying leave to file original bill).

[55] 302 U.S. 292 (1937).

> Neither the Fourteenth Amendment nor the full faith and credit clause requires uniformity in the decisions of the courts of different states as to the place of domicil, where the exertion of state power is dependent upon domicil within its boundaries.[56]

Riley v. New York Trust Co.[57] rejected the further argument that the adjudication of domicile is entitled to full faith and credit so as to bind the administrator appointed in another state. The Court permitted an administrator appointed in New York to protect that state's tax claims to relitigate the issue of domicile in Delaware, even though all of the parties entitled to be heard pursuant to the law of Georgia (where the earlier judgment had been rendered) had been present in the Georgia court. The opinion specifically notes that "this re-examination may result in conflicting decisions upon domicile, but that is an inevitable consequence of the existing federal system. . . ."[58]

What, then, accounts for the apparent inconsistency between the escheat cases on the one hand and estate taxation on the other? Since taxation, like escheat, involves fiscal interests, it might seem that the United States Supreme Court is prepared to tolerate unresolved "real conflicts" even when the states' pecuniary concerns are at stake. But given the premise that multiple estate taxation is constitutional, tax claims, unlike escheat claims, do not pose such a conflict as long as they merely burden private beneficiaries rather than the fisc. A real conflict exists only when the total tax liability owed to all interested states exceeds the estate's assets. In these situations, however, the Supreme Court *does* intervene.

The first case presenting this problem, *Texas v. Florida*,[59] dealt with the estate of Colonel Green, whose peripatetic habits resulted in four states claiming him as a former domiciliary. The Court granted Texas leave to file an original bill against Florida, New York, and Massachusetts as well as the estate's beneficiaries.[60] The special master[61] found that the states' tax bills, combined with the federal government's, exceeded the value of the fortune Colonel Green had inherited from his mother, the legendary Hetty Green.[62] On the basis of this finding, the Court concluded that the risk of conflicting assessments in excess of the estate's value warranted the exercise of its original jurisdiction. In con-

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[56] *Id.* at 299.
[57] 315 U.S. 343 (1941).
[58] *Id.* at 350.
[59] 306 U.S. 398 (1939).
[60] Texas v. Florida, 300 U.S. 643 (1937) (granting leave to file complaint).
[61] Texas v. Florida, 301 U.S. 671 (1937) (granting motion to appoint special master).
[62] *See Florida*, 306 U.S. at 409.

trast to other instances of multiple estate taxation, such as *Dorrance*, the potential inability of one or more states to collect in full presented a case or controversy. Accepting the special master's findings of fact and conclusions of law, the Supreme Court held that Colonel Green was domiciled in Massachusetts when he died.[63]

Justice Frankfurter's dissent in *Texas v. Florida*[64] favored an even more exacting test for distinguishing real from spurious conflicts. According to him, the mere fact that the taxing authorities of various states press claims does not engender a case or controversy. Rather, no actual dispute arises as long as judicial determinations of the estate's liability are still outstanding because "[i]t is not to be assumed that the state courts will make findings dictated solely by fiscal advantages to their states."[65] Justice Frankfurter criticized the majority's decision for, in effect, furnishing private parties with a pretext to avoid multiple estate taxation. In his opinion, the Court's decision amounted to a "declaration of rights on behalf of the estate which could not be adjudicated otherwise than through the screen of a controversy between states."[66] Drawing the line between conflicting demands of state authorities and an actual loss of revenue, Justice Frankfurter highlighted the distinction between private controversies and the "resolution of conflicting *governmental interests*."[67]

The tax litigation prompted by Howard Hughes's demise, which amounted to a replay of *Texas v. Florida*, reiterated the fundamental distinction between real and ephemeral state interests. In *California v. Texas (I)*[68] the Supreme Court initially denied California's petition for an original bill to determine that the decedent was not domiciled in Texas at death. Four Justices concurred on the ground that the estate could file an interpleader to assure the disposition of the conflicting tax claims in a single proceeding.[69] Like Justice Frankfurter's dissent in the

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[63] It is unclear whether the Court reached this conclusion on the basis of state law or by relying on a federal concept of domicile. Justice Stone's opinion merely reiterates the special master's ambiguous conclusions that there is "no local law peculiar to any of the states with respect to the essential fact elements which go to establish domicile" and that "the rule in each of the states defining domicile . . . [is] substantially that of the common law." *Id.* at 413.

[64] *Id.* at 428.

[65] *Id.* at 431.

[66] *Id.* at 433.

[67] *Id.* at 434 (emphasis added).

[68] 437 U.S. 601 (1978) (per curiam).

[69] *See id.* at 601 (Brennan, J., concurring), 602 (concurring opinion per Stewart, J.), 615 (Powell, J., concurring).

earlier case, Justice Stewart's concurring opinion strongly emphasized the need to distinguish between the estate's dilemma — a matter outside the Court's original jurisdiction — and the predicament of states whose tax claims are jeopardized when other states appropriate the estate's assets. While impending multiple taxation ought to permit the estate to interplead the various tax authorities,[70] that threat does not warrant leave to file an original bill because "the only live controversy. . .is between each State and the decedent's estate . . . . There is . . . no present dispute *between the claiming States.*"[71] Such a dispute can arise, at best,[72] only once a state is left with an uncollectable judgment. Consequently, Justice Stewart shared Justice Frankfurter's view that *Texas v. Florida* was wrongly decided, because it purported to resolve a dispute between states, whereas the real issue was the unfairness of multiple estate taxation.

Contrary to the views expressed by the four concurring Justices in *California v. Texas (I)*,[73] the majority in *Cory v. White*[74] subsequently reaffirmed the holding in *Worcester County Trust Co. v. Riley* that the eleventh amendment precludes an estate from interpleading state tax officials. At the same time, however, the Court, in *California v. Texas(II)*,[75] granted California's motion for leave to file a bill seeking a determination of whether Howard Hughes was domiciled in California or Texas when he died. The motion was based on the allegations that the combined estate taxes imposed by Texas, California, and the federal government would add up to a total marginal tax rate of 101%, and that interest on the unpaid taxes might further deplete the estate.

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[70] Justice Stewart's concurring opinion suggested that *Worcester County Trust Co. v. Riley* should be overruled. *See* 437 U.S. at 608 nn.9-10, 611. Justice Powell who, with Justice Stevens, joined this opinion, also wrote a separate concurrence to state more emphatically his belief that the *Riley* case had lost precedential value. *See id.* at 615-16. Justice Brennan agreed with him. *See id.* at 601.

[71] *Id.* at 611 (emphasis in original).

[72] Justice Stewart's concurring opinion doubts that a state's inability to collect because another state exhausted the available funds justifies exercise of the Supreme Court's original jurisdiction:

> The status of unsatisfied creditor does not necessarily create the kind of controversy between States that can or should be resolved by means of adjudication under this Court's original jurisdiction. This may, rather, be the kind of dispute that is best resolved by the contending States through negotiation or arbitration.

Id. at 615 n.15.

[73] *See supra* note 70.

[74] 457 U.S. 85 (1982).

[75] 457 U.S. 164 (1982) (decided on the same day as *Cory v. White*).

According to the majority, pursuant to *Texas v. Florida* these allegations sufficed to characterize the case as a controversy between states.

Echoing Justice Frankfurter's dissent in *Texas v. Florida* and Justice Stewart's concurrence in *California v. Texas (I)*, four Justices argued that no real conflict arises until the states' tax claims are adjudicated and the estate's assets are shown to be insufficient to satisfy the tax judgments. Driving home the distinction between genuine state interests and whatever concerns states may have in the welfare of their citizens, Justice Powell's dissent quotes *Simon v. Eastern Kentucky Welfare Rights Organization*:[76] "The necessity that the plaintiff who seeks to invoke judicial powers stand to profit in some *personal interest* remains an Art. III requirement."[77]

Whatever one may think about the way in which the Court handles conflicting estate tax claims, one thing is clear: all of the Justices agree on the fundamental distinction between the rights of private beneficiaries and those of governments. Only a threat to the state's real interest in protecting its revenues can rise to the dignity of a case or controversy sufficient to prompt the Court to exercise original jurisdiction. Unless a state's pecuniary stake is threatened, there simply is no dispute — however much a state may be concerned about the multiple taxation of its domiciliaries — that warrants Supreme Court intervention. The line of demarcation that separates fiscal concerns from the more nebulous type of interest Currie hypothesized could hardly be clearer.

There is, then, an obvious qualitative difference between a state's real interests, which — like those that prompt boundary disputes[78] and disagreements about water rights[79] — are sufficiently concrete to trigger the Court's original jurisdiction, and those desires states are said to have in effectuating their policies in conflicts cases. The wish to apply forum law (if states in fact have such wishes) is too insubstantial to qualify as an interest sufficiently worthy of protection to confer upon a state the status of a real party in interest. Nor are the cases dealing with escheat and estate taxation the only ones to distinguish between real and spurious interests. The Supreme Court, on several occasions,

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[76] 426 U.S. 26, 39 (1976).

[77] *California*, 457 U.S. at 170 (emphasis added).

[78] *See, e.g.*, Nebraska v. Iowa, 406 U.S. 117 (1972); Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657 (1838).

[79] *See, e.g.*, Arizona v. California, 373 U.S. 546 (1963); Kansas v. Colorado, 185 U.S. 125 (1902).

has rebuffed a state's attempts to press claims on behalf of its citizens[80] unless the state is in fact suing to protect its own proprietary interests.[81] Accordingly, however deeply states may be concerned about the well-being of their citizens and the policies of the laws enacted to promote their welfare, in the event of a conflict such concerns are too insubstantial to compel a resolution on the federal level.

II. CURRIE'S GOVERNMENTAL INTERESTS

As is apparent, the same word, "interest," has been used to describe two entirely different types of governmental concerns. One type is weighty enough to prompt the Supreme Court to assume its role as the ultimate arbiter in our federal system; whereas the other is too trivial to warrant the exercise of original jurisdiction. Even if states should be preoccupied with the application of their laws in interstate cases, such concerns are clearly of a lower order than proprietary interests. Since mere choice-of-law issues fail to spur into action the supreme authority charged with safeguarding federalism, it is fair to ask whether they do in fact present a clash of governmental interests.

Currie envisaged the states' desire to vindicate the policies behind their laws as an important governmental endeavor, a matter of high politics. In his words, the

> assessment of the respective values of the competing legitimate interests of two sovereign states, in order to determine which is to prevail, is a political function of a very high order. This is a function that should not be committed to courts in a democracy. It is a function that the courts cannot perform effectively, for they lack the necessary resources.[82]

According to Currie, the states' interests in effectuating their policies are of such importance that not even the Supreme Court is equipped to resolve choice-of-law problems. He said:

> We should put aside, also, any primary reliance on federal judicial power. This means, first of all, that we should not expect the United States Supreme Court, in reviewing decisions of state courts, to resolve conflicts such as these . . . . The considerations involved in a resolution of truly conflicting interests of different states are . . . not merely "economic and sociological" (which might lead us in these days to contemplate their eval-

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[80] *See, e.g.*, Oklahoma *ex rel.* Johnson v. Cook, 304 U.S. 387 (1938); New Hampshire v. Louisiana, 108 U.S. 76 (1883).

[81] *See, e.g.*, South Dakota v. North Carolina, 192 U.S. 286 (1904); Pennsylvania v. The Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518 (1851).

[82] B. CURRIE, *supra* note 17, at 182. *See also id.* at 272.

> uation by the courts), but political (which should make us realize at once that the courts should have nothing to do with them).[83]

These are astonishing propositions, considering that in border disputes, as well as in escheat and estate tax cases —when there can be no doubt about the reality of the governmental concerns at stake — the Court has never hesitated to tell the contending states whose interest is to prevail. While controversies concerning such matters as territorial integrity and revenues affect the states directly, in ordinary conflicts cases individuals rather than governments bear the brunt of losing. Yet if, in a federal system, the interests of states do in fact clash, who is to resolve the conflict but the federal judiciary? How can it be said that the Supreme Court, the ultimate arbiter of states rights, is not equipped to perform such a function?[84]

Currie, after all, recognized that the Court "in the exercise of its original jurisdiction over controversies between two or more states, . . . sits in judgment *not merely* on the 'interests' of the states as they are invoked in private litigation but on the rights and duties of the states as political entities."[85] *A fortiori*, the Court should be able to cope equally well with a rather more ephemeral species of interest. Currie implicitly acknowledged this inconsistency, but he failed to deal with it in a convincing fashion. He took the position that when the Supreme Court exercises its original jurisdiction to resolve disputes between states, it does so

> as a matter of sheer necessity. Unless the jurisdiction is to be abdicated, the case must be decided . . . . No such necessity dictates the development of criteria for choice between the interests of two or more states in private litigation . . . .[86]

This statement in effect concedes that no pressing need exists for a neutral tribunal to adjudicate the conflict between the kind of interests Currie hypothesized. Rather, as he observed, each state is free to resolve the conflict by applying its own law.[87] Such freedom implies the power of each state to subvert the interests of any other; a conclusion that is tolerable only if the interests at loggerheads are too trivial to arouse the states' susceptibilities. Yet Currie refused to acknowledge explicitly that some interests are more real than others; he simply left "aside such questions as jurisdiction to tax, or to escheat, although the

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[83] *Id.* at 124.
[84] *Id.* at 272.
[85] *Id.* at 273 (emphasis added).
[86] *Id.*
[87] *Id.* at 273-74.

concept of governmental interest has played an instructive part in the determination of such questions."[88] He did, however, obliquely touch upon the distinction drawn by the Supreme Court in a related context. A footnote acknowledges that federal-state conflicts "often involve the corporate, or public, interests of government, whereas conflict-of-laws cases . . . involve governmental interests *only* as they are reflected in the outcome of private litigation."[89]

Having sensed the distinction between real and spurious interests, Currie swept it under the carpet, even though he considered the avoidance of issues as a cardinal sin.[90] His disciples have taken a similar hands-off attitude. But at least one of them is aware that the word "interest" is used to connote two entirely different ideas. Thus Sedler concedes that "a conflicts case admittedly does not involve a direct conflict between states in the same manner as a boundary dispute or a dispute over spheres of interest."[91] According to him,

> interest analysis is not intended to turn conflicts law into a public matter . . . . While a state as such may indeed have an interest in the outcome of litigation between private parties, the premise of interest analysis . . . is *not* that the purpose of conflicts law is to advance the state's governmental interest.[92]

He further admits that "Currie perhaps put too much emphasis in some places on the interest of the state as such in having its law applied . . . ."[93] Moreover, Sedler takes issue with the proposition that the weighing of interests is a political function that should not be committed to courts in a democracy,[94] noting that "perhaps Currie somewhat overstated the case."[95] And yet, even Sedler apparently cannot make do without the needlessly confusing[96] word "interest"; in fact he still speaks of "*governmental* interests."[97]

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[88] *Id.* at 192.

[89] *Id.* at 599 n.47 (emphasis added).

[90] *Id.* at 436.

[91] Sedler, *supra* note 8, at 191.

[92] Sedler, *Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the 'New Critics'*, 34 MERCER L. REV. 593, 636-37 (1983) (emphasis in original).

[93] *Id.* at 637.

[94] *See supra* text accompanying notes 82-83.

[95] Sedler, *supra* note 92, at 637.

[96] Weintraub, *A Defense of Interest Analysis in the Conflict of Laws and the Use of that Analysis in Products Liability Cases*, 46 OHIO ST. L.J. 493, 495 (1985).

[97] "[I]t is not rational to make choice of law decisions on the basis of a priori rules which are based solely on the factual connection between a transaction and a state and which ignore entirely policies and governmental interests." Sedler, *supra* note 13, at

III. The Semantic Trap

To use the same word to convey two entirely different meanings hardly advances analysis. How could a writer of Currie's acumen fall into such a semantic trap? The only one to offer an explanation for such careless terminology is Cavers, who wrote:

> As I see it, Professor Currie has felt a need for a word in which to embody a conclusion that the purposes of a statute or common-law rule would be advanced by its application to a particular set of facts. He has used the word "interest" to meet that need. Since the rule emanates from the state, I believe the rule's purposes may reasonably be ascribed to the state . . . .[98]

Although Cavers had misgivings about the term, he believed that one could reasonably attribute to a state a desire to effectuate the purposes of its laws, and added: "To identify that desire in such a situation by modifying 'interest' by 'governmental' or 'state' does not seem to me inapt."[99] But a mere "desire" — foreign authors speak of a *volonté d'application*[100] — is of course a far cry from what is at stake when governments quarrel over territory or revenues. As Cavers noted, the term interest is "not without its hazards"[101] because it suggests that a vague wish is somehow "comparable to the state government's interest in the achievement of public objectives it is actively pursuing or would vigorously defend."[102]

It is regrettable that even scholars who, like Cavers, appreciate the difference between real interests and those hypothesized by Currie are nonetheless sanguine about the semantic confusion that inevitably results when the same word does double duty. Mischief is bound to result from labeling fiction as fact. On countless occasions, judges mindlessly utter the word interest,[103] and the "misleading air of substantiality . . .[it] exudes"[104] continues to delude courts and scholars. The Supreme Court, whose case law so clearly distinguishes between real and spurious interests, keeps using this modish catchword indiscriminately in choice-of-law and jurisdiction cases;[105] and the Justices' ritual incan-

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[98] D. Cavers, *supra* note 30, at 100.

[99] *Id.*

[100] *See* Gothot, *Le renouveau de la tendance unilatéraliste en droit international privé* (pt. 1), 60 Revue Critique de Droit International Privé 3, 27 (1971).

[101] D. Cavers, *supra* note 30, at 100.

[102] *Id.*

[103] *See supra* text accompanying notes 3-6, 10-12, 14-16.

[104] D. Cavers, *supra* note 30, at 100.

[105] *See supra* notes 22-23.

tations bestow an aura of reality upon that figment of the legal imagination. Nor does it help that Chief Justice Rehnquist occasionally, though not consistently, puts the term between quotation marks.[106] Such adornments do not sufficiently apprise the unsuspecting reader of a distinction that escapes even the cognoscenti.

No wonder that by now Currie's terminology has become so much a part of the conflicts vocabulary that hardly anyone feels the need to question its reality or meaning. Although it is devoid of content, the jargon he propagated is pernicious because it carries a heavy ideological freight. It reflects a conflicts philosophy premised on a Hobbesian state of nature;[107] a philosophy that is antithetical to the spirit of a discipline that deals with interstate and supranational transactions. No one has been blunter than Currie about the incompatibility of governmental interests with the values of simplicity, predictability, uniformity, and equality.[108] His work shows how the preoccupation with the wishes of sovereigns inevitably distracts from the essential purpose of the conflict of laws, that is, the realization of interstate justice.[109]

In truth, however, as Story realized, the law of conflicts does not deal with squabbles between sovereigns. Instead of resolving battles royal, it "is chiefly seen and felt in its application to the common business of private persons, and rarely rises to the dignity of national negotiations, or of national controversies."[110] If he was right, the cant currently affected by courts and conflicts scholars cannot but distort our perspective. George Orwell pointed out that "if thought corrupts language, language can also corrupt thought."[111] Once we think in terms of prerogatives, rather than private rights and duties, all "commands of the sovereign, whatever their content may be, will . . . appear . . . to be of nearly equal weight . . ."[112] At that point, we are left with a conflicts law that is as parochial as it is barren of substantive values. To forestall further deterioration of our age-old discipline, we would do well to

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[106] *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 822 (1985); Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 775, 776 (1984); Thomas v. Washington Gas Light Co., 448 U.S. 261, 292, 296 (1980) (Rehnquist, J., dissenting).

[107] Von Mehren, *supra* note 5, at 94.

[108] *See* B. CURRIE, *supra* note 17, at 707-09.

[109] *See id.* at 104, 133, 153.

[110] J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS 11-12 (2d ed. 1841).

[111] G. ORWELL, *Politics and the English Language*, in THE ORWELL READER 355, 364 (1956).

[112] Bodenheimer, *supra* note 1, at 64.

heed Bodenheimer's admonition and to direct our attention to "the role which *justice* plays in the administration of the law."[113]

[113] *Id.* (emphasis in original).