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THE VERDICT OF QUIESCENT YEARS: MR. HILL AND THE CONFLICT OF LAWS

BRAINERD CURRIE†

Not lightly vacated is the verdict of quiescent years.

LUCAS*

PROFESSOR ALFRED HILL recently weighed some ideas about conflict of laws advanced by this writer and found them wanting.¹ His critique seems to require an answer, though I approach the task with some reluctance. I do not relish the defensive attitude that is inevitable in responses to criticism; I do not care for the excessive use of the first person singular that is unavoidable in such discourse except by resort to more distasteful alternatives. Moreover, in this instance I lack spirit for the kind of thrust and parry that sometimes characterizes such professorial encounters. I have no zeal to mount my typewriter and charge into the fray. The truth is that I am delighted that so competent a scholar as Professor Hill has taken note of what I have had to say, and has taken the trouble to articulate and publish his disagreement. In his negative reaction I am sure he is by no means alone, but others have, for the most part, been content simply to disagree and let it go at that. I welcome Mr. Hill's critical analysis; it is better to die by the sword than to be ignored into limbo.²

Mr. Hill's analysis is responsible, informed, and fair. His discussion is free from personalities in the invidious sense. He very courteously gave me a copy of the manuscript prior to publication; not only so, but we spent a full day discussing it together, with the result that some misunderstandings were clarified and (I believe) he modified his original reactions to some extent. It is perfectly clear that he is interested in sound legal scholarship rather than in scoring points in an academic fencing match. I hope that in this response I can maintain the same level of objective discussion.

A prefatory word about my role as a conflict-of-laws pundit, as I conceive it: People doubtless write law-review articles for a variety of reasons. I do so, primarily, as a means of working through problems that arise in the teaching

† Professor of Law, The University of Chicago.

* This is a favorite quotation of my colleague, Professor Jo Desha Lucas. After extensive joint and several inquiry, we have been unable to determine its provenance. Until some kind reader identifies it, it seems only reasonable to attribute it to its proximate source.

¹ Hill, *Governmental Interest and the Conflict of Laws—A Reply to Professor Currie*, 27 U. CHI. L. REV. 463 (1960) (hereinafter cited by page number only).

² In view of what is to come, it is perhaps well to state here that I have no empirical data to support this proposition.

of law-school courses. I do not conceive of myself as a pamphleteer, a crusader, a reformer. I seek understanding. One hopes, of course, that what one writes may be of help to the courts as they struggle with knotty problems; that it may be of help to advocates as they argue their cases; that it may provide insight for students, and stimulate them to think along what one believes to be constructive lines. One hopes, in a rather abstract and skeptical way, that one may thus ultimately have some influence for improvement of the administration of justice. Because of such background hopes, I sometimes tend to write as if I were advocating a program for immediate action; but I have no delusions on that score. When I say that "We would be better off without choice-of-law rules"³ I state a conviction; I do not, however, "take the helm while tossing overboard the compasses, sextants, and other navigational aids which centuries of effort have devised."⁴ I am not a man of action; I am a classroom man. My convictions are published so that people like Mr. Hill can cut them to pieces. If anything remains to influence the growth of the law, that will be gratifying. In the meantime my primary purpose will have been accomplished: so far as I am concerned I can teach conflicts more effectively, with more insight, and with more integrity.

I began teaching conflicts in 1946, without the dubious advantage of having studied the subject in law school. My experience during the following decade must have paralleled that of almost every newcomer to the subject: it is indeed a field of sophism, mystery, and frustration. Time after time the courts have refused, with apparent perversity, to decide according to the rules in the book.⁵ What motivates them to do so? How is one to predict their behavior? On the other hand, the courts oftentimes applied the rules literally and blindly, without regard to results that were seemingly indefensible. As others have done, I found inspiration in the writings of Cook⁶ and Cavers,⁷ as well as of others whose influence has previously been acknowledged. Yet my troubles persisted. In particular, I found students quite unreceptive to the Cavers approach, for reasons which he himself has succinctly stated.⁸

In 1957-58 I enjoyed, at the Center for Advanced Study in the Behavioral Sciences at Palo Alto, what some unidentified genius has called "the leisure of the theory class." I regarded my troubles with conflict of laws as sufficiently

³ *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 177; Hill at 463.

⁴ P. 485.

⁵ "Why does a court engage in this silly kind of enterprise—localism without purpose?" Paulsen & Sovern, "Public Policy" in *the Conflict of Laws*, 56 COLUM. L. REV. 969, 971 (1956).

⁶ COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* (1942).

⁷ Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933).

⁸ *The Conditional Seller's Remedies and the Choice-of-Law Process*, 35 N.Y.U.L. REV. 1126, 1139 n.34 (1960).

important to justify the devotion to them of this rare opportunity to spend a year in undistracted reflection. The outcome was the series of articles discussed by Mr. Hill. As he correctly states, the earliest of the articles laid down the basic lines of the analysis. Later articles have in the main adhered to the fundamentals, with some modification and elaboration.⁹ It remains to be seen how well the thesis can be defended against Mr. Hill's attack.

I

Mr. Hill divides his criticism into three main parts,¹⁰ the first of which is entitled "The Purported Demonstration of the Inadequacy of the Traditional System." Here, I am sorry to say, I think Mr. Hill has constructed a straw man to be the target of his destruction. He attributes to me a purpose to demonstrate how formal choice-of-law rules *characteristically* operate,¹¹ and demolishes any such demonstration by observing that no empirical data are adduced to indicate the relative frequency with which the rules of the system are applied to give undesirable results. I can only reply that I have no such purpose; the purpose was rather to take the system at its face value, and determine what results it would produce if its rules were faithfully and consistently applied. That the undesirable results thus indicated were "characteristic" of the operation of the rules in real life I did not assume; on the contrary, I said—and Mr. Hill quotes the passage¹²—"A sensitive and ingenious court can detect an absurd result and avoid it; I am inclined to think that this has been done more often than not and that therein lies a major reason why the system has managed to survive."¹³ As Mr. Hill noted, I also spoke of the "escape devices" available to the court desirous of manipulating the system to avoid absurd results.¹⁴ Mr. Hill regards these as "extraordinary concessions"¹⁵ by a critic of the traditional system. They do not seem to me to be extraordinary at all. They belong to our common fund of knowledge about the system; my point was, and is, that "it is a poor defense of the system to say that the unacceptable results which it will inevitably produce [if it is taken at face value and the rules are faithfully and consistently applied] can be averted by disingenuousness if the courts are sufficiently alert."¹⁶

Mr. Hill's interest in empirical data is understandable in light of the modern tendency of legal research to be fact-oriented—a tendency with which I have

⁹ I cannot entirely agree with all the characterizations suggested by Mr. Hill in n.48, p. 472; but a recital of these minor differences of opinion would be tedious even to the hypothetical reader who may be interested in the substantive issues involved in *Hill v. Currie*.

¹⁰ P. 465.

¹¹ Pp. 463, 473 (the emphasis is his).

¹² P. 469.

¹³ *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 175.

¹⁴ Pp. 468–69.

¹⁵ P. 469.

¹⁶ *Supra* note 13, at 176.

no quarrel. The faculty to which I belong is perhaps distinguished by its enthusiasm for the value of empirical investigation. That type of research has not, however, rendered legal analysis obsolete. There are problems that can be resolved only by factual investigation; as a rule, however, the problem can be stated only by means of legal analysis.

In my presentation of the problem I did not employ factual data on the incidence of the various type-cases, nor did I count the number of times that courts reached the indicated result as compared with the number of times they avoided it by manipulating the system. Instead I used the device of the hypothetical case. This procedure seems to distress Mr. Hill, but it is surely not lacking in respectability. It is familiar enough to the classroom-oriented writer. When the *Palsgraf* case¹⁷ is reached in the course on torts, the instructor is likely to put some such problem as this: A box lies in an alley. A truck-driver acts in such a way as to create an unreasonable risk of harm to the property interest of the owner of the box. Unknown to the truck-driver, a small boy is playing inside the box, and is injured. Is the driver liable for the injury to the boy? No one asks how often this has happened. There need only have been one case of a real boy in a real box; indeed, if the instructor is sufficiently imaginative—and imagination in the construction of hypothetical cases has traditionally been a mark of the superior instructor—there need never have been a real boy in a real box at all. The imaginary case serves to test the doctrine. It might, indeed, be useful or at least interesting to know the magnitude of such occurrences, so that the economic and social impact of the doctrine might be judged. But the empirical problem does not present itself until it is revealed by analysis.

It happens that in conflict of laws it is possible, given certain assumptions, to state all possible hypothetical cases. The creative imagination that ordinarily goes into devising ingenious variations is not required. All that is necessary is a rather pedestrian tabulation, according to quasi-mathematical principles, of the possible combinations of factors assumed to be relevant variables. This procedure may not be possible in any other area of the law. At any rate, the tables that appeared in the early articles—tables that Mr. Hill treats with more kindness than some critics¹⁸—are nothing more than enumerations of the full range of hypotheticals. Nothing is assumed or implied as to the probable frequency of the various cases, except in a few instances where a common-sense judgment may be made as to the probabilities—e.g., the likelihood that a particular combination will occur may be lessened by the fact that in normal cir-

¹⁷ *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928).

¹⁸ They were lampooned in Horowitz & Netterville, *Unprivileged Refusal to Reap Where One Has Not Sown*, 12 J. LEGAL ED. 201, 204-05 (1959), and numerous complaints concerning them have been brought to my attention. I regard them as an aid to analysis; but, of course, to the extent that they serve as such, they require thought. Thus they are, naturally, objectionable. Mr. Hill has voiced no such objection; he merely wants statistics in addition.

cumstances service on the defendant cannot be perfected by the court designated as forum; or it may be assumed that, when parties in different states are negotiating by correspondence, it is *a priori* as likely that the acceptance will be posted in one state as in the other. Mr. Hill, I believe, understands this fully, though he inaccurately refers to the method as "statistical."¹⁹ He simply feels that the infirmities of the system cannot be established without factual data to supplement the analysis.

Suppose that a married woman resident in Maine, where the disabilities of coverture have been removed, contracts to guarantee her husband's obligation to a Massachusetts creditor. The contract is "made" in Massachusetts, and the creditor's action is brought there. Massachusetts law provides that married women may not bind themselves for the debts of their husbands. Has any instructor in conflict of laws ever failed to put to his class this variation of the facts in *Milliken v. Pratt*?²⁰ Has anyone ever hesitated to do so because of ignorance as to the frequency with which such a case may arise? Is it not enough, for purposes of analysis, that the case is not impossible, just as the boy in the box is not impossible? I do not know how often the configuration has arisen; one may guess that it is relatively rare, since it may be that the Massachusetts creditor would require a great deal of luck to effect service of process on the nonresident defendant in Massachusetts. Further, I do not, of course, know whether, in such cases as have arisen, the courts have followed the book and applied the law of the place of contracting to free the emancipated married woman from her honest obligation, or whether they have more or less ingeniously contrived a way to avoid that result. I know only that such a combination of facts may arise, and that if it does the system directs that the court render an absurd judgment.

At the risk of being branded a reactionary, I will go farther and say that I do not particularly yearn to know either the frequency of such cases or the figures as to their disposition. This would be interesting information, and it would no doubt provide convincing support for criticism of the system. The question, however, is whether its contribution to our appreciation of the problems of conflict of laws would be sufficient to justify the cost of obtaining it. A substantial foundation grant would be required to finance the investigation, and I, for one, do not feel in position to write the brief justifying the application. Study of appellate cases would not suffice; there would have to be study of the records of trial courts, without appropriate indexing aids; I would not be equipped for the task, and I think I could better spend my time otherwise. If there are others who regard this kind of research as fruitful and necessary, I wish them well; it's just not my dish of tea.

Perhaps it was inadvisable to speak of the unsatisfactory results in the

¹⁹ P. 471.

²⁰ 125 Mass. 374 (1878). See *Married Women's Contracts*, 25 U. CHI. L. REV. 227, 238 (1958).

hypothetical cases in terms of "cost"; yet Mr. Hill's exception to the mode of expression strikes me as a trifle solemn. The expression is metaphorical, in any event; even if empirical data were available, to speak in terms of costs would be to employ a figure of speech. When one can show, as in the case of married women's contracts, that application of the law of the place of contracting subverts domestic policy without advancing foreign policy in four of the fourteen possible cases, and subverts foreign policy without advancing domestic in two additional cases,²¹ one has not, to be sure, said anything very meaningful about the cost of the system in any literal sense; but if the traditional role of the hypothetical case has any significance, one has said something meaningful about the way in which the system regards state interests. May it not be said fairly, if not with literal precision, that the price of uniformity is the sacrifice of state interests in nearly half of the possible cases? If not, in the absence of supporting data, it seems to me that we shall have to avoid such statements as that "eternal vigilance is the price of liberty."

Mr. Hill is even more unhappy about the treatment of *Grant v. McAuliffe*²² than about the treatment of *Milliken v. Pratt*. First, he is unhappy about the candid resort to fiction.²³ With respect to this precise count of the indictment, my only defense, perhaps, is that the law has always made use—profitably, for the most part—of fiction. With respect to the implications of the charge, more will be said in due course.

Next, Mr. Hill suggests that it is "arguable" that the resort to fiction amounts to "nothing more or less than resort to familiar choice-of-law rules which . . . [Currie] believes advance the respective interests of California and Arizona more effectively in this instance than the *Restatement* rule";²⁴ and he regards my definition of the situations in which Arizona may assert an interest in the application of its law as extreme and artificial.²⁵ Here we have two instances of either misunderstanding on Mr. Hill's part or failure of communication on mine. It should not be impossible to remove the grounds for disagreement in such instances.

It is true that many of the "connecting factors" that are familiar in choice-of-law rules will be found relevant in determining the extent of a state's interest in the application of its law and policy. It does not at all follow that the utilization of such factors means that choice-of-law rules are being utilized. A choice-of-law rule purports to state the course that should be followed by *any* court; when the same factor is utilized in defining a governmental interest, we are concerned not with what every court should do, but with what will advance

²¹ See *Married Women's Contracts*, 25 U. CHI. L. REV. 227, 242 (1958).

²² 41 Cal. 2d 859, 264 P.2d 944 (1953); Currie, *Survival of Actions*, 10 STAN. L. REV. 205 (1958); Hill at 469-73.

²³ P. 470.

²⁴ P. 470. He makes a similar argument at p. 480.

²⁵ Pp. 470-71 n.45.

the interests of a particular state. Thus the *Restatement* says, in effect, that whether a cause of action for personal injuries survives the death of a tortfeasor shall be determined according to the law of the place of harm, irrespective of other considerations, and by any court whatever.²⁶ I concede California the right, if it so desires, to assert an interest in providing compensation for the injured plaintiff notwithstanding the death of the tortfeasor when the injury occurs in California; but this is not a choice-of-law rule: I would not expect Arizona to apply the California rule in those circumstances, where to do so would interfere with Arizona's (assumed) policy of protecting the Arizona estates of deceased Arizona tortfeasors. If this is not plain enough, illustrations could be multiplied indefinitely.

The second failure of communication is not so easily explicated. Perhaps it will help if I am permitted to recount a bit of quite personal history. As the article on *Grant v. McAuliffe* was originally written, I recognized only one basis for an interest on the part of Arizona in applying its protective policy: the domicile of the deceased tortfeasor in that state. The Article Editor of the *Stanford Law Review* at the time, Mr. William W. van Alstyne, took strong exception to this position, arguing that Arizona might legitimately assert an interest when property of the decedent was being administered in the state. I resisted his suggestion, arguing that such a position would be inconsistent: if Arizona asserted an interest where its own domiciliaries were concerned, it should logically and consistently acknowledge the interest of another state in which the decedent was domiciled. Mr. van Alstyne commendably persisted in his objection, and in the end convinced me that he was right. It was not for me to judge whether the claims of Arizona were logical and consistent; it was for the Arizona courts to declare the interests of the state, and if their determination could not be stigmatized as constitutionally unreasonable, it must be accepted. This is one of the many instances in which I gratefully acknowledge, with pride in the tradition, the contribution of the student editorial process.

From this experience I learned an important point, to which I have tried to adhere consistently (without complete success): Determination of the policy expressed in a state's law, and of the state's interest in applying that policy to cases involving foreign elements, is not distinctively the task of the conflict-of-laws technician. It is the task of the specialist in the type of domestic law involved, e.g., the law of torts, or contracts, or mortgages.²⁷ Ultimately, it is for determination by the state's courts in the light of all the expert knowledge that can be brought to bear. The distinctive task of the conflict-of-laws technician (and it is one of diminishing importance) is to take the state court's determination of state policy and interest as given, subject to constitutional limitations, and then to determine how that interest is to fare in competition with (or in the

²⁶ RESTATEMENT, CONFLICT OF LAWS § 390 (1934).

²⁷ Cf. Currie & Lieberman, *Purchase-Money Mortgages and State Lines*, 1960 DUKE L.J. 1, 55.

absence of competition with) other interests. Of course, explicit determinations of policy and interest in the interstate context are rare. Thus it is necessary for the technician to *postulate* state policies and interests. This he does by bringing to bear what little he may be able to learn about the history and purpose of the domestic law of torts, or contracts, or mortgages. *All of his conclusions as to such matters are tentative, and subject to modification on the advice of those who know better.*

Especially in the early articles, the tactic was deliberately adopted of conceding the state the widest reasonable latitude in asserting an interest in the application of its policy. The reason was that it seemed useful to determine what the ultimately selfish state would do, acting solely in furtherance of its short-range interest in connection with the specific law involved, with a view to examining the extent to which the state did not act in that way, and inquiring into the reasons for its failure to do so.²⁸

As a result, it is not surprising that the early articles conveyed the unintended impression that they called upon the state courts to define state interests in the broadest terms permissible under the Constitution, without regard to the long-range interest of the states, and then to apply local law inflexibly in order to effectuate the immediate interests. That is the impression conveyed to Mr. Hill.²⁹ But by the time Mr. Hill wrote his article it should have been abundantly clear that this was not the thesis. The article on the *Romero* case³⁰ recognized that delineation of the scope of a state's interest is a task of judicial statesmanship, and that a court may be well advised to consider the conflict with foreign interests that may result from a too selfish and provincial determination. For obscure reasons Mr. Hill seems to think that what was said in the *Romero* article does not count, or at least is not as important as the early articles. Almost one detects a feeling that there can be no atonement for limited vision in the early stages of development. I trust there is no such principle, because in articles written since Mr. Hill's I have made further changes, and I anticipate more to come in the future.

Mr. Cavers has been more charitable. Regarding the *Romero* article as a major modification of the original emphasis on state "egocentricity," he now finds it "rather difficult to differentiate" my views from his own.³¹ In a sense Mr. Cavers is right about the shift in emphasis; at least, after working through the *Romero* problem, I had the distinct feeling of having materially clarified my understanding of the problem. It is fair to add that the mellower view was

²⁸ This approach was rather clearly stated in the first article, *Married Women's Contracts*, 25 U. CHI. L. REV. 227, 237 (1958).

²⁹ Pp. 470-71 n.45.

³⁰ Currie, *The Silver Oar and All That: A Study of the Romero Case*, 27 U. CHI. L. REV. 1 (1959).

³¹ Cavers, *The Conditional Seller's Remedies and the Choice-of-Law Process*, 35 N.Y.U.L. REV. 1127, 1138 (1960).

contained, if only in seed form, in the early articles,³² although I doubtless wrote for the most part as if I were carried away by the indubitability of the interests as I had inexpertly defined them for formal purposes.

To return to Mr. Hill and *Grant v. McAuliffe*: I do not insist that the Arizona court would be derelict in its duty if it were not to apply the Arizona rule of abatement in every case in which either (a) the decedent was domiciled there or (b) property of the decedent is being administered there. Clearly enough, the article itself recognized the possibility that an Arizona court might, in the exercise of moderation, limit Arizona's interest to the one situation or the other.³³ Moreover, if Mr. Hill means to suggest, as I think he does, that a discriminating Arizona court would be well advised to apply its rule only where those interested in the estate were actually within the protection of Arizona's policy, I have no basic quarrel with him; I only anticipate that the complications of administering the rule in such a particularized way would lead the court to frame its definition more broadly—a technique that is constitutionally sanctioned,³⁴ though of course “it does not follow that this is necessarily the basis to be employed in a critical study of the methods by which governmental interests may be rationally advanced.”³⁵ Indeed, I can imagine an enlightened Arizona court's holding that its abatement rule is only a relic of the past that no one has taken the trouble to dispose of, and that the rule states no “real policy” (a concession in the original article upon which Mr. Hill seizes with apparent relish). In that event, I would expect the enlightened court not only to refuse to apply its law in a situation in which to do so would conflict with the policy of California, but also to overthrow the outmoded relic for domestic cases. If Arizona has no real policy of protection for the estates of deceased tortfeasors, there is no ground for thus curtailing its policy of requiring compensation for the injured. There is no reason why conflict of laws should provide a playground for timid reformers.

Mr. Hill regards it as a “curious fact” that “California fares better under the *Restatement* method than it does under . . . Currie's method—that is to say, the *Restatement* method yields results favorable to California in a higher number of possible cases. . . . But California policy would not suffer, despite this difference, if both states adhered to the *Restatement* rule. If, as . . . Currie believes, the value of a choice-of-law rule is to be measured by the consistency with which it advances governmental interest, it would seem that, in this instance at least, he has chosen an unfortunate example to illustrate the costs of the traditional method.”³⁶ In turn, I find this a curious argument. On what

³² See, e.g., *Married Women's Contracts*, 25 U. CHI. L. REV. 227, 240–41 (1958); *The Constitution and the Choice of Law*, 26 U. CHI. L. REV. 9, 83 (1958).

³³ Currie, *Survival of Actions: Adjudication versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205, 222 n.67 (1958).

³⁴ *Carroll v. Lanza*, 349 U.S. 408 (1955).

³⁵ P. 471 n.45.

³⁶ Pp. 471–72.

basis does Mr. Hill identify himself with California?³⁷ True, the discussion proceeds on the basis of a case decided by the California Supreme Court; but if we identify ourselves with Arizona rather than California, we find, of course, that, conversely, the governmental-interest analysis yields results favorable to Arizona in a larger number of cases than does the method of the *Restatement*.³⁸ If we attempt to take a detached viewpoint, not identifying ourselves with either state, we might say that the differences between the two methods cancel each other out. With the *Restatement* method, in the cases of true conflict of interests, the interest of State *C* prevails twice as often³⁹ as does that of State *A*. With the governmental-interest method, the interest of State *A* prevails twice as often as does that of State *C*. And who is to say which of these results is preferable?

The trouble is that in order to take a detached viewpoint we must establish ourselves on Cloud Nine, or some other place out of this world (which, in a

³⁷ The biographical sketch in the *Directory of Law Teachers* (1960) associates Mr. Hill with New York, Massachusetts, and Texas in addition to Illinois.

³⁸ The most convenient way of indicating the difference is to construct a table similar to Table 6 (10 STAN. L. REV. at 234), based on Table 7 (*id.* at 242). (The reader interested in the details of the analysis should refer to the tables cited.) Table 6 summarized the results of application of the place-of-injury rule; the following counterpart shows the results of each state's following the analysis in terms of governmental interests:

I. California interest advanced without detriment to Arizona interest.....	Case 2 (A C C C) Case 4 (C C A C) (2)
II. Arizona interest advanced without detriment to California interest.....	Case 12 (A A A C) Case 14 (A C A A) (2)
III. California interest advanced at expense of Arizona interest.....	Case 3 (C A C C) Case 6 (A A C C) Case 7 (C A A C) (3)
IV. Arizona interest advanced at expense of California interest.....	Case 5 (C C C A) Case 8 (C C A A) Case 9 (A C C A) Case 11 (C A C A) Case 13 (A A C A) Case 15 (C A A A) (6)
V. Neither interest affected.....	Case 10 (A C A C) (1)
VI. California interest impaired without advancing any Arizona interest.....	None

In the original Table 6 the cases were distributed as follows:

- I. Case 2 (one)
- II. Cases 12 and 14 (two)
- III. Cases 3, 5, 6, 9, 11, 13 (six)
- IV. Cases 7, 8, 15 (three)
- V. Case 10 (one)
- VI. Case 4 (one)

³⁹ In terms of the number of *possible* cases; not necessarily in terms of actual frequency.

way, is what the traditional system expects of us). The significant thing about the comparison of the results of applying the place-of-injury rule with those of employing the interest analysis is not that in the first California's interest prevails over Arizona's conflicting interest six times and Arizona's prevails only three, while in the second the proportions are reversed. That phenomenon is an incident of the structure of the particular problem, and there exist no scales in which to weigh impartially the desirability of the one result or the other. The significant difference lies in the fact that all the decisions indicated by the analytical method *make sense from the standpoint of the court that renders them*. There is no subordination of domestic to foreign policy; and, perhaps most significantly, there is no such stultifying decision as the *Restatement* calls upon the California court to render in the situation presented in *Grant v. McAuliffe* itself, subverting California's interests without advancing the interest of any other state.

It may help to bring the discussion back to earth if we speculate as to how Mr. Justice Traynor, author of the majority opinion in *Grant v. McAuliffe*, would respond to Mr. Hill's argument. As an associate justice of the Supreme Court of California he cannot, of course, detach himself from his duty to effect the policy of California, as he determines it, and so to apply California law to situations in which its application is necessary to effectuate California policy, subject to constitutional limitations. In effect, Mr. Hill would say to him: I urge adherence to the rule of the *Restatement*, and application of the law of the place of injury even in the *Grant v. McAuliffe* situation, since, however indefensible the result may be in that situation, the over-all result (if Arizona also adheres to the *Restatement*, and blindly sacrifices her own interests) will be that California interests will prevail over Arizona's in the greater number of possible cases of conflicting interests.

I doubt that Mr. Justice Traynor would be persuaded. The problem before him and his brethren in a case like *Grant* is to reach a rational and just result in determining the issue between the parties at bar. He has no way of knowing how California interests would fare if the principle urged by Mr. Hill were followed with respect to the many other matters covered by the *Restatement*. He can have no assurance that Arizona courts will really behave in the docilely eccentric way that Mr. Hill anticipates. The assumed prevalence of California interests is stochastic in the extreme. But above all, even if such cooperation by Arizona were assured, I think it highly unlikely that Mr. Justice Traynor would be willing to trade off the rights of the plaintiff in the case at bar in return for state policy gains in litigation between other parties. The court's responsibility is the judicial one of finding a rational and just result in the case before it, not the political one of furthering some transcendent objective, whether it be the more complete effectuation of California policy in cases brought in other states, or the attainment of uniformity of result wherever the case happens to be brought.

And what argument would Mr. Hill address to the Supreme Court of Arizona?

The value of a conflict-of-laws method is to be measured not by "the consistency with which it advances governmental interest"⁴⁰ in the abstract, but by the extent to which it helps the courts of a particular state to reach rational and just results in the cases that come before it, having regard to the policies expressed in the laws of that state and its interest in the effectuation of its policies.

Mr. Hill notes that I did not attack the results actually reached in *Grant v. McAuliffe* and *Milliken v. Pratt*.⁴¹ It is indeed true that I supported, and do support, the decision in *Grant v. McAuliffe*; but the implication that the existing system works well is untenable. The decision in *Grant v. McAuliffe* was in the teeth of section 390 of the *Restatement*; it was excoriated by a defender of the faith;⁴² it was reached by the narrowest of margins. The precedents being divided on the question of characterization, a sensitive majority was able to avoid the absurd result demanded by defenders of the faith by preferring a characterization different from that which had become orthodox—if you will, by manipulating the loose apparatus of the system in order to reach a result deemed desirable on quite independent grounds.

As Mr. Hill says, I did not explicitly indicate disagreement with the result in *Milliken v. Pratt*. That omission I now have the opportunity to rectify. The discussion must proceed on two levels, because on its actual facts the case is not the typical one in which there is a clear conflict of interests. When the case came to trial the Massachusetts statutes had been altered so as to remove the incapacity that was imposed on married women at the time of the transaction. In the former discussion this change in law was for the most part left out of consideration so that the typical case of a continuing conflict might be considered.

On the same assumption, that Massachusetts law at all relevant times imposed the incapacity, I suggest that the task of the Massachusetts court was, first, to determine the policy expressed in Massachusetts law. Assuming that the policy is found to be protection of a susceptible class (as was assumed before), the next step is for the court to determine what married women and what transactions fall within the scope of the policy: *i.e.*, in what situations the law must be applied in order to effectuate the legislative policy. At this stage the court may reasonably reach alternative results. It would be justified, as a constitutional matter, if it gave maximum scope to local policy by applying the law for the protection of all Massachusetts married women irrespective of other considerations. On the other hand, it might be well advised, and would be no less justified, if it gave the policy a more restricted scope. It might reason

⁴⁰ P. 472.

⁴¹ P. 473.

⁴² Sumner, *Choice of Law Governing Survival of Actions* 9 HASTINGS L.J. 128 (1958).

that, when a local married woman deals with a merchant of another state, in which the incapacity is not provided by law, the merchant is at a disadvantage, and insistence on the policy of protecting the married woman will create a conflict with the interest of the foreign state, disappointing the reasonable expectations of the creditor. The court might, therefore, define the scope of the state's interest more narrowly, and decline (in the absence of a clear legislative direction to the contrary) to apply the protective policy in this situation.⁴³ Note, however, that this result cannot be accomplished by adopting the rule that the law of the place of contracting is controlling. That rule would accomplish both less and more than is intended by such a line of reasoning. The place-of-making rule will catch the case of the contract made abroad by two Massachusetts domiciliaries; it will fail to give the foreign creditor the consideration intended for him where the acceptance is posted in Massachusetts. Moreover, it is not all foreign creditors who are entitled to this consideration, but only those who are accustomed to dealing with married women without worrying about questions of capacity; if the creditor's state has the same law as Massachusetts, there seems no reason to treat him differently from Massachusetts creditors.

If the Massachusetts court had formulated some such relatively narrow definition of local interests I would have no quarrel with it. It did not do so, however, but instead chose the place-of-making rule. In that light there is nothing good to be said for the decision. It is a precedent that has taught thousands of law students that the only consideration is place of making, tempered, perhaps, by "local public policy," and so has been a source of mischief.

If the Massachusetts law had not been changed, the best guess seems to be that the court would have held the law of the place of contracting "applicable," but would have declined to apply that law on grounds of "local public policy."⁴⁴ This brings us to the question of the decision as it was, on the facts as they were. The law of Maine, as the place of contracting, was held applicable, and no "local public policy" remained to obstruct its application. Mrs. Pratt was required to pay. The change of law intervening between the time of the transaction and the time of action was decisive. So long as we isolate the question of the "applicable law" from that of "local public policy" this interesting phenomenon may pass unnoticed. Yet if we realize that the question of policy is implicit in the question of applicability, we are brought face to face with a problem of retroactivity. A contract unenforceable when made became enforceable by virtue of a subsequent change in the Massachusetts statute. Before expressing an opinion as to the soundness of such a result, I need an answer to one question: Would the Massachusetts court have given retroactive effect to the new statute in a purely domestic case? If not (and there is at

⁴³ See *Married Women's Contracts*, 25 U. CHI. L. REV. 227, 240-41, 260-61 (1958).

⁴⁴ See *id.* at 229-30.

least a presumption against retroactivity for such legislation), then the decision in *Milliken v. Pratt* was wrong, because the statute should no more be given retroactive effect in a mixed case than in a domestic case.

II

Having satisfied himself that the foundations of the traditional system of choice-of-law rules are secure, Mr. Hill turns to criticism of the governmental-interest analysis, or the particular version of that analysis under consideration. The first phase of his discussion is concerned with three points, the first two of which have also troubled other critics of the method. These relate to the function of "weighing" or "balancing" conflicting state interests, and to the problem of the disinterested third state.

Mr. Hill is not far from the mark when he states that a judgment as to whether a particular function is judicial or legislative "is essentially a judgment as to the proper distribution of power in our society, and not susceptible of being proved or disproved."⁴⁵ We all agree that courts make law. Mr. Hill would also agree, I take it, that in our society there is some limit to the law-making powers of the judiciary. I shall not say that our problem here is to determine where the line is to be drawn: that is a perpetual problem, and it would be as futile as it is unnecessary to attempt to resolve it for present purposes. I shall not even assert that the weighing of conflicting governmental interests is peculiarly legislative in character; from a younger generation I have learned, better than I knew before, that in matters of conflict between state and national interests the courts have no practical alternative but to weigh and choose, and that the supremacy clause⁴⁶ does not provide a sovereign solution.⁴⁷ The problem with which we are here concerned relates to the function

⁴⁵ P. 476.

⁴⁶ U.S. CONST. art. VI, par. 2.

⁴⁷ See D. P. Currie, *Federalism and the Admiralty: "The Devil's Own Mess,"* 1960 SUP. CT. REV. 158. Cf. B. Currie, *The Constitution and the Choice of Law*, 26 U. CHI. L. REV. 9, 77 (1958).

The state-federal conflicts referred to are principally those arising from the negative implications of such constitutional grants of federal power as the commerce clause and the admiralty clause. In this they differ from interstate conflicts, which tend to be more explicit. The Supreme Court might have taken the position that the federal interest must prevail in every case, or, contrariwise, that the state interest must prevail in every case, in the absence of clear expression of the congressional will. The result would have been to leave state interests (or federal interests, as the case might be) at the mercy of congressional inertia, much as judicial restraint in conflict-of-laws cases leaves interstate conflicts not only unresolved but unattended by any interested and responsible body. That result would have been particularly unfortunate with respect to federal-state conflicts, which, especially as regards interstate commerce, often involve the corporate, or public, interests of government, whereas conflict-of-laws cases (as I define them: see *The Constitution and the Choice of Law*, 26 U. CHI. L. REV. 9, 51 n.179 (1958)) involve governmental interests only as they are reflected in the outcome of private litigation. Thus there is greater justification for judicial intervention to resolve such federal-state conflicts. Moreover, while the supremacy clause does not provide a sovereign solution, the ultimate paramountcy of national interests provides a guide for decision that is lacking where the competing interests are those of coordinate states.

of courts in true conflict-of-laws cases, *i.e.*, cases in which there is conflict between the interests of two or more coordinate states. If we confine the discussion to the problem thus limited, there is hope that the area of disagreement may be reduced.

Progress toward that goal may be facilitated by a reminder that my approach to the problem is that of a law teacher, not of an activist. Let me overstate the position in order to emphasize it: I do not *care* whether courts undertake to weigh and balance conflicting state interests or not.⁴⁸ They are subject to many temptations to do so; plausible apologies for their doing so can be formulated; and the total failure of Congress—the body expressly invested with power to resolve such conflicts—to exercise its power is no doubt unbearably frustrating to men of action. If the courts succumb to such forces I shall not join an appeal to the tumbrels and the guillotine. I shall, however, have problems as a law teacher. The courts are not likely to make explicit the considerations that motivate the choice between one state interest and another; indeed, they are not likely to marshal, or to ask counsel to brief, the “legislative facts”⁴⁹ on which alone an informed choice can rest. They are much more likely to continue to proceed, as they have done in the past, on the basis of intuitive or sketchily informed judgments as to what is best for the country at large, or the community of nations, and to rationalize the result in terms of juridical concepts.

Now, whatever else may be said on this subject, I refuse to pretend to my students that such rationalizations are meaningful. If students are to gain an intelligent appreciation of the reasons why courts decide as they do, and to be able to predict how they will decide in the future, they must certainly look behind such statements as that fraternal life insurance certificates are governed by the law of the state of incorporation because “entry into membership of an incorporated beneficiary society is more than a contract; it is entering into a complex and abiding relation”⁵⁰ And when we look behind, is it not idle and dishonest to pretend that what we find is legal reasoning in any of its characteristic forms? Underlying the *Bolin* decision I can find only this chain of reasoning: Fraternal benefit societies serve a useful purpose; as a practical matter they cannot operate at all unless on a uniform basis; such organizations are sufficiently democratic that the member does not need the protection his home state has sought to provide for him by law; therefore they should be allowed to operate in every state in accordance with the law of the state of

⁴⁸ The position is stated more moderately and more accurately in *The Constitution and the Choice of Law*, 26 U. CHI. L. REV. 9, 78 (1958); *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L. J. 171, 177.

⁴⁹ See Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75.

⁵⁰ *Sovereign Camp v. Bolin*, 305 U.S. 66, 75 (1938). See *The Constitution and the Choice of Law*, 26 U. CHI. L. REV. 9, 53 (1958); *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 177.

incorporation. This is not reasoning from precedent; this is not reasoning by analogy;⁵¹ this is not statutory construction; this is not constitutional interpretation. It is indistinguishable from the kind of reasoning to which the Missouri and Nebraska legislatures resorted in the enactment of their respective laws, although the conclusion agrees with that of only one of the two states. It is indistinguishable from the kind of reasoning to which the Congress would resort if it should give its attention to the problem. Whatever one may do with labels—whether we say that choosing on such a basis is a legislative function that courts should not perform, or whether we say that it exemplifies the judicial function at its sophisticated best—one thing must be clear: no system of rules for choice of law can possibly accommodate, or rationalize, or guide the process. If courts must resolve problems in this fashion, by all means let them do so; but let us not delude ourselves with any notion that we can control or predict the process by a juridical science of conflict of laws.

Let me retreat, now, from the extreme position and confess that, as one having some residual hope of contributing to the improvement of law administration, I *am* interested in whether courts “weigh” conflicting state interests or not. Naturally, a classroom analysis having no hope of recognition in the world of affairs would be unrealistic even by academic standards. Therefore I repeat that I believe courts should not attempt the weighing operation; that they are not equipped to marshal the facts necessary to inform their decisions in such a process; and that the choice between conflicting state interests should be left to Congress, to which it is expressly committed by the Constitution.

The driving force that leads people to construct systems of conflict of laws, or to call upon courts to weigh conflicting state interests, is a compulsive feeling that conflicts must not remain unresolved. Congress has never acted in such matters, and cannot be expected to act comprehensively with respect to them.⁵² The resulting situation is intolerable, especially in a federal union, where the power to resolve conflicts clearly exists. If they are not resolved, each state will effectuate its own interests so far as it can. The consequence will be that decision will vary according to the forum in which action is brought; an even more harrowing consequence will be that an attainable ideal will not be attained. Therefore, since Congress has not performed the function, the courts must do so by their own resources. I have been a victim of this compulsive feeling. As I reread the final paragraph of the article on *The Constitution and the Choice of Law*⁵³ I am rather painfully aware that its final form is quite different from the original, which deplored unresolved conflicts in a federal union and called upon those who waste their energies in scholastic disputations to turn instead to drafting legislation for enactment by Congress.

⁵¹ Cf. LEVI, AN INTRODUCTION TO LEGAL REASONING (1949).

⁵² See Hill at pp. 478–79.

⁵³ 26 U. CHI. L. REV. 9, 84 (1958).

Only after prolonged wrestling with the devil did I come to realize that, with respect to any proposed resolution of a conflict of state interests, it may be appropriate to ask whether the better course is to leave the conflict unresolved. For example, it may very well be that it is better to allow the state of employment and the state of injury to effectuate, so far as they can, their conflicting policies as to workmen's compensation than to have either Court or Congress determine which shall prevail; and that is in fact the situation in which Court and Congress have left the matter;⁵⁴ the Court by declining to "weigh" the conflicting interests and Congress by ignoring the problem.

Two things follow: (1) Unless we are overwhelmed by an immature fear of uncertainty, there is no good reason why the courts should rush in to fill the breach left by the inaction of Congress; and (2) while I have no more illusions than Mr. Hill as to the extent to which Congress will interest itself in the power it has not exercised for 170 years, it is not unreasonable to call upon Congress, rather than the courts, to resolve interstate conflicts in any critical situation in which resolution is required as an alternative to peaceful co-existence. It is not true, as Mr. Hill believes, that congressional action "to be adequate would have to take the form of a complete statutory system of choice of law."⁵⁵ Perish the thought!

In the same connection, as I reread the late Mr. Justice Jackson's magistral address on the full faith and credit clause,⁵⁶ I am surprised and strengthened by the extent to which my views on judicial activism in this context are derived from his. For example:

Certainly the personal preferences of the Justices among the conflicting state policies is not a permissible basis of determining which shall prevail in a case. But only a singularly balanced mind could weigh relative state interests in such subject matter except by resort to what are likely to be strong preferences in sociology, economics, governmental theory, and politics. There are no judicial standards of valuation of such imponderables. How can we know which is the greater interest when one state is moved by one set of considerations—economic, perhaps—to one policy, and another by different considerations—social welfare, perhaps—to a conflicting one?⁵⁷

And Mr. Justice Jackson had not despaired of the eventual assumption by Congress of at least some of its responsibility.⁵⁸

Mr. Hill's handling of this matter of the judicial function is deft and states-

⁵⁴ *Alaska Packers Ass'n v. Industrial Acc. Comm'n*, 294 U.S. 532 (1935); *Pacific Employers Ins. Co. v. Industrial Acc. Comm'n*, 306 U.S. 493 (1939).

⁵⁵ Pp. 478-79.

⁵⁶ *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1 (1945), reprinted in ASSOCIATION OF AMERICAN LAW SCHOOLS, SELECTED READINGS ON CONFLICT OF LAWS 229 (1956).

⁵⁷ Jackson, *supra* note 56, 45 COLUM. L. REV. at 28, AALS READINGS at 250.

⁵⁸ *Id.*, 45 COLUM. L. REV. at 5, 17, 21, AALS READINGS at 233, 237, 244.

manlike.⁵⁹ He does not accuse me of being one of those naive persons who fail to appreciate that courts do and must make political decisions. Instead he states my position accurately and happily,⁶⁰ and finds inconsistency between the opposition to weighing domestic and foreign interests and the wide latitude to make "political" decisions that is conceded to the courts in other matters, such as the delimitation of local interests. At this point, in the hope of reducing the area of disagreement, I presume to restate Mr. Hill's argument in a form which makes it, perhaps, more effective as criticism, and also makes it possible to answer the criticism more clearly.

Reformulated, the criticism would run thus: Currie denies the propriety of the court's "weighing" the interest of the forum state against that of the foreign state, primarily on the ground that this is a political function of a "very high order." Yet he concedes that, in determining what the policies and interests of the forum state are, the court not only may but should take into account the possibility that broad and provincial definitions may result in conflict with the interests of another state, and may properly adopt a moderate definition in order to avoid such conflict. Is not this process of definition in the light of foreign interests substantially the same as that involved in weighing interests? Has not the so-called "political" function of weighing simply been moved back a step, and given a different name?

There is a degree of force in such criticism. For purposes of the discussion let it be conceded that the difference is largely semantic: that in thus approaching the problem of defining domestic policies and interests the court must take into account "legislative facts" which it is not ideally equipped to assemble, and that its appraisal of those facts requires reasoning and judgment of the legislative type. But though the differences may be semantic, they are nevertheless of very great significance. The process of defining policy and interest is the process of construction and interpretation; the considerations actually motivating the court are likely to be made explicit, and legislative correction of the

⁵⁹ Readers are likely to be misled, however, by his reference to the fact that in most states judges are elected (p. 476). Surely he does not mean that popularly elected judges have greater freedom to make law than judges selected in some other manner. From conversations with him I know that he was troubled by my statement that the function of choosing between governmental interests "should not be committed to courts in a democracy." *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 176. He rightly concludes that this was intended to mean that the problem was one of separation of powers. P. 476. But the word "democracy" was there to be dealt with, and so Mr. Hill was impelled to remark that judicial legislation by elected judges "is not undemocratic in the sense that it is removed from popular control." *Ibid.* That, for what it may be worth, is a proposition that must be admitted.

⁶⁰ Pp. 276-77. I particularly appreciate his contribution of the term "indigenous interests." *Ibid.* This expression conveys well the important point that the local interests which a court should advance are the product of policies designed to regulate the domestic order, and not of a raw desire to subordinate the interests of foreigners to the selfish "interests," unrooted in domestic law and policy, of local people.

result is invited. By contrast, the process of "weighing" competing interests is likely to obscure the problem and the motivating reasons for the decision, and moreover to assume a mystical form that tends to paralyze the legislature.

Thus the Jones Act⁶¹ provides that "Any seaman who shall suffer personal injury in the course of his employment may . . . maintain an action for damages. . . ." Despite the generality of the act, it is not clear whether it should be applied in certain mixed cases, e.g., where a foreign seaman is injured aboard a vessel of bona fide foreign registry in an American port. If the Supreme Court were to hold, as it has been urged to do, that the law of the flag is determinative,⁶² the natural-law flavor of the decision would seemingly remove the matter to a plane beyond the reach of legislative rectification. This would be true whether in applying the rule the Court acted mechanically or because it believed, with Professor Hill, that choice-of-law rules aptly reflect governmental interests. Much the same effect would follow if the Court, after making explicit the conflicting governmental interests, were to "weigh" them against each other and pronounce that the American interest in providing a right of action as a means of providing a fund for reimbursement of medical creditors of the injured seaman is inferior to the interest of the foreign country in regulating the rights of the seaman and his employer. There is an aura of finality about such a judicial determination that inhibits legislative correction. Even Professor Freund, who early recognized that questions of full faith and credit involve conflicting state interests, doubted the power of Congress to define the effect of a state's law in other states in such a way as to conflict with past decisions of the Supreme Court.⁶³

Fortunately, the Supreme Court has adopted neither of these approaches in considering the applicability of the Jones Act to mixed cases. It has approached the problem as one of statutory construction, a process in which

⁶¹ 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1958).

⁶² Cf. RESTATEMENT, CONFLICT OF LAWS § 405 (1934).

⁶³ "Whether Congress could legislate under the full faith and credit clause to restore the practice adopted by the Louisiana courts and others [with respect to cumulative recovery of workmen's compensation] is, to say the least, doubtful. The constitutional power 'to prescribe the manner in which such acts, records, and proceedings may be proved, and the effect thereof' may well be thought to support legislation enlarging the compulsory area of full faith and credit beyond the bounds set by the present statute . . . ; but legislation withdrawing from the compulsory area what the Court has held encompassed by the constitutional mandate may stand on a different footing." Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210, 1229-30 (1946). I would formulate the distinction differently. To the extent that the Court has found that a state must give full faith and credit to the law of another when the forum state has no interest in the matter, congressional action to the contrary is foreclosed since here the constitutional provision is self-executing. But in cases of truly conflicting interests, where the Court has in effect weighed the competing interests, as in the fraternal insurance cases (see Currie, *The Constitution and the Choice of Law*, 26 U. CHI. L. REV. 9, 52-65 (1958)) the Court has merely made a legislative choice in the absence of congressional action, and Congress is free to make a different choice even though the result would be to narrow the area of compulsory full faith and credit.

analysis of the competing governmental interests plays a major part.⁶⁴ When the Court came to deal with the specific factual situation stated here, the analysis of governmental interests was neither so explicit nor so thorough as one might desire.⁶⁵ It was nevertheless evident. The Court did not perceive in the circumstance that the accident occurred in an American port any basis for distinguishing the case from that in which the injury occurs abroad. It therefore refrained from attributing to Congress an intention to embrace the case within the Jones Act. American policy and interests had not been made explicit either by Congress or counsel in the course of argument. On the other hand, application of the act in such circumstances would have an unsettling effect on the commerce of a foreign nation, "without basis in the expressed policies of this country."⁶⁶ Like all statutory construction, such a decision is essentially legislative in character; the Court is trying to decide as it believes Congress would have decided had it foreseen the problem. Similarly, the process is intrinsically not very different from that involved in "weighing" the respective interests and choosing between them. The profound difference consists in the fact that the process employed by the Court in these cases is avowedly that of statutory construction, and legislative correction is positively invited. The specific objection to interest-weighting in conflict-of-laws cases arises from the tendency of that approach to inhibit legislative correction—a tendency that is not encountered in statutory construction, nor, perhaps, in any other context of judicial lawmaking except constitutional litigation.

Second, Mr. Hill is distressed by the fact that the method of governmental-interest analysis, with its forum orientation, makes no provision for the case of the "disinterested third state,"⁶⁷ that is, the case in which the conflict is between the interests of two states, and the action is in a third. Here the conflict cannot be resolved by preferring the interest of the forum, because by hypothesis that state has no interest. I have considered the problem at some length,⁶⁸ and it is, of course, true that the method of governmental-interest analysis provides no solution for it, if interests are not to be weighed. Yet I find it difficult to share Mr. Hill's distress. At the risk of overworking a simile, I ask Mr. Hill whether Euclidean geometry should be rejected because it does not make provision for squaring the circle. When a problem cannot be solved with the re-

⁶⁴ See *Lauritzen v. Larsen*, 345 U.S. 571 (1953).

⁶⁵ *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959). See Currie, *The Silver Oar and All That*, 27 U. CHI. L. REV. 1, 65-75 (1959).

⁶⁶ 358 U.S. at 384.

⁶⁷ Pp. 477-79.

⁶⁸ *Married Women's Contracts*, 25 U. CHI. L. REV. 227, 262 (1958); *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964, 1015-17 (1958). A similar problem, presented by the rare case in which only two states are involved, neither of which has an interest at stake, is discussed in *Survival of Actions: Adjudication versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205, 229-32 (1958).

sources at hand it is sheer quackery to pretend a solution. The rational course is to resort to other materials and methods, preserving the basic method for its value in solving problems within its competence. My position is that the case of the disinterested third state cannot be solved by juridical methods; the aid of paramount legislation—specifically, legislation by Congress under the full faith and credit clause—is necessary. This fundamental fact is not altered by the improbability that Congress will concern itself with the matter.

It is true that the courts must nevertheless decide such cases in the absence of congressional action. Again, my principal concern is that we do not delude ourselves about the character of the process of decision; we cannot construct a juridical science of conflict of laws to guide or rationalize it. Certainly the traditional system of conflict of laws does not provide a rational basis for choice between the competing laws. With its arbitrary references to such "contacts" as place of contracting and place of harm it would, as I have said before, "casually defeat now the one and now the other policy, depending on a purely fortuitous circumstance."⁶⁹ Mr. Hill, perhaps, would prefer that the court "weigh" the conflicting interests. This, as I have indicated, is all right with me. But I hope Mr. Hill will write a guide for the courts as to how they should perform the weighing process, and I hope he will keep it clear that the courts are performing a legislative function by default; I hope he will not attempt to construct juridical concepts to rationalize the process. If he writes in this way he will at least not make the teaching problem harder; I fear that nothing he can write along this line will make it easier.

In my opinion, the best way for the courts to handle the case of the disinterested third state is, first, to dismiss on *forum non conveniens* grounds where that is an appropriate disposition. It will not always be appropriate, however, and so I suggest, as a second basis for disposition, the application of the law of the forum, simply on the ground that no good reason appears why the court should apply any *particular* foreign law.⁷⁰ I do not regard this disposition as unconstitutional, as Mr. Hill suggests.⁷¹ *Prima facie* the forum is entitled to apply its own law,⁷² and here no compelling reason exists for displacing that law by the law of a particular foreign state.

It may be conceded that if there is any area in which a set of rules for choice of law is justified it is in such cases as this. But such rules should be as simple and clear as possible, and should be strictly limited so that they will not be applied to the more normal situation in which they have no place, and in which the court can make a rational determination on the basis of domestic interest.

⁶⁹ *Married Women's Contracts*, 25 U. CHI. L. REV. 227, 262 (1958).

⁷⁰ See *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964, 1017-18 (1958). Cf. Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959, 964 (1952).

⁷¹ P. 478.

⁷² *Alaska Packers Ass'n v. Industrial Acc. Comm'n*, 294 U.S. 532, 547-48 (1935).

It is amusing to speculate on the possibility that choice-of-law rules may have originated in just such a limited context. If so, their metaphysical character, traceable to the attempt to rationalize them in jurisprudential terms, was a fatal flaw, which enabled them to burst the bounds for which they were intended and to swallow up the whole field of conflicting interests. If there are to be choice-of-law rules for the case of the disinterested third state, this vice should be avoided. Not only should the rules be simple and clear, but they should be so completely unrelated to jurisprudential concepts that there is no possibility of their being proliferated into doctrine that may become controlling in unlike situations. There is no need to frame such rules with elaborate care and theorizing: the results they will produce will be arbitrary in any event. I once suggested that it would almost be better to flip a coin, since that would produce the same results that are produced by the traditional system, and more economically.⁷³ That will not do, of course, but only because it does not provide for predictability. The rules for choice of law in the case of the disinterested third state should approximate the toss of a coin as closely as possible and still furnish a basis for prediction.

There is a related problem: It is said that certain laws express no governmental policy whatever, but are simple regulations to guide decision where the parties to a consensual transaction do not stipulate to the contrary, as they are free to do. I am not certain that such laws exist; but if they do, it is perfectly clear that an excellent solution to the conflict-of-laws problem is available without resort to abstruse principles of jurisprudence. By hypothesis, no policy of any state is involved. All that is required, then, is a way of determining, simply and certainly, what law will be applied, so that transactions can be planned and litigation undertaken with some confidence as to the outcome—and, in addition, assurance that the decision will not vary according to the forum. In all solemnity, I suggest that a nearly ideal choice-of-law rule for such cases would be that the governing law shall be that of the state first in alphabetical order.⁷⁴ Moreover, I believe the same rule would serve for the case of the disinterested third state. The only difference is that here two states do have interests at stake. Those who believe that it is possible judicially to choose between such interests will, of course, be horrified at the proposal; but since I am not impressed by the arguments in favor of such judicial legislation,

⁷³ *Married Women's Contracts*, 25 U. CHI. L. REV. 227, 262 (1958).

⁷⁴ Because there are different systems of alphabetization, and because of problems of transliteration, there would still be occasion for scholastic disputations; but these should be more rewarding than discussions of conflict-of-laws theory.

This rule might impose undue hardship on the courts of states low in the alphabet, since they would be constantly burdened by the task of ascertaining foreign law, while states high on the list would have the advantage of frequently applying domestic law. This difficulty could be met by applying the rule of inverse alphabetical order for transactions occurring in odd-numbered years. The difficulty does not apply to the case of the disinterested third state, which must, under any system of choice-of-law rules, apply foreign law in any event.

and since the existing rules for choice of law are just as arbitrary and much more complex, I stand my ground.

Mr. Hill's third point is obscure. Generally stated, it is that the governmental-interest analysis largely overlooks "the extent to which the development of a choice-of-law rule is the outcome of a clash of competing interests of an *intrastate* character."⁷⁵ By this he apparently means that when a court selects or constructs a choice-of-law rule it should give heed to the effect of the respective alternatives upon local private interests, and decide accordingly. Thus, if the quest is for a rule to determine the contractual capacity of married women, and the choice is between the law of the place of contracting and the law of the domicile, the decision may be influenced by the degree to which the one rule or the other would advance the interests of local creditors and local married women. This process is a familiar one, if Mr. Hill's meaning is accurately reflected by his citation of *Lams v. F. H. Smith Co.*;⁷⁶ but it hardly commends itself to the seeker after a rational and workable method of handling conflict-of-laws problems. It is the process of selecting among the given materials of the traditional system in such a way as to maximize domestic governmental interests by approximation and indirection, instead of by forthright action.

But Mr. Hill seems to mean more than this. His emphasis on private, or intrastate, interests seems to suggest that it is open to the court to make a new calculus of those interests for interstate purposes, quite possibly at variance with the balance previously struck by the legislature for domestic purposes, and then, by its determination of the choice-of-law rule to be followed, to advance the newly paramount interest. Specifically, a court in a state whose law incapacitates married women, being urged to apply domestic law consistently for the protection of domestic women, and realizing that such a choice would entail extension of the same protection to citizens of other states similarly protected by their home laws, might calculate (or speculate) that such a course would defeat the interests of local creditors suing foreign married women in a large number of cases, and might prefer a rule pointing to the place of contracting on the ground that the interests of local creditors would thereby be advanced, although the policy of protection for local women might suffer in consequence. That is to say that, rather than accept the constitutional limitations upon the pursuit of domestic policy, the court is at liberty to abandon the "indigenous" policy established by the legislature and promote an inconsistent policy on the interstate plane.

This will not do at all. I can find no place in conflict-of-laws analysis for a calculus of private interests. By the time the interstate plane is reached the resolution of conflicting private interests has been achieved; it is subsumed in

⁷⁵ P. 479.

⁷⁶ 36 Del. 477, 178 Atl. 651 (1935), cited at p. 481 n.87. See Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, 69 YALE L. J. 1323, 1327 (1960).

the statement of the laws of the respective states. The forum state in Mr. Hill's discussion has deliberately subordinated the interests of creditors to those of married women. That is the policy which the courts of the state are bound to execute. The constitutional consequences of such a policy are part of it. It is not open to a court to say: "Now that we are aware that the effect of the privileges and immunities clause is to make us generous to foreign married women as well as to our own at the expense of our creditors, we withdraw the basic policy of protection, for interstate purposes, and instead resort to a choice-of-law rule designed to promote the interests of local creditors." If Mr. Hill believes that resort to the law of the place of contracting avoids constitutional problems he is mistaken. Elsewhere I have suggested that apparently neutral choice-of-law rules involve various constitutional problems.⁷⁷ Here it seems quite obvious that if, by its domestic law, the forum state has conferred on domestic married women a privilege or immunity which the Constitution obliges it to extend to citizens of other states, the constitutional obligation cannot be avoided by slyly invoking the "rule" that the law of the place of contracting governs.⁷⁸

III

The next part of Mr. Hill's essay is less specific. In the main it is a general criticism of the method of analysis I have advocated, combined with at least equally general statements of Mr. Hill's own position, and interspersed with specific criticism of rather miscellaneous points. It is not tightly organized, and is not easy to answer in organized fashion. I shall not attempt any such detailed response as might be made in a letter to Mr. Hill; many of the points are such that detailed discussion would not deserve the attention of the general reader. Since this part of the essay merges naturally into the conclusion, I shall treat the two together.

The dominant theme is that there is nothing new in the proposition that conflict cases should be decided in such a way as to advance domestic interests; this has always been the central purpose of conflict-of-laws doctrine. If only one defines domestic interests with sufficient breadth, one will find that, in general, traditional conflict-of-laws rules are aptly designed to effectuate them. Adjustments may have to be made from time to time to keep pace with changing conditions, but the fountainhead of progress in conflict of laws is the received heritage of doctrine. In Mr. Hill's own words:

⁷⁷ Currie & Schreter, *supra* note 76.

⁷⁸ If the law of the place of contracting had the juridical significance attributed to it by territorialist theory the classification might be regarded as a reasonable one. But where, as here, it is clear that the court resorts to that rule not because of the compulsion of theory nor for any legitimate purpose, but only as an expedient to achieve discrimination against citizens of other states, the classification dividing contracts made within the state from those made elsewhere cannot be defended. See Currie & Schreter, *supra* note 76, at 1328.

It has been noted earlier that it is now taken as axiomatic, at least by scholars, that choice-of-law rules should rationally advance the policies or interests of the several states (or of the nations in the world community). [P. 481] . . . Huber seems to be stating unmistakably that the basic objective of the law of conflict of laws is to advance the governmental interests of the forum. [P. 482] . . . [T]he rules represent, in the main, rational responses to the felt necessities of the times in which they were produced; . . . writers from the time of Bartolus to the time of Beale have taught us much about the nature of governmental interest and the means for implementing it; and . . . the system traditionally employed in the United States embodies much of these teachings. [P. 483] If all relevant interests are considered, including those of a long-term or general character, the particular choice-of-law rule that is evolved may be rationally defensible as being advantageous for the forum even though particular local interests may suffer. [P. 503] It is a mistake to assume that the conflict-of-laws theory and practice of the past represented the product of metaphysical speculations about the nature of law rather than, in the main, the response of men, no less rational than their modern counterparts, to the felt necessities of their times. . . . [I]t is not suggested that the traditional learning of the law of conflict of laws is adequate for contemporary needs. The suggestion is only that it is highly relevant, and that progress in this as in many other areas of the law is most likely to be made by growth from the rich roots of our legal heritage. [P. 504]

There is a difference of perspective here that I do not wish to exaggerate, but rather to delineate carefully, since it is a source of much of the disagreement.

Mr. Hill is right in saying that I do not claim to have originated the idea that conflict-of-laws problems should be analyzed in terms of governmental interests.⁷⁹ On the contrary, I have diligently sought for evidence of its antiquity—because I knew that it would be distasteful to the orthodox. While I have not traced it all the way back to Huber, I found significant recognition of it in Lord Kames's *Principles of Equity*, published in 1760,⁸⁰ and in certain early decisions of the Supreme Court, notably *New York Life Ins. Co. v. Head*.⁸¹ I hope Mr. Hill is right as to Huber; I would welcome this additional historical confirmation, although at the moment I feel that the evidence offered by Mr. Hill must be supplemented by a good measure of faith to be accepted. However that may be, I should not be in the least surprised if historians were to trace the idea to the very earliest origins of conflict of laws. It is elemental and natural; anyone considering a conflicts problem as a matter of first impression would be likely to approach it first in terms of the interests of the local community, and secondly in terms of the avoidance of reprisals; only later, as the glossators and theorists and schoolmen began to take charge, would these elemental considerations tend to become lost in doctrinal rationalizations.

⁷⁹ P. 474.

⁸⁰ See Currie, *The Constitution and the Choice of Law*, 26 U. CHI. L. REV. 9 (1958).

⁸¹ 234 U.S. 149 (1914). See Currie, *supra* note 80, at 38.

But this, as I see it, is exactly what happened. Let us assume that Mr. Hill is right: all that Ulric Huber did was to codify the practices of his time—the principles employed by wise and sensitive judges in the newly independent states of the Netherlands to promote domestic interests, broadly conceived. Then Mr. Justice Story elaborated Huber's principles into a treatise that dominated American thought on the subject for exactly a century.⁸² Meanwhile, another powerful force was in the making. In 1900 Professor Beale published his casebook on the conflict of laws. Here was a scholar whose chosen mission in life was to systematize a challenging subject. During the ensuing generation thousands of future lawyers and judges left Harvard Law School profoundly influenced by his doctrine.⁸³ In 1934 and 1935 his life work culminated in his crowning achievements: the *Restatement* and the treatise. The *orthodox* pattern of American conflict of laws had been established. These works will be searched in vain for anything resembling the governmental-interest analysis. It was only later—after the Supreme Court had rendered a highly significant decision⁸⁴—that Beale “humbly and modestly . . . forecast a movement of social-economic thought” that would affect the law of conflict of laws.⁸⁵

Almost all constructive writing on conflict of laws in this century has been in revolt against this “heritage” which has effectually squeezed out any explicit consideration of governmental policy except as it “grudgingly,” to quote Mr. Hill,⁸⁶ recognizes the right of a forum to refuse enforcement to a foreign claim repugnant to local ideas. Not all of this constructive writing has emphasized analysis in terms of governmental interests. One would have to read with keen insight the fine pre-*Restatement* critiques of Cook, Lorenzen, and Cavers to find the problem formulated in that way. For my part, I am willing to assign a fairly precise date and a name to the modern rediscovery of the importance of governmental interests. The agent of this rediscovery was not a professor, a glossator, nor a theorist, but a judge. The date was 1935, and the man was Harlan Fiske Stone.⁸⁷ The first adequate academic recognition of this rediscovery I attribute to Professor Freund.⁸⁸ In my judgment, scholars,

⁸² STORY, *CONFLICT OF LAWS* (1st ed. 1834). The American Law Institute's *Restatement* was published in 1934, and was followed the next year by Beale's treatise.

⁸³ See Frankfurter, *Joseph Henry Beale*, 56 HARV. L. REV. 701, 703 (1943), quoted in Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210 n.1 (1946).

⁸⁴ *Alaska Packers Ass'n v. Industrial Acc. Comm'n*, 294 U.S. 532 (1935).

⁸⁵ Beale, *Social Justice and Business Costs—A Study in the Legal History of Today*, 49 HARV. L. REV. 593, 609 (1936).

⁸⁶ P. 494.

⁸⁷ *Alaska Packers Ass'n v. Industrial Acc. Comm'n*, 294 U.S. 532 (1935). Earlier, in *Bradford Electric Light Co., Inc. v. Clapper*, 286 U.S. 145, 163 (1932), Mr. Justice Stone had spoken in terms of state interests in his concurring opinion; but not until *Alaska Packers* was the method fully explicit and victorious.

⁸⁸ Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210 (1946). Somewhat less emphatically, Professor Hancock had accepted governmental-interest analy-

lawyers and judges who are not content with things as they are in the post-*Restatement* period have given insufficient attention to the method thus rediscovered; and one of my purposes in writing the articles criticized by Mr. Hill has been to call attention to its power and utility as an instrument of analysis, so that it may be developed as a vital contribution to the just and rational solution of conflict-of-laws problems.

I do not suppose for a moment that the *Restatement* point of view was ever successful in crushing out the practice of courts to render sensible decisions. Professor Ehrenzweig, in his writings, is fond of demonstrating that the courts do not in fact decide as the *Restatement* would have them do.⁸⁹ I tend, on the other hand, to emphasize cases in which the courts have followed *Restatement* doctrine, or hypothetical cases for which the *Restatement* provides a rule of thumb, in order to demonstrate what damage that method of dealing with problems would do if it were taken seriously. And there is no doubt that to a considerable extent it has been and is taken seriously. Just such doctrine has driven perceptive judges to resort to disingenuous devices to reach just results "consistent" with the system.⁹⁰ Just such doctrine has trapped some of our finest judicial minds into decisions that are unworthy, to say the least: Holmes,⁹¹ Cardozo,⁹² Learned Hand⁹³ and Mr. Justice Harlan⁹⁴ are among them. Just such doctrine, when a perceptive court has managed to extricate itself from the coils of the system and reach a just and sensible result, has called forth angry denunciation from academic acolytes.⁹⁵

Finally, let it be noted that Mr. Hill's affirmation that the advancement of governmental interests is "axiomatic" among scholars must be taken in small doses. One of the most forthright statements of the principle in the period between Professor Freund's article and mine was that of Professors Cheatham and Reese.⁹⁶ Yet the principle that "A court should seek to effectuate the pur-

sis three years earlier. Hancock, *Choice-of-Law Policies in Multiple Contract Cases*, 5 U. TORONTO L.J. 132, 136-37, 142-43 (1943). See Currie, *Married Women's Contracts*, 25 U. CHI. L. REV. 227, 235 (1958).

⁸⁹ See any of his articles subtitled "Law and Reason versus the *Restatement*."

⁹⁰ E.g., *Levy v. Daniels' U-Drive Auto Renting Co.*, 108 Conn. 333, 143 Atl. 163 (1928); *Grant v. McAuliffe*, 41 Cal. 2d 859, 264 P.2d 944 (1953).

⁹¹ E.g., *Cuba R.R. v. Crosby*, 222 U.S. 473 (1912).

⁹² *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 120 N.E. 198 (1918). See Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Equal Protection*, 28 U. CHI. L. REV. 1, 47 (1960).

⁹³ *Sheer v. Rockne Motors*, 68 F.2d 942 (2d Cir. 1934); *Wood & Selick v. Compagnie Generale Transatlantique*, 43 F.2d 941 (2d Cir. 1930). Cf. Cavers, *The Two "Local Law" Theories*, 63 HARV. L. REV. 822 (1950).

⁹⁴ *Bournias v. Atlantic Maritime Co.*, 220 F.2d 152 (2d Cir. 1955).

⁹⁵ See Sumner, *Choice of Law Governing Survival of Actions*, 9 HASTINGS L.J. 128 (1958), commenting on *Grant v. McAuliffe*, 41 Cal. 2d 859, 264 P.2d 944 (1953).

⁹⁶ Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959, 965 (1952).

pose of its relevant local law rule in determining a question of choice of law" was placed third in a list of nine or ten policies relevant to the determination of conflicts problems, and was thus subordinated to the principle that the court should first consider "the needs of the interstate and international systems."⁹⁷ In the discussion, emphasis was placed on the difficulties of this type of inquiry, and upon the supposed anomalies it might produce.⁹⁸ Professor Reese is currently restating the *Restatement*. If he can blend his nine or ten principles into the impervious fabric of that document and come up with a rational and workable system he will have performed a superhuman task. Meanwhile, I cannot console myself with the assurance that the importance of governmental interests in conflict-of-laws analysis is accepted as axiomatic.

Mr. Hill and I, therefore, have different images in mind when we speak of the traditional system of conflict of laws and whether it works or can be made to work. To put it quite simply, I regard most of what is good in our law and literature as the product of revolt against the system, while he regards it as the product of the system itself. This explains why he regards it as an "extraordinary concession" when I say: "A sensitive and ingenious court can detect an absurd result and avoid it; I am inclined to think that this has been done more often than not and that therein lies a major reason why the system has managed to survive."⁹⁹ He even refers to my emphasis on Mr. Justice Stone's revival of governmental-interest analysis in the *Alaska Packers* case as "confirmation" of his view that an awareness of such matters has dominated the conflict of laws since the time of Bartolus.¹⁰⁰ The reader may wonder why, if Mr. Hill and I are in substantial agreement as to what is good in the law and literature of the subject, we should not get together on a common program for developing it, without quarreling about whether it is the product of the system or of revolt. The answer is that I regard choice-of-law rules as an obstruction to clear analysis and hence to progress, while Mr. Hill insists on preserving such rules for the distilled wisdom of the ages that is mysteriously encapsulated in them.

Central to Mr. Hill's criticism is the charge that I define state interest too narrowly, concentrating on "specific, limited" interests as distinguished from those of a long-term or "general" character.¹⁰¹ Although the subject is a deli-

⁹⁷ *Id.* at 962.

⁹⁸ *Id.* at 965-66. As if to demonstrate conclusively the limitations of the method, a discussion of the choice of law as to the permissible amount of testamentary gifts to charities concludes with the statement that "a determination that such legislation is the product of both policies would lead logically to the conclusion that charitable gifts, in order to be valid, must satisfy the laws of all interested jurisdictions." *Id.* at 966. This seems to me a perfectly proper conclusion, which, if it is thought to be undesirable, can be overcome by paramount legislation, but not by conflict-of-laws doctrine.

⁹⁹ P. 469.

¹⁰⁰ P. 483 n.97.

¹⁰¹ Cf. Kramer, *Interests and Policy Clashes in Conflict of Laws*, 13 *RUTGERS L. REV.* 523, 547-60 (1959).

cate one, I choose to stand, at least for the time being, on what I have previously written about it. In the very first article of the series I proposed to inquire how "a quite selfish state, concerned only with promoting its own interests; a state . . . blind to consequences, and interested only in short-run 'gains'" would approach a problem in the conflict of laws.¹⁰² This was not done because no more edifying and enlightened concept of domestic interests was conceivable, but for purposes of analysis: "[A] statement of what a state would do, acting solely in its own [short-range] interests, may serve as a gauge to measure the extent to which states do not so act, and thus provide a basis for discussing the phenomenon of their failure to do so."¹⁰³ Is not this clear enough? The short-sighted, selfish state is nothing more than an experimental model. No such state exists, at least in this country. But it is useful to ask the question: to what extent do states act contrary to their short-term self-interest, and why? In our country there are constitutional restraints upon their doing so, but these do not account for all the phenomena. They take care, to a large degree, of the problem of long-range, enlightened self-interest. But nothing compels a state to push its interests to the outermost limits permitted by the Constitution. Its courts may define its policies and interests conservatively, having regard to possible conflict with the interests of other states; it may, if it so desires, indulge in a policy of deliberate altruism, where that does not conflict with the policy of another state; it may decide, for the sake of simplicity in law administration, not to press the pursuit of its interests in certain types of cases;¹⁰⁴ it may even decide to forgo its interests in certain cases in favor of national or world-wide uniformity. But the purpose of the inquiry was to show, as I think it did show, that states often fail to advance their legitimate interests for none of these reasons—or none except possibly the last—merely because the existence of an arbitrary choice-of-law rule obscures the nature of the problem. The heart of the matter is that "we shall be more likely to get the right answers when we have learned to ask the right questions."¹⁰⁵ My insistence is that the question of domestic policy and interest should be decided first, and that only then is it appropriate to consider the extent to which the state will sacrifice a specific interest for the sake of a greater good. The traditional system starts at the wrong end, with a rule of thumb that denies the relevance of inquiry into specific interests. According to Mr. Hill, such rules—or the best of them—have already built into them the considerations relevant to long-range domestic interests and such things as the "needs of the interstate and international system."¹⁰⁶ I do not accept that view. And I sub-

¹⁰² *Married Women's Contracts*, 25 U. CHI. L. REV. 227, 237 (1958).

¹⁰³ *Ibid.*

¹⁰⁴ See Currie & Schreter, *supra* note 92.

¹⁰⁵ Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210, 1225 (1946).

¹⁰⁶ See text at note 97 *supra*.

mit that there are serious questions as to the extent to which the sacrifice of specific interests for long-range gains should be made by the courts as distinguished from the legislature. At the least, the courts should not make such determinations in such manner as to inhibit legislative rectification.

Although Mr. Hill presumably deplores discrimination—at one point he questions “whether a system of justice can long endure if injustice is systematically practiced upon foreigners¹⁰⁷—he objects to the enlarged function which I envisage for the equal protection clause in conflicts cases. He objects because this enlarged function would interfere with the process of weighing competing domestic interests in interstate cases that was discussed at the end of Part II of this paper. This leads him to reject my analysis of *Hughes v. Fetter*¹⁰⁸ as resting on the equal protection clause rather than the full faith and credit clause. Mr. Hill complains that the equal protection clause was not mentioned by the Court.¹⁰⁹ Well, what I undertook to show was that the real justification for the decision was a clause of the Constitution not mentioned by the Court—an exercise that would be difficult if the decision had been placed on the ground that seemed to the observer the appropriate one. In somewhat similar vein, Mr. Hill complains that the authority adduced in support of the conclusion that the Wisconsin statute, as construed, established an arbitrary classification is “negligible.”¹¹⁰ Here, as in his earlier insistence upon quantitative data, it seems to me that Mr. Hill adopts an unduly restrictive attitude toward the kinds of inquiry that are admissible in legal analysis and research: Conclusions, to be regarded with respect, must be supported either by statistical data or the citation of authority. I am glad that we have no academy to enforce such restrictions. What I undertook in the study that is the object of that particular criticism was a bit of historico-legal detective work, with results that seem to me to carry strong conviction. Mr. Hill does not attack the chain of reasoning on the merits, but objects merely that negligible authority is cited to support the conclusion.

The Supreme Court said to Wisconsin, in effect: The Constitution requires you to entertain this action for wrongful death; it does not, however, require you to apply the law of the state of injury; you are perfectly at liberty to apply your own law to measure the substantive rights involved.

It seemed to me paradoxical to attribute this partial compulsion to the full faith and credit clause. I therefore began to wonder about the inner vice of the Wisconsin statute, and why any state should wish to deny recovery for wrong-

¹⁰⁷ P. 488.

¹⁰⁸ 341 U.S. 609 (1951), discussed in Currie, *The Constitution and the “Transitory” Cause of Action*, 73 HARV. L. REV. 36 (1959). The problems of discrimination have been further discussed in Currie & Schreter, *supra* notes 92 & 76 (both published after Mr. Hill’s essay was written).

¹⁰⁹ N.115 at p. 487.

¹¹⁰ N.115 at p. 486.

ful death where one of its own citizens is killed by another outside the state. As construed by the Wisconsin Supreme Court, the Wisconsin statute did just this, as effectively as did the Illinois statute that was held invalid one year after *Hughes v. Fetter*.¹¹¹ Various suggested explanations as to why Illinois might have enacted such a policy were found to have little foundation.¹¹² Circumstantial evidence indicated—not conclusively, to be sure, but convincingly—that the Illinois statute was modeled on Ohio legislation which had as its manifest object discrimination against citizens of other states. Illinois simply decided to practice the same kind of discrimination; but, in order to safeguard against the risk that the statute would be invalidated under the privileges and immunities clause if the discriminatory purpose were made explicit, Illinois eliminated the saving provision for local citizens killed outside the state, and sought to approximate the same result by barring all actions for out-of-state deaths. The result was not only to discriminate against citizens of other states but also, as an incident of the basic scheme, to discriminate against local people killed outside the state. A classification that treats some local residents differently from others for the sole purpose of implementing a scheme to discriminate against citizens of other states is surely not a reasonable classification. Mr. Hill does not say that the circumstantial evidence is insufficient to support the chain of inferences. He only demands “authority” in support of the conclusion that the equal protection clause applies. The simple fact seems to be that no one except the sponsors of the legislation realized what skulduggery was afoot.

To Mr. Hill the paradox that led me to seek an alternative to the full faith and credit clause as the justification for *Hughes v. Fetter* is not apparent, or, if it is, there is in his view “a relatively simple explanation” or an “obvious resolution.”¹¹³ After prolonged effort and further conversation with Mr. Hill on this point, I simply do not understand his explanation, or resolution. That being so, there is no point in going into a detailed examination of it here. I limit myself to quoting what appears to be the key sentence in his argument. After noting correctly that the parties and the courts below had assumed that Illinois law would be applicable, as the law of the place of injury, he says: “Under these assumptions, the application of Wisconsin substantive law would have been violative of the full faith and credit clause, and the Court took the further step of holding that refusal to apply the Illinois law, the doctrine of *forum non conveniens* being unavailable, was also violative of the full faith and credit clause.”¹¹⁴ Perhaps the reader will understand my inability to follow the argument when it is recalled that these key statements, in spite of

¹¹¹ First Nat'l Bank of Chicago v. United Air Lines, 342 U.S. 396 (1952).

¹¹² See Currie, *supra* note 108, at 53.

¹¹³ N. 115 at p. 487.

¹¹⁴ N. 115 at 487.

the qualifying language, are directly inconsistent with what the Court said in its famous footnote.¹¹⁵

Finally, Mr. Hill takes issue with my general analysis of the role of due process and full faith and credit in conflict-of-laws cases. The difference between us here is narrow but important. Since it seems to rest upon a misconception, the probability that the disagreement can be resolved justifies its discussion. Quite specifically, what is involved is a case arising out of a transaction that is entirely related to a single state; but after the transaction has been completed one of the parties moves to another state, where action is brought. The question is whether the forum now has an interest in the application of its policies by virtue of the residence of the favored party. The difference of law in question is "substantive"; at least as between me and Mr. Hill, there is no pretense that the law of the forum is applicable because it is procedural. A perfect example, referred to by Mr. Hill, is *John Hancock Mut. Life Ins. Co. v. Yates*.¹¹⁶ There an insurance contract was made in New York on the life of a New York resident. The beneficiary, his wife, also resided in New York, and there the insured died. Thereafter the widow moved to Georgia, and filed an action against the insurance company in which the Georgia courts applied Georgia law to give a recovery that New York law would have denied. Rejecting my view that this is a false-conflict case, because Georgia had no legitimate interest in the application of its law favoring the beneficiary, Mr. Hill asserts that: "Obviously, Georgia . . . had a substantial interest in the case: the plaintiff was not only a resident of the state, but the kind of resident who is particularly likely to become a public charge if unsuccessful in such litigation."¹¹⁷ He does not criticize the Supreme Court's reversal of the Georgia decision, but suggests that a better explanation than mine is that Georgia, "despite its substantial interest, may not apply its own law because to do so would unfairly defeat the reasonable expectations of the parties."¹¹⁸

My position on this question was developed in considerable detail in a dis-

¹¹⁵ "The present case is not one where Wisconsin, having entertained appellant's lawsuit, chose to apply its own instead of Illinois' statute to measure the substantive rights involved. This distinguishes the present case from those where we have said that 'Prima facie every state is entitled to enforce in its own courts its own statutes, lawfully enacted.'" *Hughes v. Fetter*, 341 U.S. 609, 612 n.10 (1951). Cf. Kasner & Newman, *Paradox Lost and Paradox Regained*, in *THE WORLD OF MATHEMATICS* (Newman ed. 1956).

¹¹⁶ 299 U.S. 178 (1936). A similar situation is presented where a contract, originally associated solely with a foreign state, is assigned by the obligee to a citizen of the forum state. *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930), discussed in Currie, *The Constitution and the Choice of Law*, 26 U. CHI. L. REV. 9, 43-45 (1958).

¹¹⁷ P. 495. See also p. 484, text at n.100.

¹¹⁸ P. 495. Elsewhere I have pointed out that in cases of true conflict of interest the appeal to "the reasonable expectations of the parties" is question-begging. Currie & Lieberman, *Purchase-Money Mortgages and State Lines* 1960 DUKE L.J. 1, 44 n.40.

cussion of *Aetna Life Ins. Co. v. Dunken*,¹¹⁹ to which Mr. Hill makes no reference. That position is happily and briefly stated by Professor Cavers: "An important point . . . is that the determination of state interests is to be made at the time of the action or event whose legal consequences are at issue, not at the time of litigation, except with respect to laws which might reasonably be given retroactive application in a domestic context."¹²⁰ I cannot improve on this formulation. I can state the same proposition in other terms, and perhaps the reiteration is pardonable in view of the past failure of communication. An "interest" as I use the term is the product of (1) a governmental policy and (2) the concurrent existence of an appropriate relationship between the state having the policy and the transaction, the parties, or the litigation. In *Yates*, at the time of the transaction, Georgia may have had a policy favorable to life insurance beneficiaries, but it then had no interest in the transaction or the parties; and it cannot be pretended that because the litigation was in its courts it had a procedural interest in the application of its law. In a domestic case, a new statute is not ordinarily applied to antecedent transactions because, while the state had an interest in the parties and the transaction at the time, it had then no relevant policy. In both cases rights have become "vested." To be sure, the policy against retroactive legislation is a policy against upsetting justifiable expectations; but to seize upon that aspect of the matter, and to insist upon it rather than analysis of governmental interests in the approach to conflicts problems, is to reject a relatively precise tool in favor of one that is dangerously vague and liable to question-begging applications. Further, one freely recognizes that vested rights and reasonable expectations may be disturbed when the public interest demands that result. But, despite Mr. Hill's emphasis on the fact that the widow in *Yates* might become a public charge, it is doubtful that Georgia would have applied its law retroactively in a purely domestic case. If that is so, then Georgia had not declared a policy to the effect that vested rights must be altered to avoid the state's being burdened with indigent beneficiaries, and so it had no justification for unsettling rights that had been settled by reference to New York law.

The point may be illustrated once more by reference to the Supreme Court's recent decision in *Clay v. Sun Ins. Office*.¹²¹ Clay, a resident of Illinois, purchased from the defendant, a British company licensed to do business in Illinois, Florida, and other states, a "Personal Property Floater Policy (World Wide)." The transaction occurred in Illinois. Shortly thereafter Clay and his wife moved to Florida, where, two or three years later, certain property of the insured was willfully damaged or appropriated by his wife. The company hav-

¹¹⁹ 266 U.S. 389 (1924); see Currie, *supra* note 116, at 41-43. See also 1960 DUKE L.J. at 51 n.164.

¹²⁰ Cavers, *supra* note 8, at 1137 n.27.

¹²¹ 363 U.S. 207 (1960).

ing denied liability, Clay commenced action in the United States district court (on the basis of diversity of citizenship) more than twelve months after discovery of the losses. A clause of the policy, valid under Illinois law, purported to preclude actions commenced more than twelve months after discovery by the insured of the occurrence giving rise to the claim. But a Florida statute purported to invalidate contractual provisions shortening the time allowed by law for bringing suit, and this action had been filed well within the Florida statutory period of five years. The district court entered judgment for the plaintiff on a jury verdict. The court of appeals reversed, holding that application of the Florida statute was inconsistent with due process.¹²²

The Supreme Court vacated and remanded. Mr. Justice Frankfurter, speaking for the Court, was shocked by the fact that the court of appeals had decided the constitutional question without first resolving two questions of Florida law: (1) Whether the statute prohibiting contractual shortening of time limitations would be applied to a case such as the one at bar, and (2) whether the coverage of the policy extended to willful injury to or appropriation of property by the insured's spouse. With the second of these questions we are not here concerned; nor can we explore the interesting terms of the remanding order, which directed that the trial court hold the action in abeyance pending application by the parties to the Supreme Court of Florida for determination of the questions of local law. The questions of judicial administration gave rise to sharp conflict within the court, and are important as well as interesting; but our concern is with the conflict-of-laws aspect of the case.

To Mr. Justice Frankfurter and a majority of the justices the question whether Florida could constitutionally apply its statute to the case at bar was serious and substantial. To Mr. Justice Black, who was joined by the Chief Justice and Mr. Justice Douglas in dissent, it "border[ed] on the frivolous."¹²³ Mr. Justice Frankfurter cited such decisions as *Home Ins. Co. v. Dick*¹²⁴ to show that the application of just such a statute to a contract with which the forum state had no concern when it was made is unconstitutional. Mr. Justice Black discredited this line of cases as dating from a time when academic and territorialist ideas dominated thinking about such matters, and emphasized *Watson v. Employers Liab. Assur. Corp.*¹²⁵ and similar cases as establishing that any state having a legitimate interest in the matter may constitutionally apply its own law. He thought the interest of Florida in the *Clay* case was clear.

With respect to the question whether the application of the Florida statute to preclude the company's defense to Clay's action would present a substantial constitutional question, I believe that Mr. Justice Frankfurter was right and

¹²² *Sun Ins. Office v. Clay*, 265 F.2d 522 (5th Cir. 1959).

¹²³ 363 U.S. at 213-14.

¹²⁴ 281 U.S. 397 (1930).

¹²⁵ 348 U.S. 66 (1954).

Mr. Justice Black wrong. In addition to the cases cited by Mr. Justice Frankfurter, *Dunken*¹²⁶ and *Yates*¹²⁷ both strongly suggest that Florida may have no legitimate interest, and hence may not constitutionally apply its statute. Since the time of Chief Justice Stone, Mr. Justice Black has been the Court's most articulate exponent of the governmental-interest analysis,¹²⁸ while Mr. Justice Frankfurter has shied away from it.¹²⁹ But Mr. Justice Black, like Mr. Hill, is imprecise in his concept of what constitutes a legitimate state interest.

Mr. Justice Black is undoubtedly right in characterizing the policy expressed in the Florida statute as one designed "to preserve a fair opportunity for people who have bought and paid for insurance to go to court and collect it."¹³⁰ His treatment of the question of Florida's interest in applying the statute in this state of facts, however, is far from satisfactory. First, he seems to imply that the very generality of the statute leaves no ambiguity as to its applicability to cases with foreign factors.¹³¹ His first explicit reference to Florida's interest narrowly misses being a mere play on words: "Florida's particular interest in this very statute is shown by the fact that the Attorney General of the State filed briefs and participated in oral argument to support both the full meaning the petitioner claimed for the statute and its constitutionality when so interpreted."¹³² The Attorney General's participation as *amicus curiae* means that the state *asserted* an interest in the application of the statute in these circumstances. It does not amount to an adjudication of the issue as to whether Florida's relation to the transaction, the parties, or the litigation was such as to give it an interest in so applying the statute—an issue that was resolved by the Court in favor of the state in *Watson*, and against the state in *Dick*, *Yates*, and *Dunken*. Then, separately discussing the "constitutional" question, Mr. Justice Black stated that "Florida, the forum State, has sufficient contacts with the parties, the property insured, and the lawsuit. . . ."¹³³ He emphasized that "when a contractual provision is one dealing with limitations on actions, it is particularly inappropriate to compel the forum State, as a constitutional matter, to apply the law of the place where the contract was 'made' "¹³⁴ citing, *inter alia*, *Wells v. Simonds Abrasive Co.*¹³⁵ But this is indiscriminating in the extreme. While Mr. Justice Black recognized a difference between statutory and contractual time limitations, he insisted upon

¹²⁶ *Aetna Life Ins. Co. v. Dunken*, 266 U.S. 389 (1924).

¹²⁷ *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178 (1936).

¹²⁸ See especially *Watson v. Employers Liab. Ins. Corp.*, 348 U.S. 66 (1954).

¹²⁹ See his concurring opinion in the *Watson* case, *supra* note 128, at 74.

¹³⁰ *Clay v. Sun Ins. Office*, 363 U.S. 207, 215 (1960).

¹³¹ *Ibid.*

¹³² *Id.* at 216.

¹³⁴ *Id.* at 221-22.

¹³³ *Id.* at 221.

¹³⁵ 345 U.S. 514 (1953).

lumping together, as within the control of the forum state, all such matters.¹³⁶ *Wells*, however, merely held that the forum state might apply its own statute of limitations, shorter than that of the state of injury, where the defendant was a local enterprise. Manifestly, the forum state there had two interests: protecting local residents against the hazards of stale claims, and keeping its dockets clear for current business. In *Clay* the question was whether the plaintiff should be given a longer time to sue than that stipulated by the contract, and there was involved no conceivable policy of judicial administration.¹³⁷

Realistically, therefore, the Florida interest asserted by Mr. Justice Black must rest upon "contacts" with the parties or the insured property, not with the lawsuit. From this remaining category we must exclude the fact that the defendant company was licensed to do business in Florida. That fact does not license Florida to trespass upon the interest of Illinois in regulating what was, at the time, a purely Illinois transaction, having nothing to do with the business the defendant was licensed to transact in Florida.¹³⁸ We are left, then, with the relationship between Florida and the plaintiff or his property—and neither had any Florida connection until after the contract of insurance was complete¹³⁹ and the company's obligation presumably fixed. Did Mr. Clay's unilateral decision to move to Florida and take his property there enlarge his rights under the contract, depriving the company of what would theretofore have been a valid defense?

No confident answer can be given to this question on the record as it stands. Moreover, I fear that no very confident answer can be given on the basis of what the Florida Supreme Court is likely to say about the applicability of the statute in response to the inquiry to be addressed to it. The Supreme Court, I submit, has failed to ask the right questions of the Florida court. Essentially, the inquiry is whether that court would construe the statute as applicable to a case of the *Clay* type. Of course, if the Florida court answers that the statute would not be so applied, the problem is solved, and the constitutional ques-

¹³⁶ 363 U.S. at 222.

¹³⁷ Would Mr. Justice Black sustain the right of Florida to apply its statute if Mr. Clay and his property had remained in Illinois, where the loss occurred, if Clay had elected to file his action in Florida? The reliance on Florida's "contacts" with the parties and the property suggests a negative answer, but the heavy emphasis on the forum's control of matters relating to time limitations points in the other direction.

¹³⁸ See Currie & Schreter, *supra* notes 76 & 92. One wonders whether Mr. Justice Frankfurter might consider submission to the statute a condition impliedly attached by the state to its grant to the foreign corporation of the privilege of carrying on local business. Cf. his concurring opinion in *Watson*, *supra* note 129, and the discussion in Currie, *supra* note 116, at 48-50. Presumably he would not, since such conditions must be "reasonable," and the test of reasonableness seems to be indistinguishable from the test of whether the state has a legitimate interest in the application of its own law.

¹³⁹ There is nothing to indicate that any of the property was in Florida prior to the time Mr. Clay became a resident of that state. Indeed, there are positive indications to the contrary. Transcript of Record, p. 34, *Sun Ins. Office v. Clay*, 265 F.2d 522 (5th Cir. 1959).

tion is not presented. Mr. Justice Frankfurter's doctrine of abstention will have proved its worth in this case, at least. But if the Florida court answers that it would apply the statute in a case like *Clay*, because questions of time limitation "go to the remedy," or because of the residence of Clay and the location of the property there at the time of the loss, the Court's problems will be far from solved. There will again be a division within the Court, with some justices regarding the "contacts" as sufficient and some regarding them as insufficient to support the interest of the state in applying its law.

It is vitally important that the Florida court answer one specific question: Assuming that the policy expressed in the statute is one designed "to preserve a fair opportunity for people who have bought and paid for insurance to go to court and collect it," is the evil which that policy is designed to alleviate so acute, and is the policy so exigent, that Florida believes it necessary to apply the statute from its effective date onward for the protection of the total population of Florida, including residents who had previously entered into domestic contracts containing such "suit clauses"? In other words, is the statute construed as having retroactive effect? If the answer is no, the Court's problem is solved. If Florida has no policy of protection for residents who entered into such contracts before they were protected by the statute, it has no policy that can rationally be applied to upset vested rights under contracts made under circumstances such that Florida then had no interest in them. If the answer is yes, the Court must determine a different question—probably an easier one, since it is an ordinary question of constitutional law rather than one mixed with conflict-of-laws theory: Is such retroactive legislation a reasonable exercise of the lawmaking power under the due process and contracts clauses?

If it is, Florida may protect its new residents, who come into the state bearing out-of-state contracts, to the same extent that it may protect its old residents, holding contracts made prior to the enactment of the statute. If it is not, then it is just as unreasonable, and just as much an impairment of the obligation of contracts, to apply the law for the protection of the new resident with an out-of-state contract as to apply it for the protection of an old resident with a contract antedating the statute. In either case, the same justification must appear for applying the statute to alter rights and duties settled under a different law.

Mr. Justice Black observed that the *Clay* case had been in litigation three years when the Court's decision came down, and speculated that a similar period might well be required before it came back to the Court.¹⁴⁰ One hopes that, when and if it does come back, it will not be necessary to send it on another three-year tour of the state and lower federal courts. Yet the information that is likely to be forthcoming from the Supreme Court of Florida is not likely to provide an adequate basis for the Supreme Court's resolution of the constitutional question.

¹⁴⁰ 363 U.S. at 227.

IV

To one of Mr. Hill's charges I plead "guilty" without reservation. In the first sentence of his essay he attributes to me the proposal that traditional methods of choice of law be abandoned in favor of a method "involving the effectuation of relevant governmental policies on what appears to be an *ad hoc* basis."¹⁴¹ "*Ad hoc*" has a deprecatory connotation that was no doubt intended. But the method I advocate is the method of statutory construction, and of interpretation of common-law rules, to determine their applicability to mixed cases. While there are some general principles to guide us, statutory construction must always be an *ad hoc* process. The distinctive virtue of the common-law system is that it also proceeds on an *ad hoc* basis. I am proud to associate myself with the common-law tradition. We have too long supposed that conflict-of-laws problems can be solved in accordance with a code, transplanted from the continent of Europe, which takes no account of the policies involved in statutes and rules, nor even of the content of the laws that are competing for recognition. It is time to return to methods that are indigenous to our legal system, and that our judges and lawyers are fully competent to utilize by reason of their training and experience.

Mr. Hill's criticism has been stimulating and constructive. It has required me to re-examine the validity of the interest analysis at several critical points. It has required me, perhaps, to sand down the sharp edges of the position that courts are not equipped to make decisions that are essentially political in character. It has not, however, shaken my conviction that there should be a sharp break with the system that proffers to every state a choice-of-law rule for every situation, and that the starting point of every search for the applicable law should be an inquiry into the governmental policies and interests involved. Like most other modern scholars in this field, he is willing to accept, and even stress, the factor of governmental interest as a matter to be taken into account. I gather that he would assign to this factor somewhat the same place in the scheme of things as that suggested by Professors Cheatham and Reese.¹⁴² He is unwilling, however, to accept the view that a system of universal choice-of-law rules is inherently unworkable, or even that any particular rule for choice of law must pass the test of consonance with the enlightened interest of the state that is called upon to apply it. His trusting faith is that the inherited rules embody the wisdom which the past has lavished upon the protection of such interests, and that they are at least *prima facie* entitled to be accepted, along with the supplementary doctrines, such as characterization and renvoi, that are required in their application. His belief is that "progress in this as in many other areas of the law is most likely to be made by growth from the rich roots of our legal heritage."¹⁴³ Not lightly vacated is the verdict of quiescent years.

¹⁴¹ P. 463.¹⁴² See Cheatham & Reese, *supra* note 96,¹⁴³ P. 504.