

## THE ANTEBELLUM IRONY OF GEORGIA'S DISGUISED *LEX FORI* DOCTRINE: O WHERE HAVE YOU GONE, BRAINERD CURRIE?

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### I. INTRODUCTION

Georgia abounds with irony when it comes to choice of law. Consider the following:

1. Georgia is one of only nine states that hews to the so-called “traditional territorial” approach to resolve domestic choice-of-law problems in tort cases,<sup>1</sup> an approach emphasizing territoriality and fossilized in the Restatement (First) of Conflict of Laws.

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<sup>1</sup> See Symeon C. Symeonides, *Choice of Law in the American Courts in 2017: Thirty-First Annual Survey*, 66 AM. J. COMP. L. 1, 4, 67 (2018); accord Symeon C. Symeonides, *Choice of Law in the American Courts in 2018: Thirty-Second Annual Survey*, 67 AM. J. COMP. L. 1, 35–36 (2019).

2. Yet Georgia is the birthplace, both personally and professionally, of the great conflict-of-laws scholar, Brainerd Currie, who revolutionized the discipline by felling the petrified forest created by the traditional choice-of-law rules.

Now, Georgia has not only put an entirely idiosyncratic spin on territoriality in choice of law through the recent decision, *Coon v. Medical Center, Inc.*,<sup>2</sup> but has along the way also denounced legal realism (curiously referenced as “relativism”). Georgia has revived the view, long ago refuted by Justice Oliver Wendell Holmes, Jr., that the common law is “a brooding omnipresence in the sky”<sup>3</sup> and eschewed twentieth-century notions of federalism in favor of mechanically embracing antebellum precedents from the 1840s.<sup>4</sup>

This article explores the problems created by the *Medical Center* decision, including: (a) the fact that the decision effectively, yet surreptitiously, morphs a considerable part of Georgia conflicts law into a disguised *lex fori* doctrine, and (b) the strong possibility that Georgia’s refusal to recognize the actual content of sister-state common law violates the Due Process and Full Faith and Credit Clauses of the U.S. Constitution, as construed by the U.S. Supreme Court in *Allstate Insurance Co. v. Hague*<sup>5</sup> and *Phillips Petroleum v. Shutts*.<sup>6</sup>

Most significantly, the article proposes that the Georgia Legislature do for the disarrayed field of Georgia choice of law what it did for the disarrayed field of Georgia evidence law: adopt a new code.<sup>7</sup> In this case, that could be a choice-of-law code, substantially based upon the Restatement (Second) of Conflict of Laws. However, what would be much more useful is a simple statute adopting a pure *lex fori* approach limned by the “to the limits of due process” ambit of legislative jurisdiction set forth in the U.S. Supreme Court’s 1981 ruling in *Allstate Insurance Co. v. Hague*.<sup>8</sup>

The article proceeds in five additional sections (II–VI) and a conclusion (VII) to show *how* judicial thinking on Georgia’s choice-of-law rules is intellectually bankrupt, *why* the legislature must now step in to restore coherence and currency of this crucial area to Georgia’s legal

<sup>2</sup> 797 S.E.2d 828 (Ga. 2017), *aff’d on other grounds*, 780 S.E.2d 118 (Ga. Ct. App. 2015).

<sup>3</sup> *S. Pac. Co. v. Jensen*, 244 U.S. 205, 218, 222 (Holmes, J., dissenting).

<sup>4</sup> *See, e.g., Latine v. Clements*, 3 Ga. 426 (Ga. 1847); *see Cox v. Adams*, 2 Ga. 158 (Ga. 1847).

<sup>5</sup> 449 U.S. 302 (1981).

<sup>6</sup> 472 U.S. 797 (1985).

<sup>7</sup> *See, e.g., Paul S. Milich, Georgia’s New Evidence Code—An Overview*, 28 GA. ST. U. L. REV. 379 (2012).

<sup>8</sup> 449 U.S. at 304.

environment (particularly for business), *what* options are available to provide plausible objects for legislative action, and *where* among these options the optimal solution resides.

In Section II, the career of, and contributions to choice of law (including to the thinking of the Restatement (Second))<sup>9</sup> by Georgia's own Brainerd Currie are examined from the focused perspective of his current status as a "prophet without honor" in the conflicts jurisprudence of his own state.

Section III discusses the modern pronouncements on Georgia's hewing to the "traditional approach" to choice of law, particularly in the era from the publication of the Restatement (Second) of Conflict of Laws in 1971 to the decision in *Dowis v. Mud Slingers, Inc.*,<sup>10</sup> which dismissively criticized the Restatement (Second) and flatly refused to adopt any part of it, declaring that if the traditional Georgia choice-of-law rules were to be changed, that change would have to come from the legislature.<sup>11</sup> In this section, we will explore the *lex fori* tendencies shown by the Georgia Supreme Court and Court of Appeals in tort cases, typically expressed in the readiness of those courts to invoke the public policy exception to applying the *lex loci delicti* when the choice of law would otherwise disfavor a Georgia party. The Georgia Court of Appeals rode that wave in the *Medical Center* case when it found that it would violate Georgia public policy to apply Alabama law favoring an Alabama plaintiff against a Georgia defendant. The Georgia Supreme Court, however, firmly stopped that wave and considerably narrowed the public policy exception to *lex loci delicti*. Yet, in so doing, it replaced it with a worse rule that substantially extends, rather than contains, the quest for *lex fori* in Georgia, despite the *lex loci delicti* trappings to which it pays lip service.

Section IV discusses the *Medical Center* case and how one of the concurring judges on the Court of Appeals unearthed an antebellum,

<sup>9</sup> See John B. Rees, Jr., *Choice of Law in Georgia: Time to Consider a Change?*, 34 MERCER L. REV. 787, 808 (1983) (noting those "authorities [who] have characterized interest analysis as a preliminary step on the way to the Restatement Second approach.").

<sup>10</sup> 621 S.E.2d 413 (Ga. 2005). Without looking very closely at Currie's work and the fullness of its development, the late Justice Harris Hines wrote him off in a footnote: "Currie's 'governmental interest' approach fails to adequately deal with true conflicts and is easily manipulated by identifying alternative governmental interests of a forum law, thereby leading to forum favoritism." *Id.* at 419 n.7. In light of Georgia's amazing track record of rarely having applied another state's statute or common law rule in a tort case demonstrated in Section IV, *infra*, Justice Hines—whom Professor Van Detta met on several occasions and found to be a sincere and genteel jurist—offers a critique awash in an unintended irony.

<sup>11</sup> In Section V, the dissenting opinions of Georgia jurists who have encouraged the adoption of the Restatement (Second) Conflict of Laws are discussed.

unconstitutional doctrine buried in nineteenth century case law, which found little interest among the other judges on that court, but which captured the unanimous adoption by the Justices of the Georgia Supreme Court on appeal. We will dissect the historical provenance of the Georgia Supreme Court's opinion closely, demonstrating that it has serious and intolerable (while unintended) consequences.<sup>12</sup> Those unintended consequences include perpetuating a view of the common law that arose from an antebellum jurisprudence that is inextricably bound up with slavery jurisprudence, and that even absent that disturbing provenance, produces inequitable "administration of the law," in violation of the Equal Protection Clause of the Fourteenth Amendment as condemned by *Erie Railroad Co. v. Tompkins*,<sup>13</sup> and creates a blanket application of Georgia law without regard to the actual content of sister-state laws that "is sufficiently arbitrary and unfair as to exceed constitutional limits" established by the Article IV Full Faith and Credit Clause and Fourteenth Amendment Due Process Clause.<sup>14</sup> Section IV will also reveal that in recent years, Georgia has fairly rarely selected the law of another state in a tort case and has resorted not only to escape devices (especially the public policy device) but also to the most recent resurrection of a totally discredited, antebellum concept of "law." Further, Section IV notes that in so doing, the appellate courts in the *Medical Center* case shielded an equally outdated view that victims of negligently inflicted, severe emotional distress are virtually never entitled

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<sup>12</sup> During the pendency of the authors' work on this article, another teacher in the area of Conflict of Laws published a sustained attack on the *Medical Center* case, an assault notable for its candor, its detail, and its considerable insight. See Gary J. Simpson, *An Essay on Illusion and Reality in the Conflict of Laws*, 70 MERCER L. REV. 819 (2019). The authors do not intend to re-plough the field he tilled. In fact, quite the opposite. Professor Simson admits to a limitation in his examination of the case—he speaks of "how little reading I do of scholarship outside of my own areas of teaching and writing" in *Conflicts*. *Id.* at 823. The present authors, however, have a combined experience of over fifty years in law practice, teaching, and publishing scholarship in a wide variety of civil-law areas, in addition to Conflict of Law and Civil Procedure. See, e.g., Apolinsky & Van Detta, *Rethinking Liability for Vaccine Injuries*, 19 CORNELL J. L. & PUB. POL'Y 537 (2010) (cited in *Bruesewitz v. Wyeth*, 562 U.S. 223, 227 n.9 (2011)). Nor, unlike Professor Simson, do the present authors address themselves to the supposed eventuality "if [the Supreme Court of Georgia] 'abandons the traditional rules,' or to advising the Court that it should 'finally cast off the rules and the lack of commitment to judicial transparency and thoughtful policy analysis that they reflect.'" Simson, *supra* note 12 at 864. In discussing his views of the *Medical Center* case, Dean Simpson is careful to note that he does not "have any special pipeline to the Georgia Justices . . ." *Id.* at 838. Neither do the present authors. But the present authors have lived and worked in Georgia quite a bit longer. Having practiced law and taught in Georgia during the virtual entirety of their careers, the present authors know that any change must come from the legislature. It will not come from the Court.

<sup>13</sup> 304 U.S. 64, 75 (1938).

<sup>14</sup> *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822 (1985).

to a recovery absent “physical impact”<sup>15</sup> that supposedly is a talisman of truthfulness—a doctrine skewed against those most likely to suffer such distress in our society and one founded on antebellum conceptions of human psychology. Finally, Section IV demonstrates that the *Medical Center* approach violates both the Full Faith and Credit Clause and the Fourteenth Amendment’s Due Process Clause for the reasons expounded by the U.S. Supreme Court in *Shutts v. Phillips Petroleum*.<sup>16</sup>

Section V explores why the *Medical Center* decision cannot stand as a judicial restatement of the “traditional approach” and why the opinion in that case makes it imperative that the Georgia Legislature step in to stop the peregrinations of the Georgia courts by adopting a modern conflict-of-laws methodology, one far more in line with the state’s striving to position itself as a modern center for international arbitration.

Section VI identifies and considers the tenable options for the Georgia Legislature to do so. Among these options, the most tenable may very well be an honest and transparent *lex fori* rule that simply defaults to the constitutional limits (as set forth in *Allstate Ins. Co. v. Hague*<sup>17</sup>) the ambit of a Georgia court’s discretion to choose forum law, much like many states have adopted long-arm statutes that simply default to the constitutional limits (as set forth in *International Shoe v. State of Washington*<sup>18</sup>) a state court’s discretion in exercising personal jurisdiction over non-resident defendants. Such an approach would advance Georgia’s aspirations to be an international center both for business and the administration of justice, joining a set of legal reforms the legislature has recently enacted affecting the enforcement of non-competition agreements in Georgia, the law of evidence in Georgia’s courts, the enforcement of agreements to arbitrate and arbitration awards between trans-national parties, and the enforcement of foreign-country money judgments in Georgia courts. In addition, such an approach would finally do honor to Professor Currie’s groundbreaking reconceptualization of the choice-of-law problem as one best served by examining a state’s interest in applying its own law in its own courts whenever there is a constitutional basis for doing so.

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<sup>15</sup> *Coon v. Med. Ctr., Inc.*, 797 S.E.2d 828, 829 (Ga. 2017).

<sup>16</sup> 472 U.S. 797 (1985).

<sup>17</sup> 449 U.S. 304 (1980).

<sup>18</sup> 326 U.S. 310 (1945).

## II. BRAINERD CURRIE: VISIONARY, SCHOLAR, AND PROPHET WITHOUT HONOR IN HIS NATIVE GEORGIA

Brainerd Currie began studying choice-of-law problems in the context of the very kind of laws of which Georgia's "impact rule" is but one example: peculiar rules left over from another time and another century that most other jurisdictions have abandoned.<sup>19</sup> Laws like these are particularly good in laying bare the underlying barrenness of territorially-focused choice-of-law rules.<sup>20</sup> Thus, Currie exposed the predominantly "perverse" results of applying the traditional choice-of-law rules to inter-state conflicts between those states who clung to the common law rule treating married women as lacking contractual capacity and those who had enacted statutes removing that disability:

Currie then painstakingly analyzed how the traditional place-of-making rule would decide these fourteen cases. He found that the rule produced desirable results in only six of the cases, while it produced "perverse" results in six other cases. In the remaining two cases, the foreign interest is advanced at the expense of the

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<sup>19</sup> Unlike those who accepted the seeming legal orthodoxy of his time because it might have been easy to do so, Currie was much more demanding. As one colleague remembered:

Some would say that his greatest quality, the one that was the cornerstone of his greatness, was his exacting standards for acceptable levels of performance. He asked not 'is this good enough to get by' but, rather, 'is this the very best that is realistically possible?' Imposing this exacting standard upon himself, he expected it of others.

Elvin R. Latty, *Brainerd Currie—Five Tributes*, 1966 DUKE L.J. 2, 3 (1966).

<sup>20</sup> Symposium, *Remembering Brainerd Currie*, 2015 U. ILL. L. REV. 1961–64 (2015); see, e.g., Brainerd Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958). Currie was remembered as future-focused on the lookout for problems coming down the pike, rather than as one (such as Joseph Beale, the reporter for the Restatement (First) of Conflict of Laws (1934)) who saw law as a conservancy of the past:

In curricular matters, he was the exponent of law study in a university as basically a blessed opportunity for one of the greatest intellectual experiences, a liberal education in and through law; nevertheless, his positions were "practical" in that *he emphasized the new, the dynamic, the problems "around the corner" that the student now in law would be facing in the future*, rather than the legal lore that was accumulated by and for our ancestors for a different age.

Latty, *supra* note 19, at 4 (emphasis added).

domestic interest. He concluded:

‘The utility of a rule which operates so capriciously must certainly be suspect. That such a rule should have been announced and followed at all seems almost incredible. In fact, as everyone knows, it has not been followed consistently. When the indicated result is absurd and is perceived to be so, there are means of escaping it. . . .

Let there be no doubt, however, that courts actually do reach the results which seem so indefensible. Bad law makes hard cases. The hypnotic power of the ideas of territorial jurisdiction and vested rights is not to be underestimated.’<sup>21</sup>

Currie leveled a similar critique at problems created by the conflict between state laws concerning survival actions.<sup>22</sup> These problems were epitomized in a 1950s case presented to the California Supreme Court in which the *lex loci delecti* rule would have required choosing the law of Arizona. Such a choice would have prevented the assertion of negligence claims in a probate action by three Californians who survived a two-car collision in Flagstaff, Arizona, against the estate of a deceased Californian tortfeasor simply because of the fortuity of the Californians’ crashing their automobiles in Arizona, which at the time was one of the last to hew to the rule that tort causes of action are extinguished with the tortfeasor’s death if the actions were not filed beforehand.<sup>23</sup> Currie saw the perversity of a rule that would apply the law of a state that had no cognizable interest in whether three Californians could sue the estate of a fourth Californian being administered in the California courts for the deceased’s negligence. The problem raised no question of Arizona’s continued, if misguided, adherence to the old rule for cases involving the administration of estates in Arizona or estates of deceased Arizonans.

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<sup>21</sup> *Symposium: Remembering Brainerd Currie*, *supra* note 20, at 1962–63 (quoting *Married Women’s Contracts*, *supra* note 20, at 244, 245).

<sup>22</sup> See Brainerd Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205 (1958).

<sup>23</sup> *Grant v. McAuliffe*, 264 P.2d 944, 946 (Cal. 1953), *rev’g* *Grant v. McAuliffe*, 255 P.2d 819 (Cal. Dist. Ct. App. 1953).

After tackling these kinds of problems in his research and writing for a decade, Professor Currie came to a conclusion that startled many in 1959: the notion that “[w]e would be better off without choice-of-law rules.”<sup>24</sup> He was particularly targeting the very kind of nineteenth century, formalistic “traditional rules” with which Georgia remains so enamored.<sup>25</sup> In their place, Currie wanted courts to follow a simple methodology that dealt honestly with the problem and dropped the formalism and “masks” of the law,<sup>26</sup> behind which courts could position themselves to achieve an artifice of impartiality when in fact they are not operating impartially at all:

1. Normally, even in cases involving foreign elements, the court should be expected, as a matter of course, to apply the rule of decision found in the law of the forum.

2. When it is suggested that the law of a foreign state should furnish the rule of decision, the court should, first of all, determine the governmental policy expressed in the law of the forum. It should then inquire whether the relation of the forum to the case is such as to provide a legitimate basis for the assertion of an interest in the application of that policy. This process is essentially the familiar one of construction or interpretation. Just as we determine by that process how a statute applies in time, and how it applies to marginal domestic situations, so we may determine how it should be applied to cases involving foreign elements in order to effectuate the legislative purpose.

3. If necessary, the court should similarly determine the policy expressed by the foreign law, and whether the foreign state has an interest in the application of its policy.

4. If the court finds that the forum state has no interest in the application of its policy, but that the foreign state has, it should apply the foreign law.

5. If the court finds that the forum state has an interest in the application of its policy, it should apply the

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<sup>24</sup> Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L. J. 171, 177 (1959).

<sup>25</sup> See Simson, *supra* note 12, at 839.

<sup>26</sup> For an exposition of the concept of “masks of the law,” see JOHN T. NOONAN, JR., *PERSONS AND MASKS OF THE LAW* (1st ed. 2002).



law of the forum, even though the foreign state also has an interest in the application of its contrary policy, and, a fortiori, it should apply the law of the forum if the foreign state has no such interest.<sup>27</sup>

In response to this exceptionally concise distillation, Currie anticipated and pre-emptively rebutted criticism from the traditionalists. “It will be said,” Currie observed, “that it is no great trick to dispose of the characteristic problems of a system by destroying the system itself.”<sup>28</sup> Currie, however, rose to the challenge, retorting that his “basic point is that the system itself is at fault” in the sense that

[w]e have invented an apparatus for the solution of problems of conflicting interests which obscures the real problems, deals with them blindly and badly, and creates problems of its own which, in their way, are as troublesome as the ones we originally set out to solve.<sup>29</sup>

Currie also presciently saw that his approach would, in effect, reduce choice-of-law questions to the boundaries limned by the federal Constitution itself in delineating the relationship among states via Article IV and among their citizens via the Fourteenth Amendment.<sup>30</sup>

Brainerd Currie was the kind of native son of whom Georgia needs

<sup>27</sup> Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L. J. 171, 177–78 (1959).

<sup>28</sup> *Id.* at 179.

<sup>29</sup> *Id.*

<sup>30</sup> Based on these constitutional limitations, Currie rejected the accusation that his approach “impl[ied] the ruthless pursuit of self-interest by the states.” *Id.* To the contrary, he observed, “the states of the Union are significantly restrained in the pursuit of their respective interests by the privileges-and-immunities clause of article four and by the equal-protection clause.” *Id.* The Supreme Court followed this basic approach in *Hague*, but it looked to the Due Process Clause, rather than the Equal Protection Clause, as the doublet with the Privileges & Immunities Clause. In fact, Currie presciently predicted that “employment of this method would give a new importance to those clauses as they affect conflict-of-laws problems . . .” because, as he explained, “[i]ronically, and precisely because of their fault of operating mechanically and impersonally, without regard to the real problem of conflicting interests, choice-of-law rules have the virtue that they rarely discriminate in such a way as to raise problems as to the constitutional restraints upon discrimination.” *Id.* at 179–180. One wonders what Currie would have thought of the *Medical Center* approach, which managed to outdo the traditional approach rules he had in mind by declaring the common law to be the same where it in fact is not the same—truly raising issues not only under due process and privileges and immunities, but also under equal protection. See Section IV, *infra*.

more. As was observed of him once:

What comes through . . . is Currie's great openness to ideas . . . [including] his willingness to change his mind about his ideas. There's a great generosity of spirit there that comes through from his writing, and that was obviously true beyond the printed page as well. I think that also has something to do with why he was able to throw off all the old dogma in developing his theory, and also why so many people continue to love his writing.<sup>31</sup>

But Herma Hill Kay's warm regard for her mentor has not radiated from his home state toward the native son. In the half-century since Currie published his seminal works that turned the territorial approach on its head and revealed the self-interest that states and their courts actually promote through choice of law, his name appears only twice in a reported opinion of the Georgia appellate courts, and only one of those opinions is a choice-of-law case.

The first decision is from 1936. And Currie is not so much cited as mentioned as counsel of record in what must have been one of his early and few forays in private practice.<sup>32</sup>

The second decision occurs almost 80 years later, in 2005, and that citation was, effectively, to castigate his life's work in conflict of laws and to banish his scholarly memory to intellectual exile so far as the Supreme Court of Georgia was concerned.<sup>33</sup>

To add a further degree of insult to the 2005 injury, the Supreme Court of Georgia appears to have found it sufficient to dismiss him *sub silentio* by declaring in 2017 that its "approach [to choice of law] may seem anachronistic to lawyers and judges *trained and professionally steeped in relativist theories of legal realism*."<sup>34</sup> It is quite apparent at

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<sup>31</sup> *Symposium: Remembering Brainerd Currie*, *supra* note 20, at 1966 (observations of Professor Andrew Bradt).

<sup>32</sup> *Proctor v. Redfern*, 185 S.E. 255 (Ga. 1936), a case in which the Georgia Supreme Court agreed with Currie's clients that a covenant contained in a deed transferring property from an individual donor to Wesleyan College "the sum of one hundred dollars per month from the rents, issues, and profits of said realty from the date of the death of W. J. Proctor to the date of the death of J. B. Proctor," was a covenant that ran with the land. See Note, *Enforcement of Affirmative Covenants Running with the Land*, 47 YALE L.J. 821, 821-22, 822 n.3 (1938); Charles E. Clark, *The American Law Institute's Law of Real Covenants*, 52 YALE L.J. 699, 732 (1943).

<sup>33</sup> See *Dowis v. Mud Slingers, Inc.*, 621 S.E.2d 413, 414-16 (Ga. 2005).

<sup>34</sup> *Coon v. Med. Ctr., Inc.*, 797 S.E.2d 828, 834 (Ga. 2017) (emphasis added).

whom this gratuitous dart was primarily directed.<sup>35</sup>

A great native son, Georgia-educated lawyer, and member of the Georgia bar has thus been reduced to a prophet without honor<sup>36</sup> in the judicial decisions of his home state. For a man who died in 1965, this may seem a triviality in the grand scheme of the cosmos. Yet, this indifference to Currie's critical insights—indeed, a refusal to even engage them on any intellectual level—has seriously undermined Georgia's approach to choice of law and paved an unimpeded way for the State's highest court to render the most truly bizarre choice-of-law decision in modern times.

### III. GEORGIA: A *POSEUR* AS A "TRADITIONAL APPROACH" CHOICE-OF-LAW JURISDICTION

#### A. *The Strange Career of Lex Loci Delicti in Georgia's Courts*

American courts may profess to follow "the traditional approach" to choice-of-law issues, but this phrase—though commonly understood—is not always consistently defined. Such courts may actually cite to and follow the Restatement (First) of Conflict of Laws, the magnum opus of Harvard faculty member Professor Joseph Beale<sup>37</sup> and the second of the original Restatements commissioned by and promulgated by the then-newly organized American Law Institute.<sup>38</sup> But Beale had done most of his important work decades earlier, when he created for the first time a treatise that analyzed, organized, and systematized

<sup>35</sup> It is well documented and understood that it was Currie's legal realist framework of thought that allowed him to make the discoveries he did in choice of law. See, e.g., Symeon C. Symeonides, *The Choice of Law Revolution Fifty Years After Currie: An End and a Beginning*, 2015 U. Ill. L. Rev. 1847, 1851 ("In Currie's words, an 'interest . . . is the product of (a) a governmental policy and (b) the concurrent existence of an appropriate relationship between the state having the policy and the transaction, the parties, or the litigation.' In this way, Currie projected his legal realist conception of law as 'an instrument of social control' at the interstate level by postulating that states have an interest in the outcome of litigation between private parties." (emphasis supplied)); see generally Michael S. Green, *Legal Realism, Lex Fori, and the Choice-of-Law Revolution*, 104 YALE L.J. 967 (1995) (discussing the form legal realism took in the choice-of-law theories of commentators such as Currie).

<sup>36</sup> This phrase comes from the King James Version of The New Testament. Its most famous formulation occurs in the Book of Matthew: "And they were offended in him. But Jesus said unto them, 'A prophet is not without honour, save in his own country, and in his own house.'" *Matthew* 13:57 (King James); accord *Mark* 6:4; *Luke* 4:24; *John* 4:44.

<sup>37</sup> See, e.g., Symeon Symeonides, *The First Conflicts Restatement Through The Eyes of Old: As Bad as Its Reputation?*, 32 S. ILL. U. L. J. 39, 41–42 (2007).

<sup>38</sup> Charles E. Clark, *The Restatement Of The Law Of Contracts*, 42 YALE L.J. 643, 646–47 (1933).

American choice-of-law cases for his own conflict-of-laws students.<sup>39</sup> At the time of Beale's 1902 treatise, which came after the antebellum decisions relied upon by the Georgia appellate judges in the *Medical Center* case, there was little coherence in state court conflict-of-laws decisions, which were "inconsistent" and "hopelessly chaotic."<sup>40</sup>

But it is out of this inconsistent and chaotic soup of ad hoc case decisions that Georgia's unique version of choice of law arose. Tracing even the *lex loci delicti* rule's strange career in Georgia choice of law illustrates the point well. Georgia has resisted applying another state's law when the Georgia appellate courts find the rule too progressive, particularly if that rule will disadvantage a Georgia party. It has achieved this result primarily in two ways: first, through an unpredictable and sometimes very unconvincing invocation of the public-policy exception to applying the *lex loci delicti* doctrine; and second, through a wholly disingenuous invocation of a ubiquitous "common law" (which Blackstone may have theorized but which American experience since the founding has refuted) as a reason to allow Georgia to apply its law instead of that of the *lex loci delicti*, particularly in tort cases.

### 1. Public Policy Shenanigans

#### a. An Escape Device That Allows Lexi Loci to Function Like Lex Fori

The traditional American approach to choice of law can produce contradictions that courts cannot swallow, particularly forum courts that find it objectionable to apply a sister-state's law to an issue on which it differs from forum law on a sensitive point.<sup>41</sup> That has led

<sup>39</sup> Symeon Symeonides, *The First Conflicts Restatement Through The Eyes of Old: As Bad as Its Reputation?*, 32 S. ILL. U. L. J. 39, 42, 45 (2007) ("In 1893, Beale became the first person to teach a course on Conflicts Law in any American law school. It was first offered as an one-credit course without an assigned casebook (or textbook), because nobody had collected the cases. . . . When Beale created the first conflicts course, he took upon himself the task of collecting, and mastering, all of the existing American conflicts cases. And he did. By 1900-02, Beale published a three-volume collection of conflicts cases, which contained 400 American and English cases and seventy foreign cases translated into English. Characterized as "one of the great monuments of law teaching," this casebook was "adopted far and wide." (emphasis supplied)).

<sup>40</sup> *Id.* at 46.

<sup>41</sup> See, e.g., *Mills v. Quality Supplier Trucking, Inc.*, 510 S.E.2d 280, 282 (W. Va. 1998) (chronicling the court's use of the public policy exception to defeat the application of sister-state guest statutes, intrafamily immunities, charitable immunities, and, in that case, Maryland's contributory negligence rule, which would have disadvantaged a West Virginia plaintiff); *Owen v. Owen*, 444 N.W.2d 710, 713 (S.D. 1989) (invoking public policy exception to avoid applying Indiana guest statute to the disadvantage of a South Dakota plaintiff); *Boone v. Boone*, 546 S.E.2d 191, 194 (2001) (invoking public policy when *lex loci*

courts to use an escape device to preserve *lex fori*, particularly the public policy exception<sup>42</sup> to the *lex loci* rule, an exception that often is of dubious repute.<sup>43</sup> As the realities of twentieth-century interstate commerce and an interconnected society continued to emerge and mature into the first two decades of the twenty-first century, the public policy escape device became more aggressively used by forum courts in traditional choice of law states—a marked contrast to the cases before World War II, when some commentators remarked on just how chaste American courts were in their sparing use of it.<sup>44</sup> In its present form,

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would have required applying Georgia's interspousal immunity rule that would have barred the personal injury claim between South Carolina spouses that arose from an accident that had occurred in Georgia); *Alexander v. Gen. Motors Corp.*, 478 S.E.2d 123, 124 (1996).

<sup>42</sup> See PETER HAY, PATRICK J. BORCHERS, & SYMEON SYMEONIDES, *CONFLICT OF LAWS* § 17.8, at 804 (5th ed. West Hornbook Series 2010) (hereinafter, "HAY, ET AL., *CONFLICT OF LAWS*") ("Dissatisfaction with the rigidity of the *lex loci* rule has . . . led to its avoidance, sometimes through resort to . . . the public policy exception . . .").

<sup>43</sup> See, e.g., Monrad G. Paulsen & Michael I. Sovem, "Public Policy" in the *Conflict of Laws*, 56 COLUM. L. REV. 961, 1016 (1956).

<sup>44</sup> See, e.g., Arthur Nussbaum, *Public Policy and the Political Crisis in the Conflict of Laws*, 49 YALE L.J. 1027, 1034–1043, 1046–49 (1940). The shift between the "chaste" and the more "promiscuous" use of the public policy escape device is well illustrated between the Chief Judgeships of Benjamin Nathan Cardozo and Desmond in two wrongful death cases, decided forty-three years apart, in which the New York Court of Appeals first held that applying the recovery limits of the Massachusetts wrongful death statute to a New Yorker killed in Massachusetts was no public policy violation but then subsequently held that it was. *Loucks v. Standard Oil Co.*, 120 N.E. 198 (N.Y. 1918). *Loucks* was a New York domiciliary killed in a vehicular collision with a Standard Oil truck. *Id.* Standard Oil was a New York corporation. *Id.* The survivors of Mr. Loucks were also domiciled in New York. *Id.* The fortuity here was that the accident happened to have occurred in Massachusetts. *Id.* When Mr. Loucks's wife brought a wrongful death action in New York against Standard Oil, Standard Oil—John D. Rockefeller's Company—argued that Massachusetts's wrongful death law applied because of the *lex loci delicti* rule. *Id.* at 198–99. Massachusetts's wrongful death law limited damages in such cases to a maximum of \$10,000, to be measured not by the degree of the family's loss but rather according to the degree of "culpability" raised by the defendant's negligent conduct. *Loucks*, 120 N.E. at 198. Mrs. Loucks argued vehemently against that position on the grounds that New York did not restrict damages in wrongful death cases and her late husband and family (as well as the defendant) were New York citizens—thus, it would violate an important public policy of New York to follow *lex loci delicti*. See *id.* at 198–99. Judge Cardozo rejected the widow's argument. *Id.* at 201–02. To rise to the level of non-recognition as a matter of public policy, the foreign law would have to rise to the level of menacing the public welfare or shocking the court's sense of justice. *Id.* at 201. Here, rather, the court said that what was before them amounted to a mere difference between the two laws, which it held as insufficient. *Id.* at 202. The widow, therefore, proceeded with a damages-limited wrongful death suit in New York. After World War II, courts becoming restive against the strictures of the *lex loci* rule began to turn increasingly to escape devices, and one of those was the increasingly frequent use in some courts of the public policy exception. For example, in *Kilberg v. Northeast Airlines*, Chief Judge Charles Desmond and his New York Court of Appeals applied the public policy exception to refuse to enforce the same law's recovery

the public policy exception is at least as bad as Paulsen and Sovem observed over sixty years ago:

The most troublesome use of public policy comes when it is employed as a cloak for the selection of local law to govern a transaction having important local contacts. Resort to the concept is beguilingly easy and does not demand the hard thinking which the careful formulation of narrower, more realistic, choice of law rules would require.<sup>45</sup>

Among the Last of the Mohicans to cling to the *lex loci delicti* regime, West Virginia and Georgia have shared a vigorous use of the public policy exception over the last forty years. And what a commentator said some years ago of the West Virginia Supreme Court of Appeals's use of the public policy exception will be shown as equally applicable to the Georgia appellate courts' own use of it:

By resorting to the "public policy exception" to avoid predictable but unacceptable results, the West Virginia court avoided the traditional *lex loci delicti* rule while claiming to preserve it. However, the court's broad "public policy exception" may swallow the traditional rule, or at least consume its predictability, consistency and ease of application—the only justifications ever offered by the court for its use of the rule. The application of West Virginia law in a case in a West Virginia court involving only West Virginia

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limitations in a wrongful death action that Cardozo had enforced in *Loucks*. Kilberg v. Northeast Airlines, 172 N.E.2d 526 (N.Y. 1961). Without reckoning with or even citing *Loucks*, Chief Judge Desmond advanced public policy as grounds for refusing to apply the damages cap. *Id.* at 528–29. The court looked to the New York Constitution of 1894, which included a provision that "[t]he right of action now existing to recover damages for injuries resulting in death shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation." *Id.* at 528. Thus, the Massachusetts limitation would not be enforced by any New York court because it offends New York public policy on compensation for tort victims. *Id.* Only in his concurrence in the judgment, which in fact functions as a dissent from Chief Judge Desmond's majority opinion, did Judge Froessel decry the obvious overruling of *Loucks*, the majority's sweeping of that overruling under the rug, and the enormous impact that such a use of the public policy exception would have on choice of law. See *Kilberg*, 172 N.E.2d at 532 (Froessel, J., concurring in the judgment).

<sup>45</sup> Paulsen & Sovem, *supra* note 43, at 1016.

residents is a good result in *Paul*.<sup>46</sup> However, the judicial contortions to produce that result under West Virginia's current choice-of-law rule are unnecessary. If the Supreme Court of Appeals desires a choice-of-law rule which is fair to litigants, which is easy to apply, and which achieves predictable results, West Virginia needs a new choice-of-law rule in tort actions.<sup>47</sup>

As the use of the public policy escape device demonstrates, Georgia, too, needs a new choice-of-law rule in tort actions. Somewhat encouragingly, the Georgia Supreme Court condemned the overuse of the public policy exception in the *Medical Center* case. Yet, as discussed below, although it recognized the overuse of the public policy exception, the Georgia Supreme Court did not replace it with a better rule. Instead, the court replaced it by resurrecting an *even worse* rule.

*b. Invocation Of The Public Policy Exception In Georgia's Courts—A Sampler*

In invoking the public policy exception, Georgia courts will typically at least cite, and sometimes quote, the following provision of the Georgia code, which appears to codify the exception:

The laws of other states and foreign nations shall have no force and effect of themselves within this state further than is provided by the Constitution of the United States and is recognized by the comity of states. The courts shall enforce this comity, unless restrained by the General Assembly, so long as its enforcement is not contrary to the policy or prejudicial to the interests of this state.<sup>48</sup>

Of course, this version of the public policy exception is, arguably, fairly broadly worded. Certainly, it is potentially greater in its scope than the more demure iteration by Judge Cardozo in the famous case of *Loucks v. Standard Oil Co.*,<sup>49</sup> which is a staple of every Conflict of Laws casebook.

In two cross-border wrongful-death cases raising choice-of-law

<sup>46</sup> *Paul v. Nat'l Life*, 352 S.E.2d 550 (W. Va. 1986).

<sup>47</sup> Jeffrey Jackson, *No Place Like Home: Public Policy and Prudent Practice in the Conflict of Laws*, 90 W. VA. L. REV. 1195, 1195–96 (1988).

<sup>48</sup> GA. CODE ANN. § 1-3-9 (2010).

<sup>49</sup> *See generally* 120 N.E. 198 (N.Y. 1918).

issues decided in the last decade, the Georgia Court of Appeals has overridden the *lex loci delicti* in favor of Georgia law on public policy grounds. In *Carroll Fulmer Logistics Corp. v. Hines*,<sup>50</sup> a Georgia big rig driver's estate and his minor child sued the Georgia driver and his non-resident employer over a truck accident the latter allegedly caused in Jacksonville, Florida.<sup>51</sup> The defendants sought refuge in the Florida Wrongful Death Act, which would have been the governing law chosen by Georgia's *lex loci delicti* rule.<sup>52</sup> The plaintiffs sought to have the more generous provisions of the Georgia Wrongful Death Act applied in the case.<sup>53</sup> The Court of Appeals held that application of the Florida Wrongful Death Act would violate Georgia public policy expressed in Georgia's Wrongful Death Act because "Florida measures damages from the perspective of survivors' losses while Georgia does so from the perspective of the lost value of the decedent's life."<sup>54</sup> As the Court of Appeals elaborated,

Moreover, under the facts of this case, application of the Florida Act would eliminate the possibility of the separate recovery allowable under Georgia law for any pre-death physical and mental pain and suffering consciously experienced by Hardaway. These are differences sufficient to render the Florida Act in contravention of Georgia public policy. Applying the public policy exception to the rule of *lex loci delicti*, the trial court correctly ruled that Georgia rather than Florida substantive law applies to the wrongful death and survival actions.<sup>55</sup>

In applying the public policy exception in this way, the Court of Appeals appears to be finding differences in the laws that have any substantive impact on the case to be the basis for claiming that the other state's law, when less advantageous, espouses a public policy so antagonistic and antithetical to Georgia's that it must be found to constitute a violation of Georgia's own public policy for a Georgia court to apply that state's law as the *lex loci delicti*.

We see that same mindset re-enacted in a wrongful death action

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<sup>50</sup> 710 S.E.2d 888 (Ga. Ct. App. 2011).

<sup>51</sup> *Id.* at 890.

<sup>52</sup> *Id.* at 890–91.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 891.

<sup>55</sup> *Id.*



from 2019. In *Forbes v. Auld*,<sup>56</sup> the Georgia Court of Appeals considered whether the *lex loci delicti* would be honored where the locus of the alleged wrongful death of a Georgian was another country—Belize. Cobb County (Georgia) Schools organized a field trip for students to a wildlife sanctuary in Belize, and it was there in 2017 that a fourteen-year-old student drowned.<sup>57</sup> The suit brought in Cobb County Superior Court by his parent sought to apply Georgia's two-year statute of limitations for Georgia Wrongful Death Act Claims to the claims against the sanctuary, Cobb County, Cobb County Schools, teachers, and volunteers who participated in the field trip.<sup>58</sup> The defendants, however, argued that the statute of limitations of the Belize Law of Torts Act—12 months—applied to time-bar the claim against all defendants.<sup>59</sup> The defendants' argument was two-fold. First, although limitations periods are often characterized as “procedural” and thus subjected to the time-honored *lex fori* choice-of-law rule for matters deemed “procedural,” Belize law made the limitations period part of the substance of the cause of action.<sup>60</sup> Under the *lex loci* rule, therefore, the law of the place where the fatal injuries were sustained governed the action, and it was, under that thread of argument, time-barred.<sup>61</sup> But the plaintiffs persuaded the Court of Appeals to consider the public policy exception, and the court invoked echoes of *Carroll Fulmer Logistics* to once again cite the scope and perspective of relief as a public-policy deal-breaker:

Our analysis has proceeded thus far because the 12-month limitation period is one of several elements of the statutory wrongful death cause of action created by the Law of Torts Act. We must look to the wrongful death provisions—the provisions that create the cause of action—in the Law of Torts Act as a whole before we may apply a particular provision of the Act. And since one element of the cause of action violates our public policy, we will not enforce any of the law creating that cause of action.<sup>62</sup>

As with the Florida Wrongful Death Act in *Carroll Fulmer Logistics*,

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<sup>56</sup> 830 S.E.2d 770 (Ga. Ct. App. 2019)

<sup>57</sup> *Id.* at 771.

<sup>58</sup> *Id.* at 771–72.

<sup>59</sup> *Id.* at 772.

<sup>60</sup> *Id.* at 774.

<sup>61</sup> *Id.*

<sup>62</sup> *Auld*, 830 S.E.2d at 774 (citations omitted).

the Belize Law of Torts Act was found wanting because it differed in detail from the Georgia Wrongful Death Act:

The wrongful death provisions of the Belize Law of Torts Act instantiate a public policy contrary to Georgia's. The Belizean provisions measure damages for wrongful death from the perspective of the survivors, while Georgia law measures damages from the perspective of the decedent. We have declined to apply Florida law for just that reason. In *Carroll Fulmer Logistics Corp.*, we held that application of the Florida Wrongful Death Act would violate our public policy given that 'Florida measures damages from the perspective of survivors' losses while Georgia does so from the perspective of the lost value of the decedent's life.' 309 Ga. App. at 698. '[U]nder Georgia's wrongful death statute, damages are measured from the decedent's point of view.' The Belize Law of Torts Act, Chapter 172, § 12 provides:

'In every [wrongful death] action such damages proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action is brought may be awarded, and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the parties for whose benefit the action is brought in such shares as the court or a jury may direct.'

In other words, under the law of Belize, the measure of damages for wrongful death is the loss incurred by the decedent's survivors as a result of the death. So under *Carroll Fulmer Logistics Corp.*, application of the wrongful death provisions of Belize's Law of Torts Act would violate our public policy, given that in wrongful death actions, Belize "measures damages from the perspective of survivors' losses while Georgia does so from the perspective of the lost value of the

decedent's life."<sup>63</sup>

In the end, the Court of Appeals reversed a summary judgment that the Superior Court had granted for those defendants who were not already protected by sovereign immunity, and as to those non-sovereign defendants, sent the case back for further proceedings.<sup>64</sup>

In a construction-site injury case, an employee of a subcontractor who had been injured in North Carolina received worker's compensation benefits from the subcontractor's insurer and then sought to sue

<sup>63</sup> *Id.* at 773–74 (citations omitted).

<sup>64</sup> One of the three-judge panel concurred only in the result:

I write only to point out that the majority's analysis highlights what one commentator has described as Georgia's "peculiarly elastic" choice-of-law rules where the exceptions often seem to swallow the rule. See Symeon C. Symeonides, *Choice of Law in the American Courts in 2017: Thirty-First Annual Survey*, 66 Am. J. Comp. L. 1, 22 (2018). Our Supreme Court, however, has recently confirmed its adherence to Georgia's traditional approach in *Coon v. Med. Center, Inc.*, 300 Ga. 722, 733 (3)(c), 97 S.E.2d 828 (2017), until it becomes clear that a better rule exists. The parties do not advocate for any other rule, nor would it be within the authority of our Court to accept a new rule. For these reasons, I concur in the judgment of the majority but do not agree with all that is said.

*Id.* at 775 (McMillian, J., specially concurring). It is unclear with what, exactly, in the main opinion the concurring judge disagrees. Perhaps it is with the main opinion's quick resort to the public-policy escape device in the face of the Georgia Supreme Court's criticism, discussed *infra*, when the court might have simply ruled the issue to be procedural, no matter how Belizian law characterizes it, and then applied the traditional *lex fori* choice-of-law rule for procedural matters. If that was the concurring judge's intent, it would have been helpful to bench and bar for that to have been articulated. Even so, "characterization" is as much of an "exception" that can "swallow the" *lex loci* rule as is the public-policy exception, which Professor Currie demonstrated with regard to California's similar resort characterization to avoid the *lex loci delicti* in *Grant v. McAuliffe*, 264 P.2d 944 (1953), a famous opinion written by Justice Roger Traynor. See Brainerd Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205 (1958). On March 13, 2020, the Supreme Court of Georgia granted certiorari in this case, setting it for the June 2020 oral argument calendar. See <https://www.gasupreme.us/wp-content/uploads/2020/03/s20c0020.pdf> (Ga. Mar. 13, 2020). The SCOG informed the parties that it is particularly interested in argument addressed to the following question: "Did the Court of Appeals properly determine that because the measure of damages available in a wrongful death action under the Law of Torts Act of Belize is different from the measure of damages under Georgia wrongful death law, Georgia law applies to this tort case?" *Id.* In the meantime, Georgia Governor Brian Kemp appointed the specially concurring judge in the Court of Appeals to a vacant seat on the SCOG on April 10, 2020. See *Justice Carla Wong McMillian*, SUP. CT. OF GA., <https://www.gasupreme.us/court-information/biographies/justice-carla-wong-mcmillian/> (last visited July 28, 2020).

the general contractor for negligence in a Georgia Superior Court.<sup>65</sup> The *lex loci delicti* for that suit would have chosen North Carolina law to govern, which did not immunize from suit a general contractor in the defendant's position. Georgia law, however, would do so. The Georgia Court of Appeals invoked the public policy exception to defeat application of the *lex loci delicti*:

Like similar provisions of Georgia law, under North Carolina law, a principal contractor which qualifies as a "statutory employer" in the North Carolina Workers' Compensation Act benefits from the exclusivity provision of the Act, which provides the statutory employer with immunity from an injured employee's suit claiming that the statutory employer negligently caused the injury. But under North Carolina law, a principal contractor qualifies as a statutory employer under the Act only when two conditions are met: (1) the injured employee must be working for a subcontractor doing work contracted to it by the principal contractor; and (2) the subcontractor does not have workers' compensation insurance covering the injured employee. Under these two conditions, the principal contractor becomes a statutory employer liable to pay workers' compensation benefits for the subcontractor's injured employee, and is entitled to immunity from suit under the Act's exclusivity provision. Because Smith's immediate employer, Edens, had workers' compensation insurance covering Smith and paid the benefits, the principal contractor, Graham, would not qualify as a "statutory employer" under the North Carolina Act and would not be entitled to immunity from suit provided by the Act's exclusivity provisions. By contrast, under Georgia's WCA the principal contractor, Graham, qualified as a statutory employer entitled to immunity from suit even though Smith's immediate employer, Edens, had workers' compensation coverage and paid the benefits.

It follows that, even though Smith was injured in North Carolina, the trial court correctly applied Georgia substantive law because application of North Carolina substantive law would offend the public policy embodied in the exclusivity provision of the Georgia

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<sup>65</sup> Smith v. Graham Constr. Co., 761 S.E.2d 370, 371–72 (Ga. Ct. App. 2014).

WCA.<sup>66</sup>

Interestingly, while the plaintiff was a Georgia resident and his immediate employer was a Georgia LLC, the defendant general contractor was not; it was “a foreign corporation,” with its principal place of business in North Carolina, merely licensed to do business in Georgia.<sup>67</sup>

While the Georgia Court of Appeals in these cases repeatedly resorted to a public policy argument to avoid the *lex loci delicti* in favor of *lex fori*, the court never identifies what the relevant public policy is.<sup>68</sup> The court implies that the policy is “embodied in”<sup>69</sup> the provisions of the Georgia law it cites, as if to suggest we should all know which policy would be implicated should the law of another jurisdiction were to be applied. The fact that it merely relies on the public policy exception when the law of another state is simply different than Georgia’s undercuts the appeals court’s use of the exception itself.

*c. Products Liability Cases: Where Lex Loci Delicti Meets Public Policy*

A trio of products liability cases shows the crapshoot that has attended previous choice-of-law decisions in this area. In one case, the issue was whether expert testimony was required for the plaintiff’s defective design case to survive summary judgment where the product’s alleged failure (a design-flawed car hauler) caused an accident in Mississippi.<sup>70</sup> The Georgia Court of Appeals ruled that *lex loci delicti* required application of Mississippi law on this point.<sup>71</sup> Although not

<sup>66</sup> *Id.* at 372 (citations omitted).

<sup>67</sup> *Id.*

<sup>68</sup> For example, in the *Fulmer* case, the Georgia Court of Appeals states, “Although both acts provide recovery of damages for wrongful death, Florida measures damages from the perspective of survivors’ losses while Georgia does so from the perspective of the lost value of the decedent’s life. Moreover, under the facts of this case, application of the Florida Act would eliminate the possibility of the separate recovery allowable under Georgia law for any pre-death physical and mental pain and suffering consciously experienced by Hardaway.” *Carroll Fulmer Logistics Corp. v. Hines*, 710 S.E.2d 888, 891 (Ga. Ct. App. 2011). While the underlying policy for applying Georgia’s law over Florida’s may be to provide the plaintiff with the largest award of damages possible, the court never identifies that policy goal, thereby undermining the argument that Georgia’s policy requires application of Georgia law. See generally Ellie Margolis, *Beyond Brandeis: Exploring the Uses of Non-Legal Materials in Appellate Briefs*, 34 U.S.F. L. REV. 197 (2000).

<sup>69</sup> *Smith*, 761 S.E.2d at 372.

<sup>70</sup> *Moore v. Cottrell, Inc.* 780 S.E.2d 442, 445–46 (Ga. Ct. App. 2015)

<sup>71</sup> *Id.* at 445–47. The plaintiff lost the benefit of two different expert witnesses on pre-trial motions to strike: one because of a claimed defect in the expert’s methodology, and the other because of an allegedly untimely proffer of the expert’s affidavit. *Id.* at 445. The

stated directly in the court's opinion, the plaintiff was a Mississippi resident who had come to Georgia to sue the manufacturer, Cottrell, Inc., in Hall County, where Cottrell maintains its principal place of business<sup>72</sup> and is incorporated.<sup>73</sup> No mention of policy is made in the opinion, likely due to there being no other state's law at issue. Georgia had no "dog" in the hunt; rather, it was simply determining whether the superior court correctly applied Georgia's *Daubert*-derived requirements<sup>74</sup> to the plaintiffs' experts. Moreover, the court's determination that Mississippi law applied was inconsequential. Because the court ultimately determined that Mississippi law required expert testimony, and plaintiffs' experts had been excluded, Georgia could gratuitously apply Mississippi law in a no-harm, no-foul context.

However, the *lex loci delicti* was rejected in another case in which a Georgia resident sought to sue General Motors (neither incorporated nor having its principal place of business in Georgia) in Georgia for a design defect in the car he was driving when he was injured in an automobile accident in Virginia.<sup>75</sup> Although Virginia was indeed the place of the accident, the Georgia Supreme Court refused to apply Virginia's products liability law because it did not provide for strict liability as Georgia law provided.<sup>76</sup> The court determined that this difference violated Georgia's public policy. Moreover, the court identified Georgia's policy as that of shifting the "burden of loss" caused by defective products to the manufacturer, by which the court seems to mean the burden of proving such a claim.<sup>77</sup> Because the court explicitly identified a policy at work, the use of the exception is more defensible.

Yet, when plaintiffs injured in a Texas accident invoked Texas law that provided a *de minimis* standard for plaintiffs to prove that the driver, a Georgia resident, would have heeded a warning if given in a failure-to-warn claim, the Georgia Court of Appeals saw no public policy issue in applying the lenient Texas standard to the claims against Ford Motor Company, which, like General Motors, is neither

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Georgia Superior Court granted both motions and determined that without the expert testimony, the plaintiff's case failed as a matter of law.

<sup>72</sup> COTTRELL TRAILERS, <http://www.cottrelltrailers.com/> (last visited Apr. 20, 2020).

<sup>73</sup> See *Georgia Corporations Division*, OFF. OF THE GA. SECRETARY OF ST., <https://ecorp.sos.ga.gov/BusinessSearch/BusinessInformation?businessId=695638&businessType=Domestic%20Profit%20Corporation&fromSearch=True> (last visited Apr. 20, 2020).

<sup>74</sup> *Moore*, 780 S.E.2d at 445.; See also *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

<sup>75</sup> See *Alexander v. Gen. Motors*, 478 S.E.2d 123 (1995).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 124.

incorporated nor headquartered in Georgia.<sup>78</sup> Significantly, the court said that “Texas law applied” even though that law did not come from a statute, but was part of Texas’s common law—a ruling from the Supreme Court of Texas.<sup>79</sup>

These twisted strands of products liability choice-of-law cases came together again in a case that the majority on the Georgia Court of Appeals treated as if it were a reprise of *Alexander v. General Motors*; except this time it was the products liability law of Indiana that was assailed by a Missouri plaintiff who had sued Cottrell, Inc., for allegedly producing a defective car carrier whose defective design allegedly caused the injuries the plaintiff suffered in Indiana.<sup>80</sup> Once again, as in *Moore v. Cottrell*, a Hall County Superior Court granted summary judgment in favor of the Georgia incorporated and headquartered defendant.<sup>81</sup> On appeal, the Missouri plaintiff challenged the Superior Court’s choice-of-law ruling:

The Baileys contend that Indiana law violates Georgia public policy in two respects: (1) Indiana law does not allow a strict liability claim for a product design defect with a risk-utility test, while Georgia does; and (2) Indiana law, as applied by the trial court, eliminated the voluntariness element for an assumption of risk defense, which they contend contravenes Georgia public policy.<sup>82</sup>

The Court of Appeals was unanimous in its ruling—but significantly, not in its choice-of-law rationale. Judge Adams and Presiding Judge Barnes invoked *Alexander*,<sup>83</sup> and found that the Superior Court could not apply the *lex loci delicti* because it would violate Georgia’s public policy to do so:

Georgia law recognizes a product liability claim

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<sup>78</sup> *Bagnell v. Ford Motor Co.*, 678 S.E.2d 489, 493–44 (Ga. Ct. App. 2009). The Court of Appeals in fact reversed the Superior Court for excluding the subjective, self-serving evidence given by plaintiff in her trial testimony that “she would [not] have driven the van filled with passengers and luggage if she had known ‘that the vehicle was less stable in that condition’” and that “she would [not] have driven the van that day if Ford had placed a warning in the vehicle regarding the rollover risk.” *Id.* at 493.

<sup>79</sup> *Id.* at 493–94 (citing *Gen. Motors Corp. v. Saenz*, 873 S.W.2d 353, 357 (Tex. 1993)).

<sup>80</sup> See *Bailey v. Cottrell, Inc.*, 721 S.E.2d 571 (Ga. Ct. App. 2011).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 573.

<sup>83</sup> See *Alexander v. Gen. Motors Corp.*, 478 S.E.2d 123 (Ga. 1996).

based upon strict liability against ‘those actively involved in the design, specifications, or formulation of a defective final product or of a defective component part which failed during use of a product and caused injury.’ (Citation omitted.) *Davenport v. Cummins Alabama, Inc.*, 284 Ga. App. 666, 671(1), 644 S.E.2d 503 (2007). See OCGA § 51–1–11. Indiana law, however, does not recognize a strict liability claim for design defects:

The Indiana Product Liability Act generally imposes strict liability for physical harm caused by a product in an unreasonably dangerous defective condition. Ind. Code § 34–20–2–1. For actions based on an alleged product design defect, however, the Act departs from strict liability and specifies a different standard of proof: ‘[T]he party making the claim must establish that the manufacturer or seller failed to exercise reasonable care under the circumstances in designing the product.’ Ind. Code § 34–20–2–2.

*TRW Vehicle Safety Systems v. Moore*, 936 N.E.2d 201, 209(1) (Ind.Sup.2010) (declining to expand the statutory standard of care for product liability claims alleging a design defect). Thus, Indiana only recognizes a negligent design defect claim. *Id.* at 214(5). The issue before us, therefore, is whether this distinction in Indiana law violates Georgia public policy. We conclude that it does.<sup>84</sup>

Judge Adams and Presiding Judge Barnes concluded that “[t]his is not a distinction without a difference.”<sup>85</sup> They reasoned that “[a]lthough Indiana recognizes strict liability for manufacturing claims, its failure to recognize a strict liability claim for design defects presents a substantive legal difference[,]” and therefore,

[a] claim of negligence in an Indiana defective design

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<sup>84</sup> *Bailey*, 721 S.E.2d at 573.

<sup>85</sup> *Id.* at 574.



product liability case differs from a strict liability claim in Georgia in that Georgia has specifically adopted the risk-utility test for determining strict liability as to such claims, while the State of Indiana has specifically rejected this test in favor of a common law negligence analysis.<sup>86</sup>

Judge Blackwell (who later was appointed to the Georgia Supreme Court), however, strongly disagreed with this quick resort to the public policy exception.<sup>87</sup> Specially concurring, he observed that he was “unconvinced that the law of the two states is so ‘radically dissimilar,’” in the words of the court in *Alexander v. General Motors Corp.*, “that public policy compels the application of Georgia law in this case.”<sup>88</sup> In Judge Blackwell’s more restrained view, Indiana and Georgia law essentially asked the same question: was the manufacturer’s conduct around the design of a product objectively reasonable?<sup>89</sup> Here again, the appeals court’s resort to public policy is undermined by at least two considerations. First, the policy identified by the court is “to protect those who are injured by defective products placed in the stream of commerce in this state.”<sup>90</sup> The court, however, does not explain how application of Indiana’s design defect rules over Georgia’s would violate that policy. Second, Judge Blackwell’s astute observations further erode the exception’s application. If the “policy” is really “your law is different from ours,” when in reality, it isn’t, the exception loses much of its viability. The bottom line is that there appears to be no rhyme or

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 575.

<sup>88</sup> *Id.* at 575 (Blackwell, J., specially concurring).

<sup>89</sup> *Id.* at 575–76. Judge Blackwell observed that

neither the Baileys nor the majority persuades me that this case is one in which the differences, if any, between the Georgia reasonableness standard and the Indiana reasonableness standard are meaningful ones. At bottom, the conflict-of-laws analysis of the majority seems to rest mostly upon the fact that the Georgia courts sometimes speak of “strict liability” for defective design claims, notwithstanding that the Georgia standard for such claims is one of objective reasonableness. Accordingly, I am unconvinced that public policy requires the application of Georgia law in this case.

*Bailey*, 721 S.E.2d at 576. He joined the disposition of the case on a different ground, concerning the manufacturer’s assumption of risk defense. *Id.* at 576–77. At the end of the day, and somewhat unusually, the Georgia Court of Appeals upset the apple cart by which the trial court had favored the Georgia defendant over the Missouri plaintiff. *Id.* at 575.

<sup>90</sup> *Id.* at 573 (quoting *Alexander*, 478 S.E.2d at 123).

reason for when the Georgia courts will resort to the public policy exception or when they will allow the *lex loci delicti* to dictate the applicable law, other than perhaps a desire to protect a Georgia interest. This is a disguised *lex fori* mindset at its finest.

*d. The Apotheosis of the Public Policy Dance—The Court of Appeals Majority Opinion in Coon v. The Medical Center, Inc.*

With this background of cases in which public policy acted as a *lex fori* rule to trump application of the *lex loci delicti*, it came as little surprise that the trial court and a majority of Georgia Court of Appeals judges reached for the public policy exception to prevent a Georgia hospital from being subjected to Alabama's more permissive approach to negligent infliction of emotional distress (NIED) claims.<sup>91</sup>

Amanda Rae Coon, a resident of Opelika, Alabama, chose to sue the Medical Center on its home turf in the State Court of Muscogee County, Georgia.<sup>92</sup> She sought “damages for the emotional distress she

<sup>91</sup> See *Coon v. Med. Ctr., Inc.*, 780 S.E.2d 118, 118 (Ga. Ct. App. 2015).

<sup>92</sup> *Id.* at 120–22, *aff'd on other grounds*, 797 S.E.2d 828 (Ga. 2017). Columbus, Georgia is the largest community in Muscogee County and where the events surrounding the hospital's breach of duty to the plaintiff occurred. *Id.* at 120. It is well established, however, that the place *where* the breach of a duty of care *occurred* is not the *lex loci delicti*. Since the leading case of *Alabama Great Southern Railroad Co. v. Carroll*, 11 So. 803, 805 (Ala. 1892), it has been universally recognized (and further ensconced by Professor Beale in the Restatement (First) of Conflict of Laws § 377 (1934)) that the *lex loci delicti* is the geographic place wherein the harm occasioned by the defendant's breach of duty *is suffered* by the plaintiff. Here, that place is Opelika, Alabama, where Ms. Coon lived and where she received word from the Medical Center:

On February 23, 2011, the hospital discovered that it had released the wrong baby to the Opelika funeral home. The hospital contacted the director of the Opelika funeral home, informed him of the mistake, and requested contact information for Coon's family. The funeral director advised the hospital to contact Coon's father rather than Coon herself because ‘mentally, she [would] just not [be] able to take it’ if she learned of the mistaken identification.

Later that day, the hospital's chief executive officer contacted Coon by telephone and informed her that the hospital had released the wrong baby for burial. The following day, the baby who had been mistakenly released to the funeral home was exhumed from the Opelika cemetery. The funeral home director then traveled to Columbus to deliver the exhumed baby to a different funeral home and to retrieve Coon's baby from the hospital.

After the exhumed baby's remains were handed over to the representative of another funeral home, the Opelika funeral director retrieved a cadaver bag from the hospital morgue that had an identification tag for Coon's baby on the outside of it. Yet, when the director

suffered as a result of the mishandling of her stillborn child's remains,"<sup>93</sup> which the defendant did not reveal to her until after she had buried and grieved the child. After the child's burial, the hospital informed Ms. Coon that the remains sent to her had not been those of her child, but rather the remains of another grieving family's child, and that her child's remains were now being sent to her for burial.<sup>94</sup>

As a resident of Alabama, it is at first blush curious that she did not file her lawsuit in her local circuit court, the Lee County Circuit, the Thirty-Seventh Judicial Circuit in Alabama.<sup>95</sup> One can only think that the plaintiff's attorney thought that personal jurisdiction might be an unwelcome issue to be raised by the defendants. It is not clear the quantity nor quality of contacts that the Medical Center and other defendants had with the State of Alabama, particularly because there was no record developed on those points. As a border community, Columbus businesses probably have their fair share of customers, clients, patrons, vendors, suppliers, and others in Alabama with whom they interact. Alabama, however, does have a long-arm statute that reaches to the full limits of Fourteenth Amendment Due Process.<sup>96</sup> Why this

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returned to his funeral home in Opelika, he discovered that the cadaver bag contained nothing but a blanket, and he had to return again to the hospital morgue to obtain Coon's baby, whom hospital employees had left in a holding room in the morgue. In violation of hospital policy, no documentation was made in the morgue log book showing when Coon's baby or the exhumed baby were returned to the morgue or to show when the switch occurred and who was involved.

Once the funeral director obtained the proper remains from the hospital, Coon's baby was buried at the Opelika cemetery. The hospital paid the costs associated with the exhumation of the misidentified baby and the subsequent burial of the correct remains. Coon did not attend the second burial because she 'could not handle having to go through that all over again.'

*Med. Ctr., Inc.*, 780 S.E.2d at 121–22.

<sup>93</sup> *Med. Ctr., Inc.*, 780 S.E.2d at 122.

<sup>94</sup> *Id.* at 121–22.

<sup>95</sup> THIRTY-SEVENTH JUD. CIR. CT. OF ALA., <http://lee.alacourt.gov/> (last visited Apr. 20, 2020).

<sup>96</sup> ALA. R. CIV. P. 4.2(b) (a part of the Alabama Rules of Court within the Alabama Code) was amended in 2004 to reflect what the Alabama appellate courts were already doing in practice:

(b) Basis for Out-of-State Service. An appropriate basis exists for service of process outside of this state upon a person or entity in any action in this state when the person or entity has such contacts with this state that the prosecution of the action against the person or entity in this state is not inconsistent with the constitution of this state or the

statute wasn't used here is unclear. Because a significant portion of the plaintiff's claim was for the emotional distress caused by the defendant's negligent mishandling of the child's body, avoiding litigation in Georgia—one of the dwindling number of jurisdictions that demonstrates hostility to NIED claims—would arguably be paramount. Georgia retains the nineteenth-century “physical impact rule” as a prerequisite to even asserting such a claim. Although neither the Court of Appeals nor the Georgia Supreme Court addressed this issue, the plaintiff's brief filed with the Georgia Supreme Court confirms that the NIED claim was founded directly on Alabama case law that is contrary to Georgia's historic hostility to these types of claims (absent some contemporaneous physical impact upon the plaintiff): “Alabama does not hold to a strict “impact rule” with regard to injury for emotional distress, and Appellant would be able to maintain a claim against Appellee under Alabama law.”<sup>97</sup>

Georgia's hostility to permitting recovery for negligently caused emotional distress in the absence of a physical injury to, or at least some physical “contact” with, the plaintiff goes back to an 1892 case, which the Georgia Supreme Court reviewed in rejecting the most recent significant effort to persuade the Court to abandon the impact rule:

The doctrine has a long history with its origins in *Chapman v. Western Union Tel. Co.*, a case involving a plaintiff's unsuccessful attempt to recover damages from a telegraph company for mental pain and suffering resulting from the company's alleged failure to timely deliver a message to the plaintiff informing him of his brother's desperate illness. The Chapman court

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Constitution of the United States . . . .

*Id.* The Alabama Supreme Court has long held that long-arm statute “extends the personal jurisdiction of Alabama courts to the limits of due process under the federal constitution and the Alabama constitution.” *Sieber v. Campbell*, 810 So. 2d 641, 644 (Ala. 2001). Because Alabama's long-arm statute authorizes courts to assert in personam jurisdiction to the full extent authorized by the Due Process Clause, the only question before a court is whether the federal Constitution gives that court jurisdiction over a non-resident defendant. *See Mut. Serv. Ins. Co. v. Frit Indus., Inc.*, 358 F.3d 1312, 1319 (11th Cir. 2004). The Alabama Supreme Court's most recently issued decision under the revised Alabama long-arm statute shows a court that is not stingy with exercising extraterritorial personal jurisdiction over Georgia-based tortious acts by out of state actors having impact in Alabama. *See Ex parte Aladdin Mfg. Corp.*, No. 1170864, 2019 WL 6974629 (Ala. Dec. 20, 2019).

<sup>97</sup> Brief of Appellant at 15, *Coon v. Med. Ctr., Inc.*, 2016 WL 3181813 (Ga. 2016) (citations omitted). The authors note that the “mishandling” cases actually are situated within a greater body of Alabama law on NIED. *Id.*

observed,

‘So far as mental suffering originating in physical injury is concerned, it is rightly treated as undistinguishable from the physical pain. On ultimate analysis, all consciousness of pain is a mental experience, and it is only by reference back to its source that one kind is distinguished as mental and another as physical. So in cases of physical injury, the mental suffering is taken into view. But according to good authorities, where it is distinct and separate from the physical injury, it cannot be considered.’<sup>98</sup>

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<sup>98</sup> *Lee v. State Farm Mut. Ins. Co.*, 533 S.E.2d 82, 84 (Ga. 2000) (quoting *Chapman v. W. Union Tele. Co.*, 15 S.E. 901, 901 (Ga. 1892)) (internal citation omitted). Justice Harris Hines, writing for the Court, acknowledged that Georgia’s position was on the more restrictive end of the spectrum:

Numerous rules have been employed in other jurisdictions for determining recovery of damages for emotional distress. These rules run the gamut from variations of the impact approach, to analysis under a so-called “zone of danger,” to a broader rule based on foreseeability of injury assessed by application of factors relating to proximity, direct observation, and relationship to the victim, to the most expansive view of reasonable foreseeability of injury under general tort theory.

*Lee*, 533 S.E.2d at 85. However, he discerned and defended three public policy reasons for the Court not to retreat from its rule:

There are three policy reasons traditionally given for having the impact rule and denying recovery for emotional distress unrelated to physical injuries. First, there is the fear, that absent impact, there will be a flood of litigation of claims for emotional distress. Second, is the concern for fraudulent claims. Third, there is the perception that, absent impact, there would be difficulty in proving the causal connection between the defendant’s negligent conduct and claimed damages of emotional distress.

These policy concerns have been criticized and even held to be wholly invalid in the context of a claim of negligent infliction of emotional distress. The impact rule is also susceptible to the charge that it is arbitrary, but any rule seeking to circumscribe a defendant’s liability to bystanders must necessarily involve a degree of arbitrariness. However, the benefits of an impact rule are plain in that it provides a brighter line of liability and a clear relationship between the plaintiff’s

More recently, Georgia rejected recovery for NIED without impact even where the defendant egregiously mishandled a loved one's remains.<sup>99</sup> *Hang v. Wages Sons Funeral Home, Inc.*<sup>100</sup> arose out of a badly botched funeral. The family of the deceased were Buddhists.<sup>101</sup> Having attended another Buddhist funeral held at the defendant's establishment, they made arrangements for a Buddhist funeral with the defendant, requesting that the defendant provide a traditional Cambodian Buddhist funeral ceremony.<sup>102</sup> Such a ceremony would include a viewing of the body by mourners, followed by a ritualized cremation that, to permit the religious rites to be performed according to tradition, would not reduce the body entirely to ashes.<sup>103</sup> Unfortunately, the defendant's employees cremated the body before the service, so no viewing could be had.<sup>104</sup> The employees also reduced the body to ashes so small that the proper rituals could not be performed.<sup>105</sup> In the suit, the family claimed the defendant's actions resulted in general damages, citing both the desecration of the body and the interference with proper Buddhist rites.<sup>106</sup> Citing Georgia's physical impact rule, the defendant moved for summary judgment, and the Superior Court granted that motion, ruling that "Georgia's impact rule precluded the [deceased's]

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being a victim of the breach of duty and compensability to the plaintiff. Saechao, *supra* at 169. And a rule is not superior to its alternatives simply because it expands recovery if there is no connection between the nature of the damages and the reason for allowing the additional recovery.

*Id.* at 86. (citations omitted). Yet, significantly, Justice Hines saw that to apply the rule strictly to the case in front of the Court was very unappealing where a mother suffered emotional distress watching her child die in the wreckage of their car after an accident negligently caused by another driver. *Id.* at 86–87. Thus, he declared that the three public policy goals would not be served by denying this grieving mother her recovery, and ruled that Georgia's rule allowed—even though it really does not—"[w]hen, as here, a parent and child sustain a direct physical impact and physical injuries through the negligence of another, and the child dies as the result of such negligence, the parent . . . [to] attempt to recover for serious emotional distress from witnessing the child's suffering and death without regard to whether the emotional trauma arises out of the physical injury to the parent." *Id.* at 86–87. It is a regrettable coincidence that Justice Hines lost his life in a car accident only a month after he retired from the Georgia Supreme Court.

<sup>99</sup> See *Hang v. Wages & Sons Funeral Home, Inc.*, 585 S.E.2d 118 (Ga. Ct. App. 2003).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 119.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Hang*, 585 S.E.2d at 119.

<sup>106</sup> *Id.* at 119–120.

family from recovering general damages for their alleged emotional distress.”<sup>107</sup> The family appealed, but the Georgia Court of Appeals would not be budged:

We are sympathetic to the circumstances of the Tep family, but this case is governed by the impact rule. None of the plaintiffs in the instant case sustained any physical injury or pecuniary loss. Nor have the plaintiffs proved that Wages’s conduct was ‘malicious, willful, or wanton.’<sup>108</sup>

Thus, the family was left with no meaningful redress<sup>109</sup> against the funeral home, which had caused them so much real pain at a time that was already most painful.

These are the contrasting legal landscapes Amanda Rae Coon and her attorney confronted.<sup>110</sup> They cast their lot in the State Court of Muscogee County, Georgia.<sup>111</sup> The defendant raised the choice-of-law issue through a summary judgment motion.<sup>112</sup> After some initial confusion and conversation, the state trial court held first that Georgia law applied, not Alabama; and second, that Georgia law barred the

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<sup>107</sup> *Id.* at 120.

<sup>108</sup> *Id.* at 121. The Court of Appeals explained the origins of this peculiarly-worded rule in a footnote:

See *Westview Cemetery v. Blanchard*, 234 Ga. 540, 544(2)(B), 216 S.E.2d 776 (1975) (in case alleging wrongful movement of corpse and grave marker within cemetery, Supreme Court noted that “[i]f ‘mental pain and suffering’ [are] not accompanied by physical injury or pecuniary loss, recovery is allowed only if the conduct complained of was ‘malicious, willful, or wanton.’”); *Hill*, *supra*; *Edwards v. A.S. Turner & Sons, Inc.*, 181 Ga.App. 105, 106(2), 351 S.E.2d 505 (1986) (no recovery for emotional distress permitted in case involving alleged improper removal of remains from cemetery plot absent pecuniary loss, physical injury, or willful or wanton conduct).

*Id.* at 122 n.19.

<sup>109</sup> The Court of Appeals noted that the family’s recovery would be limited to “nominal damages.” *Id.* at 121–22.

<sup>110</sup> Another option was to file in the federal court—the U.S. District Court for the Middle District of Georgia. The federal courts are sometimes at odds with the state courts about choice-of-law methodology, especially when the state law is so far out of step with overwhelming national trends. For example, federal courts across the country favor the Restatement (Second) approach to choice-of-law issues.

<sup>111</sup> *Coon v. Med. Ctr., Inc.*, 780 S.E.2d 118 (Ga. Ct. App. 2015).

<sup>112</sup> *Id.*

plaintiff's NIED claim.<sup>113</sup> Ms. Coon's attorney appealed the state trial court's grant of summary judgment in favor of the defendant hospital.<sup>114</sup> But the Georgia Court of Appeals zeroed in on public policy and found that even if the *lex loci delicti* were Alabama, Ms. Coon's case failed as a matter of law:

Here, pretermittting whether the last event necessary to make the hospital liable for the alleged tort took place in Alabama, Georgia law applies to Coon's claims against the hospital based on the public policy exception to the rule of *lex loci delicti*. As aptly stated by the trial court, 'there is a significant difference between Alabama and Georgia law on the issue of the impact rule. Georgia follows its impact rule for sound reasons. It is not proper to ignore the rule of law regardless of the compelling emotional considerations.' The policies behind Georgia's impact rule have been fully developed, and our Supreme Court has rejected invitations to abandon the impact rule in difficult cases. Accordingly, the trial court properly applied Georgia law to this case in granting summary judgment to the hospital.<sup>115</sup>

Another judge concurred in this result but brought up the antebellum precedent as the governing rationale—the precedent that holds the common law is presumed to be the same everywhere in the thirteen original colonies and the states that ultimately grew out of them,<sup>116</sup> a line of reasoning that seemed to be a quaint quirk—until, as discussed in Section IV, the Georgia Supreme Court embraced it with gusto. A third judge dissented from both of the foregoing positions, declining to apply the antebellum precedent and insisting the public policy exception was inapposite in cases like this one:

The majority opinion concludes that application of Alabama law in this case would conflict with Georgia public policy because Alabama, in contrast to Georgia, does not apply an impact rule in emotional distress cases involving the negligent mishandling of human

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<sup>113</sup> *Id.* at 122.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 122–23.

<sup>116</sup> *Id.* at 127 (McMillian, J., concurring specially).



remains. But the fact that the emotional distress laws of Alabama and Georgia differ in some respect does not demonstrate, without more, that Georgia public policy would be undermined by applying Alabama law. Indeed, the majority does not specifically identify or discuss any of the public policy reasons for Georgia's impact rule or explain how application of Alabama law in this case would seriously contravene them. When the public policy reasons for the impact rule are identified and considered, however, it is clear that application of Alabama law in a case like the present one would not seriously contravene Georgia public policy.<sup>117</sup>

Indeed, Judge Barnes aptly observed,

[a]s the 'radically dissimilar' requirement suggests, the fact that the law of another state differs in some respect from our own law does not mean that the law of the other state necessarily violates the public policy of Georgia; otherwise, a choice of law analysis would never be necessary, and the rule of *lex loci delicti* would be rendered moot.<sup>118</sup>

## 2. Georgia's Choice of Law Antebellum "Common Law" Rationale

Notwithstanding the public policy exception and its consistent—albeit somewhat erratic—use by the Georgia courts, the concurring judge in the Georgia Court of Appeals's decision in *Medical Center* resurrected a largely forgotten antebellum artifact of Georgia's choice-of-law methodology.<sup>119</sup> This approach is discussed in more detail below but warrants introduction here in the context of the Georgia courts' use of the public policy exception. When *lex loci delicti* establishes that another state's law controls, it must be determined whether that law is statutory or common law. If statutory, that law will be given effect, unless it violates Georgia's public policy to do so. But the specially concurring judge in the *Medical Center* resurrected a largely

<sup>117</sup> *Med. Ctr., Inc.*, 780 S.E.2d at 126–27 (Barnes, P.J., dissenting).

<sup>118</sup> *Id.* at 127. As for "[t]he allegedly material distinction drawn by the special concurrence between statutory and common law claims for purposes of Georgia's choice-of-law rules," *Id.* at 128, Presiding Judge Barnes wrote that "[b]ecause nothing in the record before us shows that the argument raised sua sponte by the special concurrence was fairly presented in the court below, we should not consider whether to affirm the trial court on that alternative basis." *Id.* at 129.

<sup>119</sup> *Med. Ctr., Inc.*, 780 S.E.2d at 125–26.

forgotten string of cases stretching back to Georgia's antebellum days that propound a most peculiar—and difficult to defend—rule: When the law at issue derives from the common law and the relevant state was originally one of the thirteen colonies (or was derived from the territory contained therein), Georgia courts must presume that the common law of the other state is the same as Georgia's common law and must apply the law (as the judge understands it) of the state in which the injury occurred.<sup>120</sup> As such, in *Medical Center*, because Alabama's NIED rules are not statutory in nature, and because Alabama was formed from part of Georgia's colonial territory, Georgia courts are *not* bound to apply Alabama law, but rather are bound to apply "the common law," whatever the judge believes that law to be.<sup>121</sup> Although it is true that applying this peculiar rule in cases such as *Medical Center* will prevent the court from invoking a wobbly public policy escape device, this alternative introduces an even more troubling rule—one that lacks logic, constitutionality, or jurisprudential integrity.

This approach is yet another indefensible wrinkle in the fabric of Georgia's choice-of-law methodology. And although the Georgia courts have not always resorted to this approach when confronted with choice-of-law issues dealing with the common law of another jurisdiction, certainly sometimes they have.<sup>122</sup> The wholesale acceptance of this approach in the *Medical Center* case reinforces the need to address head-on the regressive direction the Georgia Supreme Court has charted for choice-of-law issues.

### 3. Coda: Of NIED, Impact, Public Policy, the Common Law, and Choice of Law

Georgia's impact rule, despite its vigorous defense from appellate

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<sup>120</sup> *Id.* at 125.

<sup>121</sup> *Id.* at 126.

<sup>122</sup> See, e.g., *McCorkel v. Exxon Corp.*, No. CV 475-324, 1976 WL 1568 (S.D. Ga. Nov. 30, 1976), *aff'd*, 557 F.2d 822 (5th Cir. 1977). "Where Georgia is the forum state tort liability depends on the *lex loci*. But if no special law or statute of the state where the wrongful act was committed is pleaded or proved, the courts of this state apply the common law and will decide for themselves what it is in the state where the wrong occurred." *Id.* at 10; *Ohio S. Exp. Co. v. Beeler*, 140 S.E.2d 235, 236 (Ga. Ct. App. 1965) (holding that because the common law of Tennessee is deemed to be the same as the common law of Georgia, Georgia's common law contributory negligence rules will apply); see also *Record Truck Line, Inc. v. Harrison*, 137 S.E.2d 65, 69 (Ga. Ct. App. 1964).

decisions in Georgia, is bad law<sup>123</sup> and even worse sociology<sup>124</sup> and science.<sup>125</sup> The Georgia courts have given no serious consideration to the many good reasons that have arisen since 1892 to abolish it in the second decade of the twenty-first century.<sup>126</sup> Over forty-two other state supreme courts, however, have reconsidered and abolished the impact rule because there are better, less mechanical, and fairer ways to police the tort than the outmoded nineteenth century skepticism.<sup>127</sup>

<sup>123</sup> See, e.g., Christina Hull Eikhoff, Note, *Out with the Old: Georgia Struggles with its Dated Approach to the Tort of Negligent Infliction of Emotional Distress*, 34 GA. L. REV. 349 (1999). For more enlightened approaches gathering momentum elsewhere, see, e.g., *Tort Law—Negligent Infliction of Emotional Distress—D.C. Court of Appeals Allows Recovery for Emotional Harm outside Zone of Danger - Hedgepeth v. Whitman Walker Clinic*, 22 A.3d 789 (D.C. 2011) (en banc), 125 HARV. L. REV. 642 (2011); Robert J. Rhee, *A Principled Solution for Negligent Infliction of Emotional Distress Claims*, 36 AZ. ST. L. J. 805 (2004).

<sup>124</sup> See, e.g., Deborah K. Hepler, *Providing Creative Remedies to Bystander Emotional Distress Victims: A Feminist Perspective*, 14 N. ILL. U. L. REV. 71, 77–78, 78–84 (1993) (arguing that “one reason why courts struggle with emotional distress claims” is that “[s]uch claims confront bias in the current legal system, which . . . is dominated by male norms and concepts.”); Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814 (1990).

<sup>125</sup> See, e.g., Betsy J. Grey, *The Future of Emotional Harm*, 83 FORDHAM L. REV. 2605 (2015); Betsy Grey, *Neuroscience and Emotional Harm in Tort Law: Rethinking the American Approach to Free-Standing Emotional Distress Claims*, 13 LAW & NEUROSCIENCE: CURRENT ISSUES (Oxford University Press, 2011), available at SSRN: <https://ssrn.com/abstract=1499989> (demonstrating that “(1) that science can provide empirical evidence of what it means to suffer emotional distress, thus helping to validate a claim that has always been subject to greater scrutiny; and (2) that this evidence may allow us to move away from the sharp distinction between how physical and emotional injuries are conceptualized, viewing both as valid types of harm with physiological origin.”).

<sup>126</sup> Contrast this with the celebrated rule in *Pavesich v. New England Life Insurance Co.*, 50 S.E.2d 68, 77–78 (Ga. 1905), in which Georgia became the first state in the nation to recognize “a freestanding ‘right to privacy’ tort in the common law.” Allen, Anita L., *Natural Law, Slavery, and the Right to Privacy Tort*, 81 FORD. L. REV. 1187, 1188 (2012). This rule was recognized in a very “male” context and in contradistinction to the life of bondage that Southern slavery had created, Justice Andrew Jackson Cobb writing that “as long as the advertiser uses him for these purposes, he cannot be otherwise than conscious of the fact that he is for the time being under the control of another, that he is no longer free, and that he is in reality a slave, without hope of freedom, held to service by a merciless master; and if a man of true instincts, or even of ordinary sensibilities, no one can be more conscious of his enthrallment than he is.” *Pavesich*, 50 S.E.2d at 80.

<sup>127</sup> As the Kentucky Supreme Court said in abolishing its impact rule in 2012:

[W]hile the rationale underlying the impact rule remains relevant, there are more effective methods of effectuating and protecting that rationale. We have remained steadfast in our commitment to requiring a physical contact because emotional distress “is possibly trivial and simply too speculative and difficult to measure unless [it is] directly linked to and caused by a physical harm.” But medical science and

That having been said, when it comes to choice-of-law issues in cases involving NIED claims, other states in the dwindling roster of traditional choice-of-law adherents have followed the *lex loci delicti*, without invoking escape devices to get to *lex fori*.<sup>128</sup>

Thus, it becomes truly baroque for Georgia to put a dormant, antebellum choice-of-law doctrine in the service of preserving a Victorian-era rule that has, for good reason, been rejected by the overwhelming weight of states, recently denounced by the first two female Justices of the Georgia Supreme Court,<sup>129</sup> and dispatched to legal oblivion by

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treatment have vastly improved since the late 19th century, especially in the field of mental health. . . [T]his Court foreshadowed what may be required to depart from the impact rule, yet remain vigilant of the intangible nature of emotional injury. We noted an injury action involving a first-hand account from the victim or reliable eyewitness testimony and demonstrable evidence, proven through expert testimony, of mental distress manifesting in a medical injury would give rise to a strong challenge to the impact rule.

Osborne v. Keeney, 399 S.W.3d 1, 16 (Ky. 2012). The Kentucky Supreme Court also noted that “[o]ur research reveals that at least forty jurisdictions have either rejected the impact rule or abandoned it. An exhaustive review of the law surrounding this issue and the strengths and weaknesses of approaches used in other jurisdictions has persuaded us that these cases should be analyzed under general negligence principles.” *Id.* at 17. The Kentucky court was able to identify only six jurisdictions that actually use the impact rule in some form, counting Georgia, Florida, Kansas, Indiana, and Nevada. *Id.* at 14 n.39; see also Engler v. Ill. Farmers Ins. Co., 706 N.W.2d 764, 768 (Minn. 2005) (“Today, it appears that only three states—Georgia, Kentucky, and Oregon—retain the impact test for bystander recovery.”). After Kentucky abandoned the impact rule in 2014, Oregon abandoned it in 2016. See Philibert v. Kluser, 385 P.3d 1038, 1041 (Or. 2016) (“Although we agree that the impact test should not control bystander recovery, we do not adopt either of their suggested alternatives. Instead, for the reasons discussed below, we conclude that the rule articulated in the Restatement (Third) of Torts section 48 (2012) best promotes principled outcomes while avoiding the prospect of imposing potentially unlimited liability on defendants for the emotional distress that their negligence may cause.”). This leaves, by the Engler court’s reckoning, Georgia as the lone state that “retain[s] the impact test for bystander recovery.” *Engler*, 706 N.W.2d at 768.

<sup>128</sup> See, e.g., *Carolina Indus. Prod., Inc. v. Learjet, Inc.*, 189 F. Supp. 2d 1147, 1165–66 (D. Kan. 2001) (applying Georgia’s more restrictive NIED rule to a case involving NIED damages arising out of faulty aircraft maintenance and a landing accident that occurred in Georgia); *Jones v. Prince George’s Cty., Md.*, 541 F. Supp. 2d 761 (D. Md. 2008), *aff’d*, 355 F. App’x 724 (4th Cir. 2009) (applying the law of Virginia as the *lex loci delicti*); see also *Al-Quraishi v. Nakhla*, 728 F. Supp. 2d 702 (D. Md. 2010) (applying Iraqi law to claims against a military contractor by Iraqi citizens formerly detained at military prisons in Iraq alleging physical and mental abuse; but unclear at that early stage of the litigation whether Iraqi law will help or hurt plaintiff’s NIED claims), *rev’d on other grounds sub nom.* *Al-Quraishi v. L-3 Servs., Inc.*, 657 F.3d 201 (4th Cir. 2011), *appeals dismissed for lack of appellate jurisdiction on reh’g en banc sub nom.* *Al Shimari v. CACI Int’l, Inc.*, 679 F.3d 205 (4th Cir. 2012).

<sup>129</sup> *Lee v. State Farm Mut. Ins. Co.*, 533 S.E.2d 82, 87–88 (Ga. 2000) (Hunstein and Sears,

the Restatement (Third) of Torts.<sup>130</sup>

*B. Georgia Protests Too Much—Decrying Change While Seemingly Insensible to Its Courts Slouching Toward Lex Fori*

It has become fashionable for Georgia appellate courts to dismiss any challenge to the wisdom or tenability of Georgia's antebellum approach to choice of law in tort cases on two separate grounds. First, if Georgia is going to switch, it has to be shown that the new approach is "better." Second, even if a switch is needed, only the legislature can effectuate it. This might best be referred to not merely as *circular* logic but "*short-circuiting* circular logic," for it poses a standard then declares that even if that standard is met, the Georgia courts cannot act on it.

*Dowis v. Mud Slingers, Inc.* provides the most extravagant statement of the Georgia Supreme Court's unwillingness to entertain adopting the Restatement (Second) Conflict of Laws's rules for resolving tort conflicts.<sup>131</sup> It must be noted, however, that in the past, the Georgia appellate courts have on repeated occasions not hesitated to cite and follow the Restatement (Second) Conflict of Laws when it has suited those courts' purposes.<sup>132</sup>

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JJ., specially concurring). See Section IV.C of this article.

<sup>130</sup> See John L. Diamond, *Rethinking Compensation for Mental Distress: A Critique of the Restatement (Third) §§ 45-47*, 16 VA. J. SOC. POL'Y & L. 141 (2008).

<sup>131</sup> *Dowis v. Mud Slingers, Inc.*, 621 S.E.2d 413, 415–16 (Ga. 2005). Alabama had refused the same invitation in *Fitts v. Minnesota Mining & Manufacturing Co.*, 581 So. 2d 819, 823 (Ala. 1991).

<sup>132</sup> *Dietrich v. Miller & Meier & Assocs., Architects & Planners, Inc.*, 334 S.E.2d 308, 310 (Ga. 1985) (adopting the "internal corporate affairs doctrine" choice of law rule and citing the Restatement (Second) of Conflict of Laws Sections 309 and 311 in holding that "the wrongful appropriation of a business opportunity of a foreign corporation by its officer or director is an internal affair not to be regulated by Georgia law. Instead, the local law of the state of incorporation applies, which is Wisconsin in this case."); *Roadway Exp. v. Warren*, 295 S.E.2d 743, 746 (Ga. 1982) ("Relief may be awarded under the workmen's compensation statute of a State of the United States, although the statute of a Sister state also is applicable"); see also *State v. Langlands*, 583 S.E.2d 83, 20 (Ga. 2003) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 103 (AM. LAW INST. 1971)) ("A judgment rendered in one State of the United States need not be recognized or enforced in a sister State if such recognition or enforcement is not required by the national policy of full faith and credit because it would involve an improper interference with important interests of the sister State."); *Nasco, Inc., v. Gimbert*, 238 S.E.2d 368, 369 (Ga. 1977) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) (AM. LAW INST. 1971), in support of affirming trial court's disregard of contractual forum selection clause on the grounds that such clauses "will not be applied by Georgia courts where application of the chosen law would contravene the policy of, or would be prejudicial to the interests of, this state" in that "[c]ovenants against disclosure, like covenants against competition, affect the interests of this state, namely the flow of information needed for competition among businesses,

Perhaps the three most insightful statements on choice of law to come from the Supreme Court of Georgia in the twenty-first century appear in *Convergys Corp. v. Keener*.<sup>133</sup> Here, three of the Justices on the bench in 2003, Chief Justice Norman Fletcher and Justices Leah Sears and George Carley, (1) recognized that at least one of the Restatement (Second)'s rules—Section 187(2) on enforceability of contractual choice-of-law clauses—is a superior rule to the one currently used in Georgia, but (2) were resigned to the fact that it would have to be the Georgia Legislature that effectuated this change through legislation adopting Section 187(2), rather than the Court's adoption of that section as the new common-law rule.<sup>134</sup> The third observation came from Justice Hugh Thompson, the author of the main opinion, who observed quite trenchantly:

We recognize that some of our sister states have developed analyses which seem to be derived from the Restatement provisions. But despite the adoption of some very complex rules in these jurisdictions, in actuality it does not appear that these rules are outcome determinative. *Instead, the cases seem to turn on a court's interpretation of its own public policy considerations.*<sup>135</sup>

Although Justice Thompson made this observation in the specific context of enforcing contractual choice-of-law clauses, the observation applies more generally to the entire Georgia conflict-of-laws enterprise, once the airs and affectations of rules with Latin names and metaphysical conceptions of what “law” is are stripped away. *Lex fori* is what Georgia is all about, especially in torts. The tripartite observations from *Keener* can be strung like pearls into the following proposition: better choice-of-law rules will require legislative action to make it clear that Georgia courts are focused on Georgia public policy—also known as “governmental interest”—considerations. And that proposition is at the heart of the authors' proposal to cut through the mess that has emerged from a legacy of case law that simply hides the reality that

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and hence their validity is determined by the public policy of this state.”). The Georgia Supreme Court later backpedaled from this citation to *Nasco* in *Convergys Corp. v. Keener*, 582 S.E.2d 84, 87 (Ga. 2003) (“However, this Court did not adopt § 187(2) of the Restatement in *Nasco*; the single reference to that provision was prefaced with the introductory signal ‘see’ . . .”).

<sup>133</sup> *Convergys Corp.*, 582 S.E.2d at 84.

<sup>134</sup> *Id.* at 87–88.

<sup>135</sup> *Id.* at 87 (citations omitted) (emphasis added).

Georgia is, more often than not, a *lex fori* state

IV. THE RESURRECTION OF AN ANTEBELLUM VIEW OF “LAW,”  
“SOVEREIGNTY,” AND “FULL FAITH AND CREDIT”: *COON V. MEDICAL  
CENTER, INC.*

A. *Medical Center is Built on an Untenable, Antebellum Vision of  
American Common Law and Ignores the True Nature of the  
Rapidly Developing Tort Law Throughout the Industrialization  
of the Nineteenth Century*

The *Medical Center* case can be succinctly summarized as a classic modern choice-of-law fact pattern, arising from the special tort problem where a tortfeasor causes a victim to suffer emotional distress through conduct that is (a) negligent but not intentional *and* (b) unaccompanied by any physical contact occasioned by the tortfeasor's duty-breaching conduct. The facts in such cases are unwaveringly heart-wrenching. The victim either witnesses a loved one endure horrific injury or watches a loved one's prolonged and cruel suffering or death. A more unusual class of these cases involves a loved one enduring the mishandling or misidentification of remains, so as to have to re-start a grieving process already completed, yet this time multiplied in its emotional impact by repetition of what one had thought was unendurable the first time. The notion of non-parasitic recovery for negligently inflicted emotional distress has been dogged by skepticism of its very existence and by insurance industry concerns over its fraudulent manufacture—not to mention the insidious effects of gender stereotyping on the seriousness with which the claim has been taken.<sup>136</sup>

The clearest statement of the rule that the court “reaffirm[ed]” in *Medical Center* occurs not in the Supreme Court's own opinion, but in the concurring opinion it embraced from the Georgia Court of Appeals:

[I]f the foreign state was one of the original thirteen American colonies or was derived from the territory encompassed in one of the colonies, ‘the construction of the common law given by the courts of this State will control, in preference to the construction given by the courts of the State of the contract.’ In other words, our courts will presume that the common law of the other state is the same as the common law in Georgia and thus will apply Georgia law. That is because the

<sup>136</sup> See generally Martha E. Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814 (1990).

‘common law is presumed to be the same in all the American States where it prevails. Though courts in different States may place a different construction upon a principle of common law, that does not change the law. There is still only one right construction.’ And not only are our courts ‘competent to decide’ what the common law is, ‘but it is its duty to decide, the common law being the same in both jurisdictions.’ On the other hand, if the other state was never part of the original thirteen colonies or their territories, ‘[t]here is no presumption that the common law of England exists in such a State’ because the state clearly did not ‘inherit its laws from England.’ ‘Under such circumstances, the law of the foreign State must be pleaded, in the absence of which it will be presumed that the law of this State obtains therein.’<sup>137</sup>

The reader should re-read the foregoing paragraph several times to marinate in the juices of what is being proposed here.<sup>138</sup> The words of Justice Potter Stewart are summoned to mind: “[T]his is an uncommonly silly law.”<sup>139</sup>

Yes, the old Georgia cases cited for all of these propositions do say what they are quoted for saying.<sup>140</sup> But they were wrong seventy, eighty, and one hundred years ago. And they are still wrong today. Our understanding of the common law has evolved under the stern

<sup>137</sup> *Coon v. Med. Ctr., Inc.*, 780 S.E.2d 118 at 125–26 (Ga. Ct. App. 2015) (McMillian, J., concurring) (citations omitted).

<sup>138</sup> Where else would the law of “sister states” be referred to as the law of a “foreign state”? One can practically hear the wind whistling in the rigging of Raphael Semmes, the Captain of the Confederate Raider Alabama, who was also a lawyer and would likely have welcomed that turn of phrase, as evidenced in his writings against Justice Story.

<sup>139</sup> *Griswold v. Connecticut*, 381 U.S. 479, 527 (Stewart, J., dissenting).

<sup>140</sup> In addition to the origin case *Latine v. Clements*, 3 Ga. 426 (Ga. 1847), the Georgia Supreme Court in *Medical Center* identified the following as the cases in which it “has followed the same approach in a nearly unbroken line of decisions, many of them involving torts in Alabama. *See, e.g.*, *Krogg*, 77 Ga. at 214; *Pattillo v. Alexander*, 96 Ga. 60, 61, 22 S.E. 646 (1895); *Alabama Midland R. v. Guilford*, 119 Ga. 523, 525, 46 S.E. 655 (1904); *Southern R. v. Cunningham*, 123 Ga. 90, 94, 50 S.E. 979 (1905); *Thomas v. Clarkson*, 125 Ga. 72, 78, 54 S.E. 77 (1906); *Seaboard Air Line R. v. Andrews*, 140 Ga. 254, 255, 257–259, 78 S.E. 925 (1913); *Slaton*, 168 Ga. at 716, 148 S.E. 741; *Trs. of Jesse Parker Williams Hosp. v. Nisbet*, 189 Ga. 807, 811, 7 S.E.2d 737 (1940); *Motz v. Alropa Corp.*, 192 Ga. 176, 176, 15 S.E.2d 237 (1941).” *Med. Ctr., Inc.*, 797 S.E.2d at 834–35. The Georgia Supreme Court did not appear to give a second look at the fact that its last decision applying the *Latine* rule was decided seventy-six years before *Medical Center*.



tutelage of Oliver Wendell Holmes, Jr.—almost a century ago.<sup>141</sup> Holmes, a Civil War veteran wounded three times in battle, knew all too well the dangers of treating the common law as theology—something created outside of the decisions of the courts who use it every day.<sup>142</sup>

The entire antebellum enterprise was founded on the assertion that the common law is presumed to be “the same” in the thirteen original states.<sup>143</sup> The *Medical Center* opinion trumpets a return to a mythical legal past—almost a cry of “Make the Common Law Great Again”:

This approach may seem anachronistic to lawyers and judges trained and professionally steeped in relativist theories of legal realism. But the prevailing view at the time the doctrine was established was that there is one common law that can be properly discerned by wise judges, not multiple common laws by which judges make law for their various jurisdictions.<sup>144</sup>

To accept such a statement as to the law of torts, for example, betrays a stunning ahistorical attitude. The only moment at which the common law of the thirteen colonies might have been theoretically “the same” in delictual matters was at the time of the passage of their respective Reception Acts after the Revolution.<sup>145</sup> Even these were not simultaneous in their enactment. And even in these matters, reception statutes are not uniform in their language of exactly what they were “receiving”

<sup>141</sup> See generally OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* (1881).

<sup>142</sup> See, e.g., ALLEN MENDENHALL, OLIVER WENDELL HOLMES JR., *PRAGMATISM, AND THE JURISPRUDENCE OF AGON: AESTHETIC DISSENT AND THE COMMON LAW*, at xvii (Bucknell University Press, 2017); Pierce Wells, *Oliver Wendell Holmes, Jr., and the American Civil War*, 40 J. SUP. CT. HIST. 282 (2015); see generally G. EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF* (Oxford University Press, Inc., 1993); see also Oliver Wendell Holmes, Jr., *Natural Law*, 32 HARV. L. REV. 40 at 41–43 (1918–1919); James Gordley, *When Paths Diverge: A Response to Albert Alschuler on Oliver Wendell Holmes*, 49 FLA. L. REV. 441, 443–46 (1997); Walter Wheeler Cook, *Oliver Wendell Holmes: Scientist*, 21 A.B.A. J. 211, 213 (1935).

<sup>143</sup> *Med. Ctr., Inc.*, 797 S.E.2d at 832.

<sup>144</sup> *Id.* at 834.

<sup>145</sup> See, e.g., *State Statutes Adopting the Common Law of England*, INST. FOR U.S. L., <https://www.iuslaw.org/common-law-reception-statutes/> (last visited Apr. 20, 2020). As the authors of that article aptly observe: “Soon after declaring independence from England, the various former colonies—now emerging states—passed statutes adopting most of the common law of England. *They then began independently adding to this common law.*” *Id.* (providing examples from Virginia (1776), Delaware (1776), Pennsylvania (1777), North Carolina (1778), Massachusetts (1780), and New York (1786)) (emphasis added).

and how what was “received” might be altered in the future.<sup>146</sup> In fact, these laws were little more than a stop-gap until a body of American precedent could be built up in each state.<sup>147</sup> Further—and contrary to the assumptions underlying the old Georgia cases—every state (save Napoleonic Code Louisiana) has adopted a reception statute that purports to receive some portion of the common law of England, along with Acts of Parliament.<sup>148</sup> Even Justice Story—father of the now discredited “general federal common law”—would hardly have agreed with the antebellum Georgia view:

The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation.<sup>149</sup>

To the contrary, from the moment after the inception of the reception statutes, the supposed common law uniformity was disrupted by distance, distinct economic and social cultures, and distinct approaches to legal problems. The common law jurisdictions began to move away from any “unity,” just as Edwin Hubble saw the galaxies fleeing each other after the Big Bang.<sup>150</sup>

This is particularly so in tort law, which as a body of law, was barely in its gestational stage in Colonial America and the early Republic.<sup>151</sup> It was the explosion of American territorial expansion; of American military adventurism; and of the industrialization of American manufacturing and transportation, that built up the great body of American tort law—judicially developed tort law, not statutory. And that

<sup>146</sup> William B. Stoebuck, *Reception of English Common Law in the American Colonies*, 10 WM. & MARY L. REV. 393 at 401 (1968).

<sup>147</sup> *Id.* at 394–95.

<sup>148</sup> See, e.g., Joseph F. Benson, *Reception of the Common Law in Missouri: Section 1.010 as Interpreted by the Supreme Court of Missouri*, 67 MO. L. REV. (2002); William H. Bryson, *English Common Law in Virginia*, 6 J. LEGAL HIST. 249 (1985).

<sup>149</sup> *Van Ness v. Pacard*, 27 U.S. 137, 144 (1829).

<sup>150</sup> *Edwin Hubble: Evidence for an Expanding Universe*, KHAN ACAD., <https://www.khan-academy.org/partner-content/big-history-project/big-bang/how-did-big-bang-change/a/edwin-hubble> (last visited Apr. 20, 2020).

<sup>151</sup> See the discussion of the difficulty of using colonial and early Republic law to limn the boundaries of the term “tort” as used in the 1789 Alien Tort Statute in Jeffrey A. Van Detta, *Suing Sponsors of Terrorism in U.S. Courts: Rubin v. Islamic Republic of Iran and Jesner v. Arab Bank, PLC: SCOTUS Trims to Statutory Boundaries the Recovery in U.S. Courts Against Sponsors of Terrorism and Human-Rights Violations Under FSIA and ATS*, 29 IND. INT’L & COMP. L. REV. 303 (2019).

body of law saw a quite different pace and emphasis of development in various regions of the United States, particularly stark in differentiation between industrializing areas of New England and the Mid-Atlantic versus the agrarian states where slavery held sway until “[o]ld Dixie” was “dr[iven] down.”<sup>152</sup> This is well documented in the leading histories of American tort law written by Professor G. Edward White at University of Virginia Law School<sup>153</sup> and Morton Horwitz at Harvard Law School.<sup>154</sup> One might have thought that modern judges seemingly attracted to history would have been familiar with them.

So, to quote an old Alabama lawyer: “*That dog*”—the Georgia judiciary’s 170 years’ worth of assertions that “The Common Law” is a monolith—“*don’t hunt*.”<sup>155</sup> Even Georgia’s stalwart sister state in the maintenance of the traditional choice-of-law approach, West Virginia, has resoundingly recognized the error of the antebellum view of common law espoused by *Medical Center*.<sup>156</sup> In rejecting a lawsuit that alleged “criminal conversation,” a common law tort against his former wife’s paramour, a financial services employee who assisted the former wife with a retirement account, and the financial services employer, the Supreme Judicial Court of West Virginia wrote:

One other point guides our decision. The cause of action for criminal conversation is a common law tort. However, “[t]he common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified[.]” “When the common law of the past is no longer in harmony with the institutions or societal conditions of the present, this Court is constitutionally empowered to

<sup>152</sup> “*The Night They Drove Old Dixie Down*,” HARV. U. PR. BLOG (Apr. 24, 2012), [https://harvardpress.typepad.com/hup\\_publicity/2012/04/the-night-they-drove-old-dixie-down.html](https://harvardpress.typepad.com/hup_publicity/2012/04/the-night-they-drove-old-dixie-down.html).

<sup>153</sup> G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY (1985).

<sup>154</sup> MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: 1780–1860 (1979); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY (1992).

<sup>155</sup> See, e.g., *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238–39 (1991) (“Almost 35 years ago, Professor Kurland stated: ‘Certainly, if the law is not a brooding omnipresence in the sky over the United States, neither is it a brooding omnipresence in the sky of Vermont, or New York or California.’”) (quoting Philip B. Kurland, *Mr. Justice Frankfurter, the Supreme Court and the Erie Doctrine in Diversity Cases*, 67 YALE L.J. 187, 217 (1957); William H. Rehnquist, *Remarks on the Process of Judging*, 49 WASH. & LEE L. REV. 263, 263–64 (1992).

<sup>156</sup> *State ex rel Goldman v. Kaufman*, 760 S.E.2d 883 (W. Va. 2014).

adjust the common law to current needs.<sup>157</sup>

<sup>157</sup> *Id.* at 895 (quoting *Southern Pac. Co. v. Jensen*, 244 U.S. 205 (1917) (Holmes, J., dissenting); *Carbasso v. Musulin*, 618 S.E.2d 368, 372 (W. Va. 2005) (Starcher, J., dissenting); *accord* *McDavid v. U.S.*, 584 S.E.2d 226, 230 n.4 (W. Va. 2003)). Similarly, another state that continues to hew to the traditional choice of law approach, Virginia, recently also declined to presume that the common law is “the same” in other states. In fact, when a party urged a Virginia court to recognize a “common-law” right of publicity to provide a tort cause of action and cited how several other states had interpreted the common law to recognize such a right and such a claim, the sensibly sober Virginia court set the party straight about arguing that the common-law should be presumed to be the same:

To ascertain the common law, Virginia trial courts look to decisions of the appellate courts in Virginia, and in the absence of any ruling, then to the English common law. *See, e.g., Kraft v. Burr*, 476 S.E.2d 715 (1996) (Supreme Court decided fishing rights case based on Lord Hale’s treatise of 1787). No venerable or hoary authority from the common law has been cited to this court in support of the plaintiff’s contention that there is a common law right of publicity, but rather cases are cited from other jurisdictions whose common law genealogy is unknown to this court. ‘The common law is not some brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified.’ *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (Holmes, J., dissenting).

*Crump v. Forbes*, 52 Va. Cir. 52 at \*3 (Va. Cir. Ct. 2000). By contrast, Kentucky, a *lexi fori* choice of law rule state in torts cases, *see Foster v. Leggett*, 484 S.W.2d 827, 829 (Ky. 1972), some sixty-two years ago rejected the kind of thinking exhibited in *Medical Center* as out-of-step with the overwhelming weight of judicial introspection during the days of the Eisenhower Administration, Sputnik, and the Missile Gap:

The Johnson case [from South Carolina] represents the only opinion on the subject under discussion that we have been able to locate after a careful search. But even though it does to some extent bolster Huff’s contention set forth above we are not constrained to follow it. The opinion is brief, scarcely half a page in length, and no basis whatever is advanced as to why the cutoff right cannot be invoked except the court’s statement that it was unable to find any authority for permitting it to be done. Such reasoning would be persuasive if we adhered to the view that the law is a fixed, immutable body of rules, or, to use Mr. Justice Oliver Wendell Holmes’ phrase, ‘a brooding omnipresence in the skies.’ *But this Court, and most courts of today, have rejected such a static theory of the law, which is often labeled ‘mechanistic’, and, instead, have chosen to follow the organic theory of the law.* This latter theory assumes that the law grows, that changes in society engender corresponding changes in the rules of law [sic] governing that society. Therefore, we are not moved by the argument that we cannot decide a particular case in a certain way merely because no other court has ever determined the question raised.

*Huff v. Elec. Plant Bd. of Monticello*, 299 S.W.2d 817, 820 (Ky. App. 1957) (emphasis added).

It is when a doctrine has utterly exhausted its *raison d'être* that the defense of the doctrine becomes particularly baroque. And the *Medical Center* notion of choice of law is decidedly baroque. The doyen of American conflict-of-laws scholarship, Dean Symeon Symeonides, shone a restrainedly polite but nonetheless pointed light on the state of choice-of-law in Georgia:

As detailed in the Surveys of previous years, Georgia belongs in the traditional choice-of-law camp, but its version of the *lex loci delicti* rule is peculiarly elastic. Besides frequently evading this rule through manipulative uses of escape devices such as the public policy exception, Georgia courts have carved out of the rule's scope a whole category of cases to which the rule is inapplicable. These are cases in which the tort occurred in another state that inherited the English common law and has not enacted a statute for the particular tort. *Coon v. Medical Center, Inc.*, is the latest application of this invention. . . .

The Georgia Supreme Court affirmed [dismissal of the Alabama plaintiff's action for NIED, to which it applied Georgia law], providing this unusual and self-serving rationale: 'where a claim in a Georgia lawsuit is governed by the common law, and the common law is also in force in the other state, as it is in Alabama, the common law as determined by Georgia's courts will control.'<sup>158</sup>

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<sup>158</sup> Symeon C. Symeonides, *Choice of Law in the American Courts in 2017: Thirty-First Annual Survey*, 66 AM. J. COMP. L. 1, 22–23 (2018). In a recent case, the concurring judge from the Georgia Court of Appeals's decision in *Medical Center* cited this passage from Dean Symeonides's article in another case and chided her colleagues in that case for not simply assuming the primacy of Georgia law, rather than analyze the conflict the majority found between Belize and Georgia law, as required by "[o]ur Supreme Court . . . recently confirm[ing] its adherence to Georgia's traditional approach in *Coon v. Med. Center, Inc.*, . . . ." *Forbes v. Auld*, 830 S.E.2d 770, 775 (Ga. Ct. App. 2019) (McMillian, J., specially concurring). The concurring judge seems to think that *Medical Center* was being posited by Dean Symeonides as a cure for what he had called "Georgia's 'peculiarly elastic' choice-of-law rules where the exceptions often seem to swallow the rule." *Id.* However, it is clear from the full context of Dean Symeonides's discussion that he merely considers the rule resurrected through the *Medical Center* opinion yet another "manipulat[ion]"—contrasting the humble "escape devices" with the stunning "carv[ing] out of the [*lex loci*] rule's scope a whole category of cases to which the rule is inapplicable[.]" an approach he (with uncharacteristically disapprobative language) dubbed "unusual and self-serving." Symeon C. Symeonides, *Choice of Law in the American Courts in 2017: Thirty-First*

Those who look to the Supreme Court of Georgia to make a course correction do so in vain. The deviation from the course is so severe and so intractable that decisive legislative action is the only way forward. But more here needs to be said about the provenance of the rule trumpeted in *Medical Center*. That is discussed in the next subsection.

*B. Tracing the Origin of the Medical Center Approach: Latine v. Clements Ties the Present to an Antebellum Past of Slavery Jurisprudence*

The *Medical Center* case seeks to add gravitas to its resurrection of antebellum legal theory by tracing its origins to *Latine v. Clements*.<sup>159</sup> In rejecting the plaintiff's argument "that Georgia's approach to determining the common law in force in other states is 'archaic' and 'has outlived its usefulness,'" *Medical Center* posits that "a precedent's antiquity is a factor that weighs *in favor of* adhering to it."<sup>160</sup> Just what was this 1847 case about, and what was the larger antebellum context in which the case was decided? This subsection addresses both questions—an examination which, in turn, raises troubling concerns.

In *Latine v. Clements*,<sup>161</sup> the newly established Georgia Supreme Court held that one who has recovered a judgment against the executor of an estate in the state where the will was executed also may recover

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*Annual Survey*, 66 AM. J. COMP. L. 1, 22–23 (2018).

<sup>159</sup> *Coon v. Med. Ctr., Inc.*, 797 S.E.2d 828, 834 (Ga. 2017) (citing *Latine v. Clements*, 3 Ga. 426, 430 (Ga. 1847)). The court also cites another 1847 case, *Cox v. Adams*, for the proposition that "[a]s a matter of comity, a Georgia court will defer to another state's statutes, as well as its judicial decisions authoritatively interpreting those statutes, in determining the law of that state." *Id.* (citing *Cox v. Adams*, 2 Ga. 158, 159–61, 164–66 (Ga. 1847)). Taken together, *Medical Center* sees the combination of these cases as establishing the framework for its insistence that it can disregard the actual common law decisions of sister states and simply assume that "the common law" is the same as Georgia courts say that it is:

The principles governing this case trace back to the first years of this Court's existence. From the beginning, this Court has distinguished between statutory law and common law when the law of another state provides the rule of decision in a lawsuit filed in a Georgia court.

*Med. Ctr., Inc.*, 797 S.E.2d at 833–34. Both *Latine* and *Cox* were written by the same Justice—Justice Eusebius Nisbet—whom this article will discuss below. In referring to "*Latine*" or "the *Latine* rule" or "the *Latine* doctrine" and the like, the authors refer to the antebellum view of the law represented by both cases.

<sup>160</sup> *Id.* at 836 (emphasis supplied).

<sup>161</sup> *Latine v. Clements*, 3 Ga. 426, 435 (Ga. 1847).

a judgment against the administrator of that estate in Georgia.<sup>162</sup> Thus, the rights perfected in one state (there, Virginia) are binding in Georgia. However, as to the remedies afforded by those rights, the law of the forum (Georgia) applies. Indeed, the Court acknowledged that while a Virginia judgment is entitled in Georgia to the same faith and credit to which it is entitled in Virginia, the next question becomes “what faith and credit is it entitled to in that State?”<sup>163</sup> Because no statute in Virginia defined the faith and credit to which the judgement was entitled, Justice Eugenius Aristides Nisbet, who authored the opinion, determined that the Court was bound by the common law as Georgia understood it in answering that question.<sup>164</sup> This view of the common law allowed the Georgia Supreme Court to disregard application of the laws of other states when the relevant law derived from common law rather than statutory law.<sup>165</sup>

Thus, we come back to the remarkable assertion the Georgia Supreme Court made in rebutting the charge of “archaic[ness].”<sup>166</sup> That charge, as we have said, was met with the declaration *ex cathedra* that, “a precedent’s antiquity is a factor that weighs in favor of adhering to it.”<sup>167</sup> But we must point out that the Court did not appear to dig beneath that antiquity. *Had the Court examined the context of the 1840s and 1850s Georgia Supreme Court’s conceptualization of the common law and the possible agenda of which it was part and parcel, they, like the authors here, should have been most disquieted.*

That is because the concept of the common law cherished by the antebellum judges in Georgia’s courts was an inextricable part of a larger context in which the law of Georgia was being used—and insulated from outside influences—to protect the institution of human bondage, our nation’s and state’s original sin. The antebellum concept of law in Georgia orbited the epicenter of the legal system’s galaxy—the protection and propagation of slavery—a subject that arose regularly and in a myriad of ways.<sup>168</sup> The intellectual leader of Georgia’s

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 429–30 (emphasis removed).

<sup>164</sup> *Id.* at 430.

<sup>165</sup> *See id.*

<sup>166</sup> *Med. Ctr., Inc.*, 797 S.E.2d at 836.

<sup>167</sup> *Id.* (emphasis added). Dean Simpson does an admirable job of taking apart that portion of the *Medical Center* opinion based on the weaknesses and internal inconsistencies within itself. Simpson, *supra* note 12, at 830–37. In addition, Dean Simpson cogently observes that as to “[a]n 1847 precedent laying down a common-law rule,” the passage of time invites questions about its legitimacy. Does a court-made rule that may have seemed just and wise for the social and economic conditions of 1847 continue to strike the appropriate balance in the very different world of the twenty-first century?” *Id.* at 832.

<sup>168</sup> For cases interpreting wills to determine to whom a slave now belongs, or whether a

Supreme Court from the time of its establishment in 1846 until his death in 1869 was Joseph Henry Lumpkin.<sup>169</sup> Although his contemporary, Justice Nisbet, wrote the pair of antebellum decisions at the heart of the *Medical Center* opinion,<sup>170</sup> Justice Lumpkin was not only a member of that Court but also held great sway with his colleague, Justice Nisbet.<sup>171</sup> Thus, Lumpkin's views pervaded Nisbet's jurisprudence as much as his own.<sup>172</sup>

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slave was effectively emancipated by the terms of the will, *see, e.g.*, *Carrie v. Cumming*, 26 Ga. 690, 699–700 (Ga. 1859); *Cleland v. Waters*, 16 Ga. 496, 499 (Ga. 1854); *Harden v. Mangham*, 18 Ga. 563, 564–65 (Ga. 1855). For cases analyzing whether a slave was sold or merely loaned, and thus, who currently owns said slave, *see, e.g.*, *Hudgins v. State*, 26 Ga. 350, 352 (Ga. 1858), *Hannahan v. Nichols*, 17 Ga. 77, 78 (Ga. 1855); *Mosely v. Gordon*, 16 Ga. 384, 394–95 (Ga. 1854). For a case determining whether a person of color freed in another state can be deemed free in Georgia, *see, e.g.*, *Knight v. Hardeman*, 17 Ga. 253, 254–55 (Ga. 1855). Additional, detailed discussion of the numerous Georgia Supreme Court decisions expanding the legal protection of slavery as an institution and the financial interests of slave-owners is found in Mason W. Stephenson & D. Grier Stephenson, Jr., “*To Protect and Defend*”: *Joseph Henry Lumpkin, The Supreme Court of Georgia, and Slavery*, 25 EMORY L. J. 579, 586–607 (1976). For analysis of how thoroughly the thought of those who rationalized slavery as a public good was intertwined with all of the legal activities in the slave states, *see generally* ALFRED L. BROPHY, *UNIVERSITY, COURT, AND SLAVE: PRO-SLAVERY THOUGHT IN SOUTHERN COLLEGES AND COURTS AND THE COMING OF WAR* 212–253 (2016).

<sup>169</sup> *See, e.g.*, Mason W. Stephenson & D. Grier Stephenson, Jr., “*To Protect and Defend*”: *Joseph Henry Lumpkin, The Supreme Court of Georgia, and Slavery*, 25 EMORY L. J. 579 (1976); PAUL DEFOREST HICKS, *JOSEPH HENRY LUMPKIN: GEORGIA'S FIRST CHIEF JUSTICE* (2002). Justice Lumpkin's overshadowing antebellum reputation was resurrected by Justice Antonin Scalia in *District of Columbia v. Heller*, 554 U.S. 570 (2008), in which he cited Justice Lumpkin's tour-de-force decision, *Nunn v. State*, 1 Ga. 246, 251 (Ga. 1846), rendered during the first term of ever held by the Georgia Supreme Court, in which Justice Lumpkin vigorously and at length argued that the Second Amendment applied to the states and prevented them from limiting by statute weaponry that a citizen could carry. The need to control slave populations by armed citizens is implicit in this decision, yet another area that slavery infiltrated during the antebellum origins of the Georgia Supreme Court. *See, e.g.*, Eric M. Ruben & Saul Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 YALE L.J. F. 121, 125 (2015). That decision, too, was, an outlier, even in its day. *Id.* at 122.

<sup>170</sup> *Latine v. Clements*, 3 Ga. 426 (Ga. 1847); *Cox v. Adams*, 2 Ga. 158 (Ga. 1847).

<sup>171</sup> *See, e.g.*, WILLIAM E. WIETHOFF, *A PECULIAR HUMANISM: THE JUDICIAL ADVOCACY OF SLAVERY IN HIGH COURTS OF THE OLD SOUTH, 1820–1850*, at 111–12 (1996).

<sup>172</sup> For example, Nisbet shared with Lumpkin the view that “denied . . . slaves, if freed, were capable of sharing in government with whites.” *Id.* at 111. “As authority, the judge invoked his personal version of a righteous world order: ‘To set up a model empire for the world, God in His wisdom planted on this virgin soil, the best blood of the human family’” and, thus, he asserted, “[t]o allow it to be contaminated, is to be recreant to the weighty and solemn trust committed to our hands.” *Id.* Elaborating on Lumpkin's views, a scholar has observed that,

[w]hile judges in other jurisdictions were struggling to articulate a



Justice Lumpkin, a man squarely of his antebellum age, is one of Georgia's two most significant legal thinkers (the other, of course, being Brainerd Currie). But their concepts of law and the ends of a legal culture could not be more antithetical. Lumpkin's vehemence in defense of slavery and in protecting Georgia law from anti-slavery influences verged on zealotry.<sup>173</sup> As an influential study of Justice

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blended perspective on humanity and interest, Judge Lumpkin proclaimed explicitly that God had created American government as a model of moral politics. From this perspective, tempering with absolute dominion over the slaves amounted to frustrating a divine plan. As his prior meditations reveal, he had been reflecting on the marriage of policy and morality for many years: 'The condition of the human race is most prosperous and happy when governed by absolute power under the guidance of wisdom and virtue.'

*Id.* (noting that "Nisbet agreed wholeheartedly with Judge Lumpkin").

<sup>173</sup> This description is exemplified in Justice Lumpkin's reinforcement of the view of slaves as chattel property and his proffered justification for the denial of emancipation of slaves who will remain in Georgia as a way of protecting the slave population:

The foregoing analysis will suffice to indicate, I might say vindicate, the temper and tone of our legislation in reference to slavery. And notwithstanding the persevering efforts which have been made by the fanatics of the North to jeopard the safety of our people—rob them of their property—desecrate and disregard their constitutional rights, and violate and harass their domestic peace, it is truly gratifying to contemplate the justice, wisdom of moderation of our Legislature, respecting slaves and free persons of color. All the cruel attempts of these infuriated incendiaries have, hitherto, utterly failed to influence our people to forget their duty to themselves and this dependent race. Every Act upon our Statute Book, in reference to them, is replete, upon its face, with undeniable proof of that dispassionate deliberation which is the true characteristic of a great and magnanimous people. Humanity to our slaves and free persons of color, and a just regard to their rights and welfare, have never, in a single instance, been overlooked or unheeded.

Cleland v. Waters, 16 Ga. 496, 512 (Ga. 1854). Later in the opinion, Justice Lumpkin reverts to this theme, specifically in reference to a resolution from the State of Ohio regarding the abolition of slavery:

Is it not apparent, that up to this period, the true character of the institution of slavery had not been fully understood and appreciated at the South; and that she looked to emancipation, in some undefined mode, in the uncertain future, as the only cure for the supposed evil? Thanks to the blind zealots of the North, for their unwarrantable interference with this institution. It has roused the public mind to a thorough investigation of the subject. The result is, a settled conviction that it was wisely ordained by a forecast high as heaven above man's for the good

Lumpkin's tenure observed:

As to the cases dealing with the legal status of slaves and slavery, however, the opinions of the Georgia court were hardly shared equally among the justices. During this fifteen-year period before the Civil War, Lumpkin wrote the opinions for his brethren in twenty-eight of the fifty-four slave cases decided. Thus, while his share of all cases was 35.8 percent, his share of the slave cases was 51.8 percent. The difference at least suggests a particular interest in the subject matter and a determination to lead his court and to guide the development of the law as it related to the 'peculiar institution.'<sup>174</sup>

And of the court of which Lumpkin was a member and eventually presided over, the authors of that study observed:

[T]he . . . Georgia Supreme Court while under the dominance of Justice Lumpkin was not a neutral forum which heard disputes and applied even-handed justice in the factual and legal situations presented, but was an active arm of government, committed to the preservation of the slave system. In effect, Lumpkin's personal

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of both races, and a calm and fixed determination to preserve and defend it, at any and all hazards.

*Id.* at 514. And finally, with regard to the state of the law of Georgia regarding the freeing of slaves in the state, Justice Lumpkin concluded with the fervor that only a faithful disciple of bondage could muster:

The object of the Statute's relating to manumission, was to prevent a horde of free persons of color from ravaging the morals and corrupting the feelings of our slaves. Experience has taught our legislators that such a class, lazy, mischievous and corrupt, without any master to urge them to exertion, and scarcely any motive to make it, was an extremely dangerous example to our naturally indolent slaves. They, therefore, declared that such a class should not be increased by manumission (save by consent of the Legislature) or by the admission of such persons from other States to reside therein.

*Id.* at 519.

<sup>174</sup> Mason W. Stephenson & D. Grier Stephenson, Jr., "To Protect and Defend": Joseph Henry Lumpkin, *The Supreme Court of Georgia, and Slavery*, 25 EMORY L. J. 579, 582 (1976).

beliefs and attitudes were a positive force in the resolution of disputed issues, thus contributing to the development of his court as one of policy, not merely one of law.<sup>175</sup>

For a modern court, like the Georgia Supreme Court of 2017, that proclaims neutrality and legislative deference to doing its work, to rely upon antebellum doctrine as the basis of modern rules is a tenuous proposition at best. But further, there is the more worrying fact that the antebellum doctrine also appears to have served a judicial effort to preserve a *lex fori* approach in multi-state issues involving slavery and choice-of-law problems.

There were, of course, in the first half of the nineteenth century, other jurists and other state appellate courts who viewed the common law as a body of law that *either* existed independently of positivist sources *or* was somehow distinct from state statutes, which were treated as the law entitled to full faith and credit by sister states. These views were discredited and abandoned everywhere else by the last two decades of the twentieth century. But Georgia's persists and has a different flavor. Although we cannot irrefutably establish that the Georgia Supreme Court's antebellum view of the common law was fueled entirely by a desire to protect antebellum Georgia law from anti-slavery influences, there is enough of a connection to that illicit objective to, at the very least, support a tenable inference that the antebellum Georgia Supreme Court's view of the law was so shaped by its views of slavery that the former is the fruit of the latter's poisonous tree.<sup>176</sup>

Exhibit A for this view comes from Justice Lumpkin's decision in *Knight v. Hardeman*, in which Justice Lumpkin refused to apply Maryland law to a slave who claimed her freedom based on acts that transpired there.<sup>177</sup> In that case, the decedent's will, which was made in Maryland, declared that his former slave should be deemed free as of a particular date, as shall all of his other "young blacks" when they reach the age of thirty.<sup>178</sup> The complainant was a "young black" at the time the will was executed and was somehow sent from Maryland to Georgia and sold to another party.<sup>179</sup> Because there were no witnesses who could travel from Maryland to Georgia to establish her identity as one

<sup>175</sup> *Id.*

<sup>176</sup> An apt phrase which made its first appellate opinion appearance in Justice Frankfurter's opinion for the U.S. Supreme Court in *Nardone v. United States*, 308 U.S. 338, 341 (1939), a Fourth Amendment exclusionary rule decision.

<sup>177</sup> 17 Ga. 253, 262–63 (Ga. 1855).

<sup>178</sup> *Id.* at 254–55.

<sup>179</sup> *Id.* at 255.

of the persons entitled to emancipation under the will, the Georgia Supreme Court refused to recognize Maryland law and declined to declare the complainant a free woman.<sup>180</sup> In his opinion for the Georgia Supreme Court, Justice Lumpkin propounded the following rationale:

We have, in this State, the most stringent Statutes which the ingenuity of our wisest statesmen could devise, to prevent domestic manumission. For fifty years, the policy of our legislation has manifested no variableness nor shadow of turning in this respect. Can the laws of a sister State, then, allowing the freedom of these slaves, be executed by the Courts of Georgia? Dare we say, in the face of the Acts of 1801 and 1818, that these foreign laws are not prejudicial to our own rights and interests? Are we not under paramount obligation to enforce our own policy?

To my mind, this is a plain case.

No one pretends that negroes can be carried to New York or any other free State, and held there in perpetual bondage by their owner, in defiance of the laws and policy of that State. With what more propriety can slaves be brought here and emancipated? Such a doctrine is wholly inadmissible. It might be used to subvert the domestic institutions of every slave State in the Union. Our Courts of Justice are powerless to exercise an authority so repugnant to the declared will of their own Government.<sup>181</sup>

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<sup>180</sup> *Id.* at 261–63.

<sup>181</sup> *Id.* at 262–63. Not to be outdone by Lumpkin's decade of rhetoric for the Georgia Supreme Court, Justice William Harris of the Mississippi Supreme Court turned up the heat on comity another several notches when, in *Mitchell v. Wells*, 37 Miss. 235, 263–64 (1859), he wrote in rejecting enforcement in his state of a similar law from Ohio a shocking reduction ad absurdum argument:

Two years after *Dred Scott*, a Mississippi judge offered an extraordinary justification for his refusal to allow an ex-Mississippi slave living as a free Negro in Ohio to bring suit for inherited property. Justice William Harris took Ohio to task for freeing the plaintiff and embracing 'as citizens, the neglected race . . . occupying, in the order of nature, an intermediate state between the irrational animal and the white man.' He advanced a peculiarly horrible rationale to support his claim that not Mississippi but Ohio was guilty of denying interstate principles of comity:

'Suppose that Ohio, still further afflicted with her

What does this have to do with the case that *Medical Center* cites as its bedrock, *Latine v. Clements*? The authors are well aware that “[h]istorical causation is not always an easy or a simple thing to establish. Culture, politics, and the legal system were intertwined with each other—as they still are today—in complex ways that reach beyond the establishment of a straightforward, *direct* line of causation.”<sup>182</sup> That does not, however, mean that *indirect* connections cannot be drawn usefully. Indeed, years of law study, law practice, law teaching, and reading legal history create *intuition* in a legal scholar. And it is the *intuitive* contention of the authors that the view of the law and the relationship of the states out of which *Latine* springs is the same intellectual “reservoir” from which *Knight* and the other slavery cases in Georgia flowed.<sup>183</sup> *Latine* and its nineteenth century progeny embody a view

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peculiar philanthropy, should be determined to descend another grade in the scale of her peculiar humanity, and claim to confer citizenship on the chimpanzee or the ourang-outang (the most respectable of the monkey tribe), are we to be told that ‘comity’ will require of the States not thus demoted, to . . . meet the necessities of the mongrel race thus attempted to be introduced into the family of sisters in this confederacy?’

A. E. Keir Nash, *A More Equitable Past: Southern Supreme Courts and the Protection of the Antebellum Negro*, 48 N.C. L. REV. 197, 202 (1970) (quoting *Mitchell v. Wells*, 37 Miss. 235, 263 (1859)). As Professor Nash explained, Justices Lumpkin and Harris were birds of a decidedly unfriendly feather who flocked together:

[J]udges whom we know to have been exponents of the positive goodness of slavery, such as Justice Harris of Mississippi or Chief Justice Lumpkin of Georgia, did not hesitate both to expatiate upon the peculiar institution’s virtues and its attackers’ moral baseness. Nor did they hesitate to upbraid fellow judges whose opinions they believed thrust in too liberal a direction.

*Id.* at 235.

<sup>182</sup> Sarah N. Roth, *Response: The Savage Slave and the Humble Martyr in American Law and Culture*, 94 TEX. L. REV. 8, 8 (2015) (emphasis added).

<sup>183</sup> The connection, however, between conflict of laws and slavery law in the nineteenth century is much more than intuitive: it is well-established. See, e.g., Jeffrey M. Schmitt, *Constitutional Limitations on Extraterritorial State Power: State Regulation, Choice of Law, and Slavery*, 83 MISS. L.J. 59 (2014); Louise Weinberg, *Of Theory and Theodicy: The Problem Of Immoral Law*, LAW AND JUSTICES IN A MULTISTATE WORLD: ESSAYS IN HONOR OF ARTHUR T. VON MEHREN 473, 483 n.50 (Symeon C. Symeonides, ed. 2002); John Phillip Reid, *Lessons of Lumpkin: A Review of Recent Literature on Law, Comity, and the Impending Crisis*, 23 WM. & MARY L. REV. 571 (1982); Harold W. Horowitz,

of the law that was at least in part designed to facilitate Georgia's upper hand in regulating fugitive slave and manumission issues against encroachments by common-law activist judges in the North.<sup>184</sup> Indeed, as Professor John Phillip Reid has pointed out, Lumpkin raged against what he saw as meddlers in the property rights claimed in slaves all the way back to 1760s England, denouncing the great British Judge, Lord Mansfield, who delivered the King's Bench opinion in *Somerset's Case*,<sup>185</sup> the seminal case on slavery (and manumission of fugitive slaves brought by their purported masters to England):<sup>186</sup>

For myself, I utterly repudiate the whole current of decisions, English and Northern, from *Somerset's case* down to the present time which holds that the bare removal of a slave to a free country, either by way of transit in travelling, or the convenience of temporary sojourn, will give freedom to the slave. *African* slavery may, in the rhapsodical language of British Jurists, be inconsistent with the genius of their Constitution—if so, it is the only species of slavery that is. But this is certainly not true, under the Constitution of the United States. Upon the principle of international law, properly expounded and applied, to promote the free and unembarrassed intercourse between the citizens and subjects of foreign States, we maintain, that the judgment in *Somerset's case* was wrong.<sup>187</sup>

To deny *Somerset's Case* is to deny the English Common Law that Georgia claimed as its own—to deny the very common law *Medical Center*, some 170 years after *Latine*, asserted it was preserving.<sup>188</sup> But

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*Choice-of-Law Decisions Involving Slavery: "Interest Analysis" In The Early Nineteenth Century*, 17 UCLA L. REV. 387 (1970).

<sup>184</sup> See Reid, *supra* note 183, at 593–96.

<sup>185</sup> *Somerset v. Stewart*, 98 Eng. Rep. 499 (K.B. 1772).

<sup>186</sup> See, e.g., William M. Wiecek, *Somerset: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World*, 42 U. CHI. L. REV. 86, 86–87 (1974); A.L. HIGGINBOTHAM, IN THE MATTER OF COLOR: RACE & THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 333–55 (1978).

<sup>187</sup> *Cleland v. Waters*, 19 Ga. 35, 41–42 (1855) (emphasis added).

<sup>188</sup> See, e.g., Sarah H. Cleveland, *Foreign Authority, American Exceptionalism, and the Dred Scott Case*, 82 CHI.-KENT L. REV. 393, 403 (2007). The author lucidly observes:

*Somerset* was decided in 1772 and formed part of the corpus of the English common law that was operative in the colonies at the time of the American Revolution. To the extent that the opinion stood for the

in 1847, Georgia wanted its own common law, not that of any other state, particularly those above the 1767 border line between Pennsylvania and Maryland, which became known as the “Mason-Dixon Line.”<sup>189</sup> “Dangerous” cases were being litigated in northern courts, where the vestiges of slavery were dying out but not yet entirely extirpated.<sup>190</sup> But of greater concern was the legal challenge of emancipation that slaves who were taken (not escaped) to free states claimed under the aegis of the common law declared in those free states. The most famous of these cases was decided by Massachusetts’s most accomplished antebellum jurist, the legendary Chief Justice Lemuel Shaw,<sup>191</sup> in *Commonwealth v. Aves*,<sup>192</sup> in which he declared that *Somerset’s Case* accurately stated the common law in Massachusetts and that when a non-fugitive slave entered the Commonwealth, he or she immediately became freed,<sup>193</sup> presaging scenarios such as the one

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proposition that English law did not allow slavery, it raised difficult questions regarding how slavery could be valid in the British colonies if it was invalid under the law of England.

*Id.* at 403; *see also* Wiecek, *supra* note 186, at 107–08.

<sup>189</sup> *See, e.g.*, Cameron B. Strang, *The Mason-Dixon and Proclamation Lines: Land Surveying And Native Americans In Pennsylvania’s Border Lands*, 136 PA. MAG. OF HIST. & BIOGRAPHY 5, 6 (2012) (“The astronomer Charles Mason and the land surveyor Jeremiah Dixon geodetically surveyed the long-disputed border between the colonies of Maryland and Pennsylvania. This line would eventually become ingrained in the American consciousness as the symbolic boundary between North and South.”).

<sup>190</sup> *See, e.g.*, Daniel R. Ernst, *Legal Positivism, Abolitionist Litigation, and the New Jersey Slave Case of 1845*, 4 L. & HIST. REV. 337, 337 (1986); *see also*, Lolita Buckner Inniss, *James Collins Johnson: The Princeton Fugitive Slave*, PRINCETON & SLAVERY, <https://slavery.princeton.edu/stories/james-collins-johnson> (last visited Apr. 20, 2020).

<sup>191</sup> *See, e.g.*, LEONARD W. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* 3 (1957). As Professor Levy noted of his subject:

During his thirty years as Chief Justice of the Supreme Judicial Court of Massachusetts from 1830 to 1860, Lemuel Shaw wrote approximately 2,200 opinions, probably a record number. They extend through fifty-six volumes of the *Massachusetts Reports* and if collected separately would fill twenty volumes, covering nearly every legal subject. His domain was the whole field of jurisprudence, excepting admiralty. No other state judge through his opinions alone had so great an influence on the course of American law.

*Id.* at 3.

<sup>192</sup> 35 Mass. 193 (1836).

<sup>193</sup> Aviam Soifer, *Status, Contract, and Promises Unkept*, 96 YALE L. J. 1916 (1987). As Professor Soifer observed,

Shaw sought to put his great stature behind a solution to a perplexing

litigated nineteen years later in *Knight v. Hardemann*.<sup>194</sup> By controlling choice of law, whether it involved statutes or common law, the antebellum Georgia Supreme Court could more firmly control the effect of “foreign” law<sup>195</sup> on Georgia’s regime of slavery regulation, which had been built on the pretense of “law.”<sup>196</sup>

Thus, Lumpkin and his fellow Justices on the Georgia Supreme Court vigorously opposed any effect they saw of “foreign state” law on the institution of slavery, on Georgia’s rules against domestic manumission, or upon a public policy that came to oppose manumission of slaves anywhere.<sup>197</sup> “Courts across the South frankly admitted that

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conflict of laws problem, an abiding legal complication of divided sovereignty, exacerbated by the complexities of an American nation half-slave and half-free. Shaw held that, in the absence of positive law commanding slavery, natural law (which embodied a basic legal presumption in favor of liberty) immediately and entirely freed a slave brought into Massachusetts voluntarily by her master. Liberty was general, slavery only a product of local law. Thus, when Mrs. Slater of New Orleans brought along her six-year-old slavegirl Med on her summer vacation in Massachusetts, Shaw ruled that the girl immediately became free.

*Id.* at 1918. Of course, the law was quite different as to fugitive slaves, for federal preemption brought down upon the person escaping bondage to find freedom the full weight of a most oppressive federal sovereign. *Id.* (“The law was entirely different for fugitive slaves. Since federal constitutional and statutory law protected slaveholders’ property rights, fugitive slaves did not become free upon entering Massachusetts. Shaw maintained that the highest positive law in the country, the federal Constitution, was premised on assurances to the South that runaway slaves would be returned.”).

<sup>194</sup> 17 Ga. 253 (1855).

<sup>195</sup> “And some judges in the [S]outh,” Justice Lumpkin among them, “came to believe that, as the [S]outh’s political power declined, it was essential to the survival of the [S]outh’s social system to support slavery more consistently.” Weinberg, *supra* note 183, at 483 n.50. Professor Weinberg provides a particularly compelling account of slavery law cases from both nineteenth century and modern choice-of-law perspectives. See generally *id.* at 473–76.

<sup>196</sup> Even law from some of the other slave states would have proven destabilizing to Georgia’s aggressive view of slavery. See, e.g., *Rankin v. Lydia*, 9 Ky. (2 A.K. Marsh.) 467, 470 (Ky. Ct. App. 1820) (“Slavery is sanctioned by the laws of this state, . . . But we view this as a right existing by positive law of a municipal character, *without foundation in the law of nature, or the unwritten and common law.*” (emphases added)).

<sup>197</sup> Reid, *supra* note 183, at 595–602. These Georgia Justices may have feared the kinds of cases hypothesized by historian Paul Finkelman. See Paul Finkelman, *The Nationalization of Slavery: A Counter-Factual Approach to the 1860s*, 14 LOUISIANA STUDIES 213, 233–37 (1975). This led to a particularly interesting dissonance for Justice Lumpkin, who employed his exceptional powers of rationalization to cope with the dissonance. On the one hand, Justice Lumpkin and the other adherents of slavery sought state control over the details of slavery within the state; but they became ardent invokers and users of federal power when they sought to coerce the regulation of slavery and fugitive slaves in free states. See, e.g., G. Randal Hornaday, *The Forgotten Empire: Pre-Civil War Southern*



*Imperialism*, 36 CONN. L. REV. 225 (2003). Lumpkin went so far as to embrace a (very selective) Bill-of-Rights incorporation argument when he struck down a Georgia law forbidding the carrying of a variety of deadly weapons on the grounds that the federal Second Amendment provided an absolute right to carrying openly armaments of all kinds then known for self-protection. See *District of Columbia v. Heller*, 554 U.S. 570, 612 (2010) (citing *Nunn v. State*, 1 Ga. 243, 251 (Ga. 1846)) (demonstrating where the U.S. Supreme Court majority in *Heller* cited *Nunn* favorably). Justice Lumpkin's opinion is impassioned—littered with exclamation points, a true judicial rarity—and reading more like a sermon or a stump speech for a nineteenth century politician's campaign appearance:

If a well-regulated militia is necessary to the security of the State of Georgia and of the United States, is it competent for the General Assembly to take away this security, by disarming the people? What advantage would it be to tie up the hands of the national legislature, if it were in the power of the States to destroy this bulwark of defence? In solemnly affirming that a well-regulated militia is necessary to the security of a free State, and that, in order to train properly that militia, the unlimited right of the people to keep and bear arms shall not be impaired, are not the sovereign people of the State committed by this pledge to preserve this right inviolate? Would they not be recreant to themselves, to free government, and false to their own vow, thus voluntarily taken, to suffer this right to be questioned? If they hesitate or falter, is it not to concede (themselves being judges) that the safety of the States is a matter of indifference?

"The right of the people to bear arms shall not be infringed." The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear arms of every description, and not such merely as are used by the militia, shall not be infringed, curtailed, or broken in upon, in the smallest degree; and all this for the important end to be attained: the rearing up and qualifying a well-regulated militia, so vitally necessary to the security of a free State. Our opinion is, that any law, State or Federal, is repugnant to the Constitution, and void, which contravenes this right, originally belonging to our forefathers, trampled under foot by Charles I. and his two wicked sons and successors, re-established by the revolution of 1688, conveyed to this land of liberty by the colonists, and finally incorporated conspicuously in our own Magna Charta! And Lexington, Concord, Camden, River Raisin, Sandusky, and the laurel-crowned field of New Orleans, plead eloquently for this interpretation! And the acquisition of Texas may be considered the full fruits of this great constitutional right.

*Nunn*, 1 Ga. at 251. But Justice Lumpkin's expansive language—"the whole people, old and young, men, women, and boys, and not militia only"—was considerably narrowed and contextualized by his description of the right as "inestimable to freemen." *Id.* at 249. Nat Turner's 1831 armed slave rebellion in Virginia was very much in the minds of public men in the slave-holding states during Lumpkin's time, and it was clearly on his mind here, as well. See TIMOTHY S. HUEBNER, *STATE JUDGES AND THE SOUTHERN JUDICIAL TRADITION: STATE JUDGES AND SECTIONAL DISTINCTIVENESS, 1790–1890*, 7, 68–69 (2011); Sarah N. Roth, *Response: The Savage Slave and the Humble Martyr in American Law and Culture*, 94 TEX. L. REV. 8, 12 (2015); Saul Cornell & Eric M. Reuben, *The Slave-State Origins of Modern Gun Rights*, THE ATLANTIC (Sept. 30, 2015),

they were shoring up their peculiar institution ‘in consequence of injudicious and impertinent assaults from without.’”<sup>198</sup> This crescendo of *lex fori* reached its most feverish pitch in the Georgia Supreme Court’s decision in *Padelford v. Mayor of Savannah*,<sup>199</sup> which has been described as “the great *obiter dictum* on the relation of the states to the Federal government.”<sup>200</sup> As Professor Reid explains *Padelford*, “[a]n incredible opinion of eighty-two pages”, that case “attempted to prove ‘[t]hat the Supreme Court of Georgia is co-equal and coordinate with the Supreme Court of the United States and therefore the latter cannot give the former an order or make for it a precedent.’”<sup>201</sup> This bizarre view of the fundamental nature of the Georgia Supreme Court’s position and power was not disavowed until well after Reconstruction, when, some twenty-three years after Justice Lumpkin’s death, the Supreme Court of Georgia grudgingly conceded that “[a]fter the State has yielded to the federal army, it can very well afford to yield to the federal judiciary[,]” particularly because “[o]ur sister states, Alabama and Louisiana have done so.”<sup>202</sup>

The *Latine* view of the common law’s nature comes out of the same fetid intellectual swamp from which *Cleland*, *Knight*, *Padelford*, and the other slavery cases arose. And just as *Padelford* stated an extreme position unknown to any other court in the antebellum South or elsewhere in America, the *Latine* rule as articulated and applied in *Medical Center* deserves similar condemnation. As Dean Gary

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<https://www.theatlantic.com/politics/archive/2015/09/the-origins-of-public-carry-jurisprudence-in-the-slave-south/407809/>. The point here is to show just how thoroughly the slave-owner’s zeal for slavery and honor infected every aspect of his outlook. This provides yet another reason to use the most extreme caution when even citing to antebellum opinions of a slave-state court, let alone making them the foundation for a twenty-first century choice-of-law approach.

<sup>198</sup> Reid, *supra* note 183, at 599 (quoting *Barclay v. Sewell*, 12 La. Ann. 262, 263 (La. 1857)). An examination of the other side of the judicial coin, the paths taken by Northern judges when confronted with slavery issues, is most ably explored in ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975).

<sup>199</sup> 14 Ga. 438, 506 (Ga. 1854).

<sup>200</sup> ALEXANDER R. LAWTON, REPORT OF THE THIRTY-EIGHTH ANNUAL SESSION OF THE GEORGIA BAR ASSOCIATION 104 (1921).

<sup>201</sup> Reid, *supra* note 183, at 612 (quoting Bond Almand, *History of the Supreme Court of Georgia the First Hundred Years*, 6 GA. B. J. 177, 194 (1944)). For an unsatisfyingly fawning discussion of and strained apology for *Padelford* and its author, Justice Benning, see J. DAVID DAMERON, GENERAL HENRY LEWIS BENNING: “THIS WAS A MAN”, (2004) (for example, calling the *Padelford* decision “Benning’s pinnacle of judicial expression[,]” which he even continued to argue after 1865). For an unpersuasive rationalization for the pro-slavery views of Benning and other “leading men” of the age, see generally *id.* at Chapter 7, “Judge Benning and Slavery.”

<sup>202</sup> *Wrought Iron Range Co. v. Johnson*, 11 S.E. 233, 235 (Ga. 1890). For a discussion of *Padelford* and *Wrought Iron Range*, see Reid, *supra* note 183, at 612–13, nn.140–43.

Simpson put it,

[M]ake no mistake about it: evaluated entirely on its own terms, this rule [in *Latine*] really *earns* a failing grade. In fact, it is *so* indefensible that the Georgia high court's ringing affirmation of it in [the *Medical Center* case] in the course of reaching a singularly unappealing result cries out that something must be seriously amiss.<sup>203</sup>

Dean Simpson is certainly correct in “argu[ing] that ‘something’ is much more than just the idiosyncratic” nature of the rule, but also “is the entire choice-of-law methodology of which that rule is a part . . . .”<sup>204</sup> But also seriously amiss is a twenty-first century appellate court's decision to exalt a precedent wrought by an antebellum court as part of a larger mission to prop up and preserve one of humankind's most detestable inventions—the slave economy.

That, of course, is not to say that other antebellum judges and courts did not have views of the common law that saw full faith and credit as being owed only to statutes; or that saw common law as a body existing separately and apart from the legal systems in our states; or even that saw, as Justice Story claimed to have seen, that there were particular parts of the common law—such as the general commercial common law—that the federal courts could ascertain and apply roughshod over contrary state-law decisions.<sup>205</sup> These other cases were driven by motivations ranging from judges having been educated by reading Blackstone's Commentaries (and thus having imbibed his view of the common law as a body of principles discerned, ascertained, and articulated by judges)<sup>206</sup> to judges claiming intimate knowledge of

<sup>203</sup> Simpson, *supra* note 12, at 825 (emphasis in original).

<sup>204</sup> *Id.*

<sup>205</sup> The most (in)famous example being his decision in *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 12 (1842). See, e.g., William LaPiana, *Swift v. Tyson and the Brooding Omnipresence in the Sky: An Investigation of the Idea of Law in Antebellum America*, 20 SUFFOLK U. L. REV. 771 (1986); Robert H. Jackson, *The Rise and Fall of Swift v. Tyson*, 24 A.B.A. J. 609 (1938).

<sup>206</sup> DANIEL J. BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW: AN ESSAY ON BLACKSTONE'S COMMENTARIES* (1941); Jeffrey A. Van Detta, *Comment, Compelling Governmental Interest Jurisprudence Of The Burger Court: A New Perspective On Roe v. Wade*, 50 ALB. L. REV. 675, 702 (1986) (discussing the central rule of Blackstone's Commentaries in legal education and vision of the law among American lawyers and judges of the eighteenth century); Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731 (1976); Carl F. Stychin, *The Commentaries of Chancellor James Kent and the Development of an American*

commercial practices.<sup>207</sup> Although Lumpkin and the Georgia Supreme Court may also have been channeling these influences, their worldview channeled a supervening zealotry to preserve slavery in the law of Georgia, and they saw threats to that in all quarters of legal influence from other states. Indeed, the author of *Latine*, Justice Nisbet “was elected to Georgia’s secession convention and took the lead by moving the crucial resolution that stated that it was Georgia’s right and duty to secede from the Union. Appointed chairman of the convention’s drafting committee, he became “the framer of the Georgia ordinance of secession.”<sup>208</sup>

Taken together, all of the foregoing makes the *Latine* doctrine a decidedly suspect feature of Georgia jurisprudence, tainted by its context within the era of infamous slave-law cases,<sup>209</sup> and thus a doctrine

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*Common Law*, 37 AM. J. LEGAL HIST. 440 (1993); Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1 (1996).

<sup>207</sup> LaPiana, *supra* note 205, at 831, n.336 (citing GERALD T. DUNNE, JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT 121, 141–42, 268–69 (1970), and noting that “Story [was] president of the Merchant’s Bank of Salem while he sat on [the] Court and probably had first hand knowledge of [the] practicalities involved”).

<sup>208</sup> Reid, *supra* note 183, at 623–24 (quoting RALPH BETTS FLANDERS, PLANTATION SLAVERY IN GEORGIA 247 (1933); MCPHERSON, DICTIONARY OF AMERICAN BIOGRAPHY 527, 528 (1934). Justin Simard, *Slavery’s Legalism: Lawyers and the Commercial Routine of Slavery*, 37 LAW & HIST. REV. 571 (May 2019), provides the most informative modern treatment of Justice Nisbet’s life and legal career. Simard strains to argue that “[l]egalism and the embrace of routine commercial practice allowed” Southern lawyers such as Justice Nisbet “to work together” with Northern lawyers “and to agree” with Northern lawyers “on a conception of the [legal] profession’s value and its service of right and justice, isolated from its economic effect.” *Id.* at 603. “Nisbet,” Simard argues, “ascribed to a legal culture he shared with Northern lawyers,” including practices of debt collection from Southerners on behalf of Northern manufacturers and merchants. *Id.* at 574, 594–601. Yet, Simard is also compelled to concede that although their “routine” commercial work “contributed to the maintenance of the slave economy” alongside the more noticeable cases “about a runaway slave or a slave hiring,” Southern lawyers like Nisbet wore the comforting blinders of a “legalism [that] prevented them from seeing its significance.” *Id.* Simard also concedes that “Nisbet strongly supported slavery”; “grew up in a slave-owning family, married the daughter of a plantation owner, and owned slaves himself”; and “after the Civil War . . . remembered slavery fondly and argued that all Southerners—including slaves—were better off before the ‘rapacity and injustice of the Radical Party’ had turned his society on its head.” *Id.* at 574.

<sup>209</sup> The taint of slavery continued past Reconstruction and afflicts even one of the Georgia’s Supreme Court’s most celebrated twentieth century cases, *Pavesich v. New England Life Insurance Co.*, 50 S.E.2d 68, 80 (Ga. 1905) (“[A]s long as the advertiser uses him for these purposes, he cannot be otherwise than conscious of the fact that he is for the time being under the control of another, that he is no longer free, and that he is in reality a slave, without hope of freedom, held to service by a merciless master; and if a man of true instincts, or even of ordinary sensibilities, no one can be more conscious of his enthrallment than he is.”) (recognizing a freestanding cause of action for violating the right to privacy); see Allen, Anita L., *Natural Law, Slavery, and the Right to Privacy Tort*, 81 FORD. L. REV.

from which the Georgia Supreme Court of 2017 should have beaten a hasty and decisive retreat.

But even if *Latine* were not defiled by its birth in the milieu of the antebellum slavery jurisprudence of its parent, *Medical Center's* approach to the nature of "law" remains hopelessly antebellum in every other way. It proceeds from the same font as one of Justice Joseph Story's three biggest follies<sup>210</sup> in his long career as a Supreme Court Justice and treatise writer: institutionalizing in *Swift v. Tyson* the notions that the common law exists in a body metaphysically separate from any state or federal court's declaration of it; the decisions of courts are inferior to the status of statutes; and any court can, for cases within its jurisdiction, just as well "find" the common law from its brooding omnipresence in the sky as well as a judge of another state, and thus, no deference is due a sister-state's court in its rulings limning the common law on a particular claim, defense, or issue. This view had

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1187, 1204–10 (2012); Jonathan Kahn, *Controlling Identity: Plessy, Privacy, and Racial Defamation*, 54 DEPAUL L. REV. 755, 756–57, 760 (2005) ("Plessy and Pavesich, then, can be viewed as unlikely twins, each dealing with new conceptions of slavery and subordination as the United States entered the modern age. The former denied control over personal identity to blacks, while the latter established it for whites."). Simard observed "that decisions made by Nisbet and his fellow justices, including some that explicitly involved enslaved people, continued to be cited after emancipation and even as recently as 2015." See Simard, *supra* note 208, at 592 & n. 76. For a thorough and thoughtful discussion of the ethical, historical, and dignitary wrongs worked by modern reliance on such tainted cases, see Justin Simard, *Citing Slavery*, 72 STAN. L. REV. 79 (2020).

<sup>210</sup> Although he was the father of the study of conflict of laws in America through his tour-de-force, groundbreaking treatise, Justice Story's three greatest doctrinal errors occurred in choice-of-law cases. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS (1834). First in his trio of follies is his concept of comity. See ALAN WATSON, JOSEPH STORY AND THE COMITY OF ERRORS: A CASE STUDY IN CONFLICT OF LAWS (1992). Second is ruling on the dividing line between federal and state powers in finding the federal Fugitive Slave Act preempted a contrary Pennsylvania state law. See *Edward Prigg v. Commonwealth of Pennsylvania*, 41 U.S. 539 (1842); Paul Finkleman, *Story Telling on the Supreme Court: Prigg v. Pennsylvania and Justice Joseph Story's Judicial Nationalism*, 1994 SUP. CT. REV. 247 (1994); Barbara Holden-Smith, *Lords of the Lash, Loom, and Law: Justice Story, Slavery and Prigg v. Pennsylvania*, 78 CORNELL L. REV. 1086 (1993). Third is his ruling that federal courts were just as competent as state courts in divining principles, and therefore form rules that he called "the general commercial law." *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 12 (1842); see TONY FREYER, HARMONY AND DISSONANCE: THE SWIFT AND ERIE CASES IN AMERICAN FEDERALISM (1981); see also H. Parker Sharp & Joseph B. Brennan, *The Application of the Doctrine of Swift v. Tyson Since 1900*, 4 IND. L. REV. 367 (1929) (discussing an array of areas in which the *Swift* rule produced analytic and outcome dissonance). For a contrary view on *Swift*, see Harold M. Hollingsworth, *Comments on Charles A. Heckman's Paper "The Relationship of Swift v. Tyson to the Status of Commercial Law in the Nineteenth Century and the Federal System," and Donald Roper's Paper, "James Kent and the Emergence of New York's Libel Law."*, 17 AM. J. LEGAL HIST. 256 (1973).

some currency among some of the American legal thinkers of the early Republic—mostly as a holdover from Blackstone’s *Commentaries*, which itself was, on this point, a misunderstanding of the Roman jurists.<sup>211</sup> A new age of jurists rebuked this claim, from judges sitting on the postbellum appellate court benches all the way through Justice Oliver Wendell Holmes, Jr., and, most famously, Justice Louis Brandeis in *Erie Railroad Co. v. Tomkins*.<sup>212</sup>

In 1889, the Pennsylvania Supreme Court rejected the very notion advanced by the Georgia Supreme Court in 1929 and again—amazingly—in 2017, in a case involving the validity of a release that was entered into in New York but was being tested in the Pennsylvania courts.<sup>213</sup> The choice-of-law rule being wielded by the Pennsylvania judges was *lex loci contractus*, the Latin shorthand for a rule that says issues of formation and contract validity must be adjudicated according to “the law” of the state in which the contract was made.<sup>214</sup> Under New York’s case law, the release of claims was deemed valid and enforceable; under Pennsylvania’s, the opposite was true.<sup>215</sup> The plaintiff wanted the release set aside so he could pursue claims against the railroad whose negligence caused the loss of his circus animals the railroad was transporting.<sup>216</sup> The plaintiff argued that the New York case law was not “law” for purposes of the *lex loci contractus* rule and thus, would not provide the law of decision for the Pennsylvania court, which instead, the plaintiff urged, must look to its own view of “the

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<sup>211</sup> It is true that the nature of law in the founding and antebellum era was viewed largely through the prism provided by the only legal training book actually read by all American lawyers—Blackstone’s *Commentaries*. See Patrick J. Borchers, *The Origins of Diversity Jurisdiction, Rise of Legal Positivism, and a Brave New World for Erie and Klaxon*, 72 TEX. L. REV. 79, 84 (1993). But the antebellum concept does not equate to the cruel parody of it found in the *Latine* or even more so in the *Medical Center* cases. The Roman concept of *ius gentium* provided certain principles of law that were viewed as universal—but not immutable. They were, and were expected to be, adapted by judges to the circumstances of their locale and time. See, e.g., *id.* at 111–12. That in no way allowed the common law—as morphed from the *ius gentium* principles—to be imposed by a forum court on the assumption that the law was the same in another state. That turns the historical notion on its head. See MORTON J. HORWIRZ, *THE TRANSFORMATION OF AMERICAN LAW* 245–49 (1977) (calling the *Swift* doctrine “[o]ne of the most interesting and puzzling developments in all of American legal history” particularly because the notion of a general common law from which state decisional deviation constituted error was “in the process of eroding in the decades after 1780,” and in fact, was a view incompatible with Story’s own views of law underpinning his 1834 conflict-of-laws treatise).

<sup>212</sup> 304 U.S. 64 (1938).

<sup>213</sup> *Forepaugh v. Del., Lackawanna & Western R.R. Co.*, 18 A. 503 (Pa. 1889).

<sup>214</sup> *Id.* at 504.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

general common law”:<sup>217</sup>

It is argued that the validity of this contract is a question of commercial law, and therefore the mere decisions of the New York courts are not binding; and, in the absence of any statute in New York expressly authorizing such a contract, the courts of this state must follow their own views of the commercial as part of the general common law, though different views may be held as to such law by the courts of New York.<sup>218</sup>

But the Pennsylvania Supreme Court had tired of such antebellum arguments in the postbellum period, declaring that

it is time to say plainly that it rests upon an utterly inadmissible and untenable basis. There is no such thing as a general commercial or general common law, separate from, and irrespective of, a particular state or government whose authority makes it law. Law is defined as a rule prescribed by the sovereign power.<sup>219</sup>

The court further elaborated:

What is law in one state is not law in the other, not because it was or was not the common law of England, but because it is or is not the law of the respective states; and, though it rests only on the decisions of the courts, it is none the less absolutely and indisputably the law, than [sic] if it had been made so by statute. . . . The decisions of a state court, upon its common law and on its statutes, must stand unquestioned, because it is the only authority competent to decide; or they must be alike questionable by any tribunal which may choose to differ with its reasons or its conclusions.<sup>220</sup>

The Pennsylvania Supreme Court traced the problem back to Justice Story and his “general common law” notions expressed in *Swift v. Tyson*:

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<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Forepaugh*, 18 A. at 504.

<sup>220</sup> *Id.* at 504–05.

It is not probable that the doctrine of such a distinction would ever have got a foothold in jurisprudence, and it would certainly have been long ago abandoned, had it not been for the unfortunate misstep that was made in the opinion in [*Swift v. Tyson*]. Since then the courts of the United States have persisted in the recognition of a mythical commercial law, and have professed to decide so-called commercial questions by it, in entire disregard of the law of the state where the question arose. . . . [T]he distinction between the binding effect of decisions on commercial law and on statutes is utterly untenable; that the law declared by state courts to govern on contracts made within their jurisdiction is conclusive everywhere; and the departure made by the United States courts is to be regretted, and certainly not to be followed.<sup>221</sup>

The Pennsylvania Supreme Court then proceeded to cite to the decisions of other state courts that had similarly renounced the kind of metaphysics espoused in *Swift*—decisions from Ohio, Illinois, Iowa, Connecticut, Kansas, South Carolina, Texas—and *Georgia*.<sup>222</sup> It is the Georgia case, *Atlanta & Charlotte Air Line Railway Co. v. Tanner*,<sup>223</sup> that particularly attracts our attention. Chief Justice Jackson of the Georgia Supreme Court wrote that 1882 case in a manner that fits the abandonment of antebellum doctrine and accords with full faith and credit principles, to which he alludes:

What then are the rights of the parties under the South Carolina law? No stat[ute] regulating their rights has been cited, and it is conceded that none exists. The common law must, therefore, be considered the law of that state. What is the common law on the subject matter of the rights of the parties here, in this case, under the facts disclosed by this record, and reported at the head of this opinion? Shall the common law, as we understand it in Georgia, be applied, or the common law as interpreted and adjudicated by the courts of South Carolina prevail? *In a liberal spirit of comity, without*

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<sup>221</sup> *Id.* at 505.

<sup>222</sup> *Id.* at 505–06.

<sup>223</sup> 68 Ga. 384 (Ga. 1882).



*considering whether the adjudications there would harmonize with the views of this court on what is the common law on the facts here made, we shall apply the construction of that law by the courts of our sister state to the facts here, and thus ascertain the common law prevailing in South Carolina and apply it as the law of South Carolina, so as to give it full force, as there understood and ruled by its highest court, to determine the legal rights of the parties in this case.*<sup>224</sup>

It is that very precedent of the 1882 Georgia Supreme Court that the 1929 Georgia Supreme Court purported to overrule forty-seven years later in *Slaton v. Hall*,<sup>225</sup> onto which the *Medical Center* fixed the

<sup>224</sup> *Id.* at 390–91 (emphasis supplied).

<sup>225</sup> 148 S.E. 741 (Ga. 1929). If such a thing is possible, the *Slaton* case is even more unpersuasive than the *Medical Center* case. The *Slaton* court asserts, without citations, that “[t]he common law is presumed to be the same in all the American states where it prevails” and that “[t]hrough courts in the different states may place a different construction upon a principle of common law, that does not change the law. There is still only one right construction. If all the American states were to construe the same principle of common law incorrectly, the common law would be unchanged.” *Id.* at 743. The Georgia Supreme Court invited briefing on overruling *Tanner*, but the only reasons for doing so offered by the court comes down to this: “We think that the *Tanner* Case is contrary to the weight of American decisions as well as against later Georgia decisions; and, after a thorough consideration on review, the *Tanner* Case is now overruled.” *Id.* at 744. This is hardly a compelling basis for such a bold act of judicial activism. Not a single case from another jurisdiction is examined; not a single legal treatise, text, or law review article is cited; and we are left only with the 1929 Georgia Supreme Court’s *ipse dixit*. And as the *Erie* case showed a mere eight years later, the Justice of the Georgia Supreme Court completely missed the national trend to put an end to the “brooding omnipresence” view of the common law. That is not surprising. The author of the opinion, Judge S. Pierce Gilbert, had gone to law school forty-four years before. See *Portrait of Judge S. Pierce Gilbert, Sr.*, GA. TECH ARCHIVES, <http://history.library.gatech.edu/items/show/1164> (last visited Apr. 20, 2020). Though he was a Yale graduate, the Yale Law School of 1885 was not the Yale Law School of the twentieth century, where great legal minds like Karl Llewellyn were trained. See Karl N. Llewellyn, *Wesley Newcomb Hohfeld-Teacher*, 28 Yale L.J. 795 (1919). Yale had yet to get the benefit of the work of John Chipman Gray, who joined the faculty in 1883 (about the time Judge Gilbert would have matriculated), but who had not worked out his grand theory of common-law jurisprudence articulated in his *The Nature and Sources of the Law*. See GERALD PAUL MORAN, JOHN CHIPMAN GRAY: THE BOSTON BRAHMIN OF PROPERTY LAW (2010). By the time Gray published the first edition of his magnum opus on American jurisprudence, *The Nature and Sources of the Law*, he did not take seriously the *Latine* view of the common law. JOHN C. GRAY, THE NATURE AND SOURCES OF THE LAW, 238–39, 253–55 (1st ed. 1909) (claiming that Story “was fond of glittering generalities; and he was possessed by a restless vanity”). Gray goes on to note in discussing *Swift v. Tyson* (see the authors discussion of *Swift* in the context of *Erie*, Section IV.C, *infra*) that the view that court decisions are not the law but merely evidence of it is not the better view, and that the better view is that “decisions of courts make the

continued life of *Latine* in 2017. However, by 1929, the view that state courts were abandoning in the 1880s was now no longer even a minority rule—it was a virtually extinct rule.<sup>226</sup> And almost as if it were operating some sort of judicial Jurassic Park, the 1929 Georgia Supreme Court embraced an extinct rule that their predecessors forty-seven years earlier had seen as unhelpful.

*C. The Medical Center “Vision” of the Common Law Violates the Equal Protection Clause of the Fourteenth Amendment Because It Results in the Inequitable Administration of the Laws Condemned in Erie*

Every American law school student learns about the notion that there was a separate body of common law that was (1) an antebellum fiction most famously articulated by Justice Joseph Story in *Swift v. Tyson*<sup>227</sup> and (2) exploded by the U.S. Supreme Court’s ruling in *Erie*

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Law.” *Id.* at 239–41. Gray noted, too, that the idea that case law should be treated differently from statute law is not an originalist idea, for no court did so in the first fifty years after the Judiciary Act of 1789 created the federal court system, nor is it anything but a “very improbable one,” given that “in many of the states, the statute law was so meagre.” *Id.* at 236.

<sup>226</sup> See, e.g., *Duty of Courts to Follow Decisions of Other States, On Questions of Common Law or Unwritten Law, in Which the Cause of Action Had Its Situs*, 73 A.L.R. 897 (1931). As the annotation observes:

All the cases which discuss this question—whatever may be their points of divergence in other respects—are in perfect harmony to the extent of agreeing that where the law of the situs of the transaction is statutory, or, what we are primarily concerned with, involves judicial constructions of statutory law, the courts of the forum will follow such law, and determine the rights of the parties by that law. . . . Thus far all the decisions are in accord, and the divergence of view starts here. *Most of the cases go a degree further, and hold, some expressly and others tacitly, that even though the law of the situs of the transaction on the point in controversy is neither of statutory origin nor consists of judicial constructions of such statutory law, but relates either to the general common law, or the unwritten law, or the commercial law, nevertheless the law of the situs as it is understood, interpreted, and applied by the courts of the situs, when in conflict with the interpretation, apprehension, and application of that law by the courts of the forum, will govern, and the courts of the forum will determine the substantive rights of the parties by that law as thus understood, interpreted, and applied.*

*Id.* (emphasis supplied).

<sup>227</sup> 41 U.S. (16 Pet.) 1 (1842); see R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 334 (1985) (noting that in the decades following the American Civil War, *Swift* was the most cited antebellum Supreme Court decision).

*Railroad v. Tomkins*.<sup>228</sup> Prior to *Erie*, there had been a growing sense of constitutional infirmity in the federal courts' assertion of power to articulate, in state-law issue cases before it under Article III's diversity-of-citizenship subject matter jurisdiction, a "discovered" common law that ignored that state's own appellate court decisions.<sup>229</sup> The increasing chaos this produced aroused against *Swift* growing opposition.<sup>230</sup> A number of Supreme Court Justices waged war on the doctrine. One of the earliest and most eloquent critics was Justice Stephen J. Field, the author of *Pennoy v. Neff*,<sup>231</sup> who wrote of *Swift v. Tyson*:<sup>232</sup>

I am aware that what has been termed the general law of the country—which is often little less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject—has been often advanced in judicial opinions of this court to control a conflicting law of a state. I admit that learned judges have fallen into the habit of repeating this doctrine as a convenient mode of brushing aside the law of a state in conflict with their views. And I confess that, moved and governed by the authority of the great names of those judges, I have, myself, in many instances, unhesitatingly and confidently, but I think now erroneously, repeated the same doctrine. But, notwithstanding the great names which may be cited in favor of the doctrine, and notwithstanding the frequency with which the doctrine has been reiterated, there stands, as a perpetual protest against its repetition, the constitution of the United States, which recognizes and preserves the autonomy and independence of the states,—independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by

<sup>228</sup> 304 U.S. 64 (1938).

<sup>229</sup> See, e.g., Harry Schulman, *The Demise of Swift v. Tyson*, 47 YALE L.J. 1336 (1938); Edward S. Stimson, *Swift v. Tyson—What Remains? What Is (State) Law?*, 24 CORNELL L. REV. 54 (1938); Note, *Swift v. Tyson Overruled*, 24 VA. L. REV. 895 (1938); Gene R. Shreve, *From Swift to Erie: An Historical Perspective*, 82 MICH. L. REV. 869 (1984); see also Note, *Swift v. Tyson Exhumed*, 79 YALE L.J. 284 (1969).

<sup>230</sup> JAMES MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION: A STUDY IN POLITICAL AND LEGAL THOUGHT 183–84 (1971).

<sup>231</sup> 95 U.S. 714 (1878).

<sup>232</sup> 41 U.S. (16 Pet.) 1 (1842).

the constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the state, and, to that extent, a denial of its independence.<sup>233</sup>

Justices Brandeis and Holmes took up this banner and pursued *Swift v. Tyson* for some years. For example, in 1910, Holmes wrote the following in a three-judge dissent:

It is said that we must exercise our independent judgment—but as to what? Surely, as to the law of the states. Whence does that law issue? Certainly not from us. But it does issue, and has been recognized by this court as issuing, from the state courts as well as from the state legislatures. When we know what the source of the law has said that it shall be, our authority is at an end. The law of a state does not become something outside of the state court, and independent of it, by being called the common law. Whatever it is called, it is the law as declared by the state judges, and nothing else.<sup>234</sup>

In 1928, Holmes put it more forcefully in another three-judge dissent:

Books written about any branch of the common law treat it as a unit, cite cases from this Court, from the Circuit Courts of Appeal, from the State Courts, from England and the Colonies of England indiscriminately, and criticise them as right or wrong according to the writer's notions of a single theory. It is very hard to resist the impression that there is one august corpus, to understand which clearly is the only task of any

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<sup>233</sup> *Baltimore & Ohio R. Co. v. Baugh*, 149 U.S. 368, 401 (1893) (Field, J., dissenting) (noting that the issue of whether the engineer and fireman of a locomotive engine, running alone on a railroad and without any train attached were fellow servants of the company so as to preclude the latter from recovering from the company for injuries caused by the negligence of the former is a question to be settled by the decisions of the highest court of the state in which the cause of action arose).

<sup>234</sup> *Kuhn v. Fairmount Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, White & McKenna, JJ., dissenting) (deciding whether the federal courts were bound by a decision of the highest state court on the question of subjacent support, handed down “after the rights of the parties were fixed”).

Court concerned. If there were such a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute, the Courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law. The fallacy and illusion that I think exist consist in supposing that there is this outside thing to be found. Law is a word used with different meanings, but law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else.<sup>235</sup>

*Erie* at last vindicated the concerns of Justices Field, Holmes, and Brandeis. *Swift* was finally vanquished in a majority opinion by Justice Brandeis. And since the day *Erie* was handed down in 1938, no one took seriously the antebellum view of the common law—except for the Georgia Supreme Court, in its decisions perpetuating that view in *Trustees of Jesse Parker William Hospital v. Nisbet*,<sup>236</sup> *Motz v. Alropa Corp.*,<sup>237</sup> and *Medical Center*.<sup>238</sup> As Dean Simpson memorably puts it, “[v]ery simply, Holmes’s conception of the common law long ago became the mainstream of legal thinking in American law, and the *Latine* conception embraced by the court in [*Medical Center*] has long occupied a backwater”—or

[t]o put it somewhat differently, although the court in [*Medical Center*] seems to intimate that the ‘lawyers

<sup>235</sup> *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 533–34 (1928) (Holmes, Brandeis, & Stone, JJ., dissenting).

<sup>236</sup> 7 S.E.2d 737 (Ga. 1940). Justice Duckworth dissented, but did not grace posterity with a dissenting opinion. So, we know not whether he objected to the *Latine* rule’s continued existence, or to some other aspect of the majority opinion. Justice Duckworth, who went on to become Chief Justice Duckworth and serve thirty-one years on the Supreme Court of Georgia, had a remarkable life. See Ethelene Dyer Jones, *From Humble Beginnings to Chief Justice*:

Honorable William Henry Duckworth, ROOTSWEB, <https://sites.rootsweb.com/~gaunion/mm100404.htm> (last updated Sept. 8, 2008); but see Del Dickson, *State Court Defiance and the Limits of Supreme Court Authority*: Williams v. Georgia Revisited, 103 YALE L.J. 1423 (1994).

<sup>237</sup> 15 S.E.2d 237 (Ga. 1941).

<sup>238</sup> 797 S.E.2d 828 (Ga. 2017).

and judges' to whom the *Latine* rule 'may seem anachronistic' are some small subset of the profession, the reality is that anyone graduating from law school after *Erie* in 1938—meaning virtually every lawyer or judge working today—ought to be looking at that rule and the Georgia Supreme Court's celebration of it in [*Medical Center*] and wondering if there is a misprint . . . and it really was decided in 1917, not 2017.<sup>239</sup>

*Medical Center*'s view of the common law and the choice-of-law approach it purports to base on that view suffers from the same ills diagnosed and disposed of in *Erie*.<sup>240</sup> Both proceed from a view of the common law that is untenable.

The view that the Supreme Court overruled in *Erie* boiled down to the notion that since both a state and a federal court looking at a common law rule were looking to the "same" body of unwritten law, each was as competent as the other to make that examination. This notion fell before Justice Brandeis's withering criticism:

Experience in applying the doctrine of *Swift v. Tyson*, had revealed its defects, political and social; and the benefits expected to flow from the rule did not accrue. Persistence of state courts in their own opinions on questions of common law prevented uniformity; and the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law developed a new well of uncertainties.

On the other hand, the mischievous results of the doctrine had become apparent. Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the state. *Swift v. Tyson* introduced grave discrimination by noncitizens against citizens. It made rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined

<sup>239</sup> Simpson, *supra* note 12 at 836.

<sup>240</sup> See, e.g., LAURA E. LITTLE, CONFLICT OF LAWS: CASES, MATERIALS, & PROBLEMS 758 (8th ed. 2018); Michael S. Green, *Horizontal Erie and the Presumption of Forum Law*, 109 MICH. L. REV. 1237 (2011); see also Kermit Roosevelt, *Resolving Renvoi: The Bewitchment of Our Intelligence by Means of Language*, 80 NOTRE DAME L. REV. 1821, 1840–41 (2005).

was conferred upon the noncitizen. Thus, the doctrine rendered impossible equal protection of the law. In attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the state.<sup>241</sup>

Chief Justice Warren described *Erie* as having “twin aims”: “discouragement of forum-shopping and avoidance of inequitable administration of the laws.”<sup>242</sup> The former aim is a policy preference; however, the latter aim is a constitutional limitation, inherent in a number of provisions but most obviously in the Equal Protection Clause of the Fourteenth Amendment.<sup>243</sup> *Medical Center* accomplishes its own inequitable administration of the laws in an analogous way. First, it ignores the actual content of the other state’s law, substituting Georgia’s assessment of it *in toto*. Second, it also discriminates against litigants not only in that way (i.e., so that someone from out of state gets stuck with Georgia common law *per se*, even when the *lex loci delicti* in the case is the common law of another state where the injury occurred), but also in another important way. For the *Latine* rule—though inconsistently stated among the various cases cited by the *Medical Center* court—appears to be that only the citizens of some states get the “your common law is the same as Georgia’s common law” automatically. That is to say, in its most fully articulated and developed form, the *Latine* rule subjects only those to it who hail from one of the original thirteen colonies or a state whose territory was drawn from one of those original thirteen colonies. As for citizens who hail from a state that was *neither* one of the original thirteen colonies *nor* whose territory was drawn therefrom, they apparently get the “benefit” of Georgia’s normal choice-of-law routine (e.g., application of *lex loci delicti*, with the public policy escape device if needed).<sup>244</sup> Such a distinction is

<sup>241</sup> *Erie*, 304 U.S. at 74–75.

<sup>242</sup> *Hanna v. Plummer*, 380 U.S. 460, 468 (1965).

<sup>243</sup> Paul Carrington has argued in passing that “there likely is an equal protection consideration” in *Erie*, and that “arbitrarily discriminatory results occur because of the citizenship of the disputants.” Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929, 998–99 (1996); *but see* Craig Green, *Repressing Erie’s Myth*, 96 CAL. L. REV. 595, 603 n.39 (2008) (arguing that *Swift*’s disparities “were not so extreme as to violate constitutional equal protection or due process”). However, if forced to choose whether to credit Brandeis or follow Green, we will credit Brandeis.

<sup>244</sup> Among the Georgia Supreme Court cases cited by *Medical Center* as part of the “nearly unbroken line of decisions” following the *Latine* rule was *Nisbet*. *See Med. Ctr., Inc.*, 797 S.E.2d at 834–835. *Nisbet* states the following:

These rules, however, have no application to the contract of a State that

patently irrational. It does not, indeed, pass even the low bar of rational basis scrutiny.<sup>245</sup>

Imagine the following scenario: Amanda Rae Coon, the plaintiff in the *Medical Center* case, had been from Arkansas, not Alabama; had sought treatment at the same hospital in Columbus, Georgia on the recommendation of her doctors in Pine Bluff, Arkansas; had given birth to a stillborn child in Columbus, Georgia; had returned to Arkansas, held a funeral for baby who was (as yet unknown to her) not hers; and then felt the horror, shock, fright, agony, and panic in Arkansas when the Georgia hospital called her at home to tell her that it still had the body of her stillborn child and that she had buried someone else's child. Imagine further that Arkansas had common law judicial decisions that recognize a claim for NIED without impact.<sup>246</sup> In that case, the *Latine* rule relied upon by the *Medical Center* decision would direct that the court to ask the (silly) question, "Is Arkansas's territory derived from the territory of one of the thirteen original colonies?" The answer to that question would be no. As standard histories of the state explain, Arkansas was first formed into a territory in 1819 out of the land sold by France to the fledgling United States in the 1803 Louisiana Purchase.<sup>247</sup> Thus, according to one of the "unbroken line" of cases that

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was never a part of English territory, embraced in one of the original thirteen colonies or belonging thereto, and therefore did not inherit [sic] its laws from England. There is no presumption that the common law of England exists in such a State. Under such circumstances, the law of the foreign State must be pleaded, in the absence of which it will be presumed that the law of this State obtains therein.

Trs. of Jesse Parker Williams Hosp. v. Nisbet, 7 S.E.2d 737, 741 (Ga. 1940).

<sup>245</sup> See *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4, 153–54 (1938); ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES & POLICIES* 568 (6th ed. 2019); see generally *Williamson v. Lee Optical*, 348 U.S. 483 (1955).

<sup>246</sup> Arkansas law is not, in fact, quite so plaintiff-friendly on this point. Narrow exceptions to the impact rule, which Arkansas's Supreme Court continues to declare the state follows, have been recognized, but the exceptions do not appear to provide much succor to a plaintiff in Ms. Coon's position. Compare *FMC Corp. v. Helton*, 202 S.W.3d 490, 503 (Ark. 2005) with *M.B.M. Co. v. Counce*, 596 S.W.2d 681, 684–687 (Ark. 1980) (citing William T. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939)) (discussing how the Arkansas courts had "carried the constructive physical injury theory to its ultimate limits in holding that a complaint of a married woman seeking damages for worry, humiliation, distress of mind, public shame and degradation, by reason of the actions of a hotel manager in wrongfully ordering her out of the room to which she and her husband had been assigned and out of the hotel by insulting and abusive language falsely imputing adultery to her, stated a cause of action," which "caused Prof. William T. Prosser to say, in 1939, that it was time that the courts recognize that they had created a new tort").

<sup>247</sup> See MORRIS S. ARNOLD, THOMAS A. DEBLACK, GEORGE SABO III & JEANNIE M.



*Medical Center* described as adhering to the *Latine* rule, the court—if the plaintiff “pleads” the law of the other state in her complaint—will (presumably) apply it under the *lex loci delicti* rule. Of course, the Georgia court might still invoke a public policy escape device. In fact, given Georgia’s hostility to NIED, this is a strong possibility. But at the very least, it actually takes cognizance that the other state has a different law, what that different law provides, and presumes that law will apply unless, of course, the Georgia court reaches for the public policy escape card. Even so, the approach discriminates based on the fortuity of the residency of a party seeking the application of a sister-state’s law in a Georgia court. It punishes those residents of the thirteen original states and their direct progeny, while it abstains from those residents of the numerous other states admitted to the Union that do not share that lineage.

Notably, the same problem would arise for a case in which Amanda Rae Coon were a Florida citizen who delivered a stillborn child in a Georgia hospital and endured the same series of unfortunate events, culminating with a horror, shock, fright, agony, and panic she would have felt in Florida when the Georgia hospital called her at home to tell her that it still had the body of her stillborn child and that she had buried someone else’s child. As the Georgia Supreme Court recognized in a 1940 progeny of *Latine*, “Florida not being one of the original thirteen colonies or derived therefrom, there is no presumption that the common law exists in that State, even though it may have been adopted by statute.”<sup>248</sup> By the mid-1980s, Florida case law on NIED had moved away from the “strict impact” rule for NIED claims.<sup>249</sup> Florida has a rule that is, in that sense, “different from Georgia’s,” but whether it is different enough to fall to the public policy exception is not clear. What is clear is that a Florida Amanda Rae Coon would, if she pleaded Florida law in her complaint, get the benefit of the *lex loci delicti* rule when the Alabama Amanda Rae Coon, on identical facts, would not. The Florida Amanda Rae Coon would get the opportunity to argue that Florida law is not so drastically inconsistent with Georgia that it should not be applied if pleaded, thanks particularly to a 2000 Georgia Supreme Court opinion, *Lee v. State Farm Mutual Insurance Co.*,<sup>250</sup> and the strong “special concurrence,” filed by two justices who

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WHAYNE, ARKANSAS: A NARRATIVE HISTORY 79 (2002); see also Morris S. Arnold, *The Significance of the Arkansas Colonial Experience*, 51 ARK. HIST. Q. 59 (1992).

<sup>248</sup> Trs. of Jesse Parker Williams Hosp. v. Nisbet, 7 S.E.2d 737, 741 (Ga. 1940).

<sup>249</sup> See *Champion v. Gray*, 478 So. 2d 17, 20 (Fla. 1985); cf. *Zell v. Meek*, 665 So. 2d 1048, 1053–54 (Fla. 1995).

<sup>250</sup> *Lee v. State Farm Mutual Ins. Co.*, 533 S.E.2d 82 (Ga. 2000).

themselves are mothers of children, Justices Carol Hunstein and Leah Sears.<sup>251</sup> Again, the clear discriminatory and inequitable impact of the *Latine* rule could not be more evident.<sup>252</sup>

<sup>251</sup> *Id.* at 87–88 (Ga. 2000) (Hunstein and Sears, JJ., specially concurring). The plaintiff in that case was, like Amanda Rae Coon, a mother—a mother who brought action against uninsured motorist carrier to recover for her emotional distress from witnessing her child’s death following auto accident in which mother also suffered injuries. *Id.* at 82. The majority held that the mother could her NIED claim from witnessing mortal injury to her child, regardless of whether her emotional trauma arose from her own physical injury. *Id.* Justices Hunstein and Sears saw the court’s ruling a bit differently than Justice Hines, its author:

I agree with the majority that the mother in this case should be allowed to pursue a claim for negligent infliction of emotional distress she sustained from witnessing the injury and death of her child. Unlike the majority, however, I would not make it a prerequisite to recovery that the mother prove she herself sustained an ‘impact,’ i.e., physical injury, and thus reject the majority’s endorsement of a position ‘that is distinctly the minority rule today.’

*Id.* at 87. Justices Hunstein and Sears advocated strongly for a modern, yet pragmatic approach:

Based on my review of foreign case law and learned treatises, I would endorse the majority rule, as derived from the seminal case of *Dillon v. Legg*, establishing foreseeability of emotional harm as the general test of liability. In *Dillon*, the California Supreme Court ruled that in order to determine if a defendant owes a bystander a duty of care, the courts will take into account such factors as the following: (1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2) Whether the shock resulted from a direct emotional impact upon the plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship. . . . The foreseeability rule, first proposed in the *Dillon* opinion, has since been modified and refined by many states, including California itself, which have followed its rationale to arrive at fair and pragmatic solutions to its application. It is beyond the range of a special concurrence to define the parameters of the foreseeability rule this Court should apply in Georgia. It is sufficient to note that any reasonable version of the foreseeability rule is preferable to the repudiated, regressive impact rule adopted by the majority.

*Id.* at 87 (internal citations omitted).

<sup>252</sup> One wonders whether the *Medical Center* court felt some unease about this prospect. Buried in a footnote is the curious observation that although “[w]e have said that this approach will be followed if the other state was one of, or formed from the territory of one of, the original 13 colonies that inherited the common law of England,” the court “need not

This is discrimination perhaps different in context but not in kind from that which Justice Brandeis and the Hughes Court majority condemned and struck down in *Erie*.<sup>253</sup> The *Latine* approach also violates

address today whether the common law also may apply in other states” since in the *Medical Center* case, “Alabama was formed predominantly from the territory of Georgia.” *Coon v. Med. Ctr., Inc.*, 300 Ga. 722, 834 n.5 (Ga. 2017). Yet, if the *Latine* rule is really the progeny of “a nearly unbroken line of decisions” dating back to 1847, why should that part of the rule be in any more doubt than the part the court resoundingly resurrects? *Id.* at 834. Note the Court’s gauzy, approximated assertion that “Alabama was formed *predominantly*” from Georgia territory. Thus, one might ask, should the particular county in Alabama in which the injury occurred be taken into consideration under *Latine*? Where does a Georgia court get the warrant to make a generalization about territory of a sister state? More pointedly, what would we do about cases where the *lex loci* would have been in an Alabama county that was *not* formed from the territory of Georgia? For example, histories of Alabama tell us that Spain claimed its former Spanish West Florida territory in what would become the coastal counties (i.e., Baldwin and Mobile) of Alabama until Spain by treaty ceded it to the United States in 1819. See MICHAEL THOMASON, *MOBILE: THE NEW HISTORY OF ALABAMA’S FIRST CITY* 61 (2001). The more one digs into the *Latine* rule’s application, the more untenable it becomes.

<sup>253</sup> See generally EDWARD A. PURCELL, JR., *LITIGATION & INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870–1958* (1992) (demonstrating a thorough study of the inequitable administration of the law that reigned in twentieth century suits arising under state law but heard in federal courts via their diversity subject matter jurisdiction). The authors may be thought by some (but not very many) to be some *enfant terribles* of the relativist theories of legal realism dangerously expounded from the podia of their alma maters twenty and thirty years ago, just as those other notorious “liberals,” Holmes and Cardozo, had been expounding it in other venues since the nineteenth century. To the contrary, however, it is clear that the *Latine* edifice, constructed haphazardly in various intervals from 1847 to 2017, is irrational, discriminatory, and therefore, inequitable. It violates fundamental notions of modern equal protection, and as shown in Section IV.D, *infra*, of due process and full faith and credit as well. At this juncture, the authors feel compelled to do further honor to Brainerd Currie. Professor Currie from time to time enjoyed using verse to convey his legal commentary. See, e.g., Brainerd Currie, *Five Tributes*, 1966 DUKE L.J. 1, 8, 10 (1966); Becky Beaupre Gillespie, *For the Shame of Rose of Aberlone: Remembering the Rhymes of Brainerd Currie*, U. OF CHI. L. SCH. (Sept. 15, 2016), <https://www.law.uchicago.edu/news/rhymes-brainerd-currie>. Of course, he certainly would have appreciated the poetry—expressed in *liberetti*—of that sparkling wit among nineteenth century British barristers, W.S. Gilbert. So, in that vein, the authors observe the following: Like the Guardsman’s cuirass in Gilbert and Sullivan’s *Princess Ida*, of which Gilbert’s Guardsman sings

[i]s but a useless mass.  
It's made of steel,  
And weighs a deal,  
This tight-fitting cuirass  
Is but a useless mass!  
A man is but an ass  
Who fights in a cuirass,  
So off, so off goes that cuirass!  
Chorus.

two other Constitutional provisions, as becomes clear in Section IV.D in which the authors examine the *Medical Center* decision through the lens of the Supreme Court's 1985 decision in *Shutts v. Phillips Petroleum Co.*,<sup>254</sup> written by Chief Justice Rehnquist, a judge whose conservative *bona fides* were as good as any member of the Court that decided *Medical Center*.<sup>255</sup>

*D. Medical Center's Approach Violates Both the Full Faith and Credit Clause and the Fourteenth Amendment's Due Process Clause, for the Reasons Expounded by the U.S. Supreme Court in Shutts v. Phillips Petroleum*

Article IV of the U.S. Constitution gives us an invention of particular genius that the Framers used to define the relationship among co-equal sovereigns in a federal union:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.<sup>256</sup>

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*Yes, yes, yes!  
So off goes that cuirass!*

—the irrational discrimination worked by *Latine* and its progeny need to be bidden an unapologetically unsentimental farewell and sent on their way. See W.S. Gilbert, Libretto to *Princess Ida or Castle Adamant*, Act III, No. 25, "This Helmet, I Suppose," available at The Gilbert & Sullivan Archive, available at: [https://www.gsarchive.net/princess\\_ida/webop/pi\\_25.htm](https://www.gsarchive.net/princess_ida/webop/pi_25.htm). See also Westin P. Hatfield, *Sir William Schwenck Gilbert—Lawyer and Librettist*, 46 A.B.A. J. 386 (1960). Some liberties have been taken with the punctuation and formatting of the original source material. The Guardsman's song was prominently featured in the Mike Leigh film about Gilbert and Sullivan's tension-filled creative process, *Topsy-Turvy* (1999). See Janet Maslin, "Topsy-Turvy": Gilbert and Sullivan Get Back to the Drawing Board, N.Y. TIMES (Dec. 17, 1999), available at: <https://archive.nytimes.com/www.nytimes.com/library/film/121799topsy-film-review.html> (discussing the Guardsman scene from *Princess Ida* that opens the film).

<sup>254</sup> See generally *Shutts v. Phillips Petroleum Co.*, 472 U.S. 797 (1985).

<sup>255</sup> See, e.g., Robert E. Riggs & Thomas D. Proffitt, *The Judicial Philosophy of Justice Rehnquist*,

16 AKRON L. REV. 555 (1983); see also Laura K. Ray, *A Law Clerk and His Justice: What William Rehnquist Did Not Learn from Robert Jackson*, 29 IND. L. REV. 535 (1996); STEPHEN E. GOTTLIEB, MORALITY IMPOSED: THE REHNQUIST COURT AND LIBERTY IN AMERICA 72–80 (2000).

<sup>256</sup> U.S. CONST. art. IV, § 1; see 28 U.S.C. § 1738 (2018) (implementing the constitutional command).

In specifying “Acts,” “Records,” and “judicial Proceedings” of “every other State,” one might wonder whether that includes the common law. However, it is settled that although the Full Faith and Credit Clause “does not mention the common law of sister states, . . . it is generally assumed that it is included within the meaning of ‘records,’ or ‘judicial proceedings.’”<sup>257</sup>

The U.S. Supreme Court condemned as unconstitutional a state supreme court’s decision to simply assume that its law should be applied to a case with interstate parties and facts without either undertaking any examination of those sister states’ law or making any choice-of-law analysis. In *Phillips Petroleum Co. v. Shutts*,<sup>258</sup> a class action suit was brought against gas producer on behalf of 28,100 royalty owners for recovery of interest on “suspense royalties” withheld by producer while gas rate increase applications were pending before Federal Power Commission.<sup>259</sup> “These royalties,” explained the Kansas Supreme Court, “were withheld by Phillips at various times from July 1974 to February 1978 under three Federal Power Commission (FPC) opinions pertaining to gas rates in nationwide gas rate proceedings, and later paid by Phillips to the royalty owners without interest.”<sup>260</sup> In the suit seeking payment of the unpaid interest, 97% of the class of the royalty owners had no connection with Kansas and 99% of the leases under which the class claims were made “for interest on delayed royalty payments were located in states other than Kansas,”<sup>261</sup> including Texas and Oklahoma where “[t]he largest number of leases affected . . . [were] located” and including “owners . . . domiciled in the 50 states, the District of Columbia, the Virgin Islands, and several foreign countries.”<sup>262</sup> Phillips Petroleum challenged class certification on a number of grounds, including the fact that “the ‘commonality’ requirement [for class certification] is not met ‘[w]hen liability is to be determined according to varying and inconsistent state laws’” particularly where “‘this action involves eleven states and a maze of different interest laws.’”<sup>263</sup> The Kansas Supreme

<sup>257</sup> SYMEON SYMEONIDES, CHOICE OF LAW (OXFORD COMMENTARIES ON AMERICAN LAW) Ch. 2, § III.B.3 (2016) (citing Ralph U. Whitten, *The Constitutional Limitations on State Choice of Law: Full Faith and Credit*, 12 MEM. ST. U. L. REV. 1, 56–60 (1981)).

<sup>258</sup> See generally *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

<sup>259</sup> *Shutts v. Phillips Petroleum Co.*, 679 P.2d 1159, 1165 (Kan. 1984), *rev’d*, 472 U.S. 797 (1985).

<sup>260</sup> *Id.*

<sup>261</sup> See PETER HAY, PATRICK J. BORCHERS & SYMEON SYMEONIDES, CONFLICT OF LAWS 184 (5th ed. 2010) [hereinafter HAY, ET AL., CONFLICT OF LAWS].

<sup>262</sup> *Shutts*, 679 P.2d at 1166.

<sup>263</sup> *Id.* at 1174–1175.

Court brushed this off, concluding that it could simply apply Kansas law to all claims in the case, and thus did not undertake a meaningful look at the actual content of the other states' laws pertaining to the liability for and calculation of interest.<sup>264</sup> This is the ruling to which the majority of the U.S. Supreme Court, in an opinion by Chief Justice Rehnquist, took great exception. To simply apply Kansas law across-the-board by assuming that the interest law was the same in all of the states whose laws might potentially apply here was an unconstitutional violation of the limits on legislative jurisdiction that the Supreme Court had limned in cases decided under both the Full Faith and Credit Article and the Due Process Clause of the Fourteenth Amendment:

Kansas must have a 'significant contact or significant aggregation of contacts' to the claims asserted by each member of the plaintiff class, contacts 'creating state interests,' in order to ensure that the choice of Kansas law is not arbitrary or unfair. Given Kansas' lack of 'interest' in claims unrelated to that State, and the substantive conflict with jurisdictions such as Texas, we conclude that application of Kansas law to every claim in this case is sufficiently arbitrary and unfair as to exceed constitutional limits.<sup>265</sup>

The *Shutts* case once again came before the Supreme Court under a different name—this time to vet the argument that the Kansas Supreme Court really had not done what the U.S. Supreme Court had instructed.

On the remand from the Supreme Court of the United States in *Shutts*, the Kansas Supreme Court looked at the other interested states' law and decided they would apply the same rule as Kansas. The analysis is a very weak one. It triggered another certiorari petition, which the Supreme Court of the United States heard and decided under the name *Sun Oil Co. v. Wortman*.<sup>266</sup> However, having chastened the state supreme court once, the United States Supreme Court, in an opinion by

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<sup>264</sup> *Id.* at 1174–1175, 1181. Specifically, the Kansas Supreme Court rejected Phillips Petroleum's contention that Kansas law could not be applied to plaintiffs and royalty arrangements having no connection with Kansas, asserting that generally the law of the forum controlled all claims unless "compelling reasons" existed to apply a different which the Kansas Supreme Court found lacking here, noting as well that "[t]he plaintiff class members have indicated their desire to have this action determined under the laws of Kansas." *Id.* at 1181.

<sup>265</sup> *Shutts*, 472 U.S. at 821–22.

<sup>266</sup> *Sun Oil Co. v. Wortman*, 486 U.S. 717, 731–34 (1988).

Justice Scalia, decided in *Wortman* not to get into the business of policing whether a state supreme court's interpretation of a sister-state's law in a choice-of-law analysis was incorrect—or even implausible. Instead, it left that as an issue on which the forum state's supreme court will, by and large, have the last say.

There are good arguments that the Supreme Court of the United States was too permissive in *Wortman* and should now tighten up what it has left loose.<sup>267</sup> However that may be, it is still unconstitutional to do what was done in *Medical Center*—to apply an unthinking, across-the-board presumption that the common law rules of the states created from the original thirteen colonies is identical to Georgia's common law rule—particularly when there is case law, as there in *Medical Center*, to show *not only* that the other interested jurisdiction (Alabama) has a common law rule on the issue, *but also* that the common law rule conflicts with Georgia's common law rule. The *Medical Center*'s logic is no better—in fact, is even less plausible—than the Kansas Supreme Court's “one-size-fits-all” approach rejected in *Shutts*:

Here the Supreme Court of Kansas took the view that in a nationwide class action where procedural due process guarantees of notice and adequate representation were met, ‘the law of the forum should be applied unless compelling reasons exist for applying a different law.’ Whatever practical reasons may have commended this rule to the Supreme Court of Kansas, for the reasons already stated we do not believe that it is consistent with the decisions of this Court. We make no effort to determine for ourselves which law must apply to the various transactions involved in this lawsuit, and we reaffirm our observation in *Allstate* that in many situations a state court may be free to apply one of several choices of law. But the constitutional limitations laid down in cases such as *Allstate* and *Home Ins. Co. v. Dick*, must be respected even in a nationwide class action.<sup>268</sup>

Whatever allure there seemed to be in *Medical Center*'s application of the antebellum rule of *Latine v. Clements*, that approach cannot withstand the modern full faith and credit and due process

<sup>267</sup> See William B. Sohn, Comment, *Supreme Court Review of Misconstructions of Sister-State Law*, 98 VA. L. REV. 1861 (2012).

<sup>268</sup> *Shutts*, 472 U.S. at 822–23 (citations omitted).

jurisprudence which limns the bounds of constitutionally permitted legislative jurisdiction under our federal system. The rule of *Medical Center* is therefore entirely untenable, not only because of the gross misconception of the common law upon which it is founded, but also because it is unconstitutional in its operation—by choosing law without any regard to or examination of its content, and by assuming a sister state's law is identical to its own, when it clearly is not and, in fact, is directly contradictory.

Now, it falls to the Georgia Legislature to fix 170 years of bad case law that has, from time to time, regularly resurfaced. Additional reasons for doing so are described in Section V. Thereafter, Section VI explores viable approaches to doing so.

#### V. THE RETROGRADE OF THE *MEDICAL CENTER* CASE ENDS THE (ALREADY) QUESTIONABLE UTILITY OF ARTICULATING GEORGIA'S CHOICE OF LAW RULES THROUGH JUDICIAL OPINIONS

##### A. *Ossification Through Obfuscation*

One of the most remarkable aspects of the *Medical Center* case is that it is the only case which students and scholars of choice of law can recall in the last fifty years that actually attempts to turn the clock back—back to 1847, no less. By looking to an antebellum past to modify the normal operation of *lex loci delicti* to something unrecognizable other than as an undeclared embrace of *lex fori*, the *Medical Center* case is remarkable for accomplishing two things in one fell swoop. First, it ossifies Georgia choice of law into an era of 170 years ago. Second, it obfuscates that ossification by declaring that it is simply following precedent that has been too often ignored by lower courts taking a modern (realist) view of what law is and how it works. The decision posits itself as a restoration. In fact, it is far from it. It is actually a confirmation, beyond even the doubt that a case like *Dowis v. Mud Slingers, Inc.* raised, that the time has come for Georgia's Supreme Court to get out of the choice-of-law rulemaking business.

From the first pathbreaking choice of law case that the U.S. Supreme Court decided a century after *Latine v. Clements* with the pen of Justice Robert H. Jackson, *Lauretizen v. Larsen*,<sup>269</sup> a forerunner of the

<sup>269</sup> See generally *Lauretizen v. Larsen*, 345 U.S. 571 (1953) (Jackson, J.). As Professor Currie wrote some eight years after the decision in *Lauretizen* was handed down,

Who are the modern American judges whose work has contributed to enlightenment and to the cause of justice and reason in the conflict of laws? . . . One thinks of Mr. Justice Jackson, not only for his opinion in *Lauritzen v. Larsen* but also for his recognition of the importance of



Restatement (Second) multi-factored rules, to Judge Stanley Fuld's pathbreaking New York Court of Appeals decisions in *Auten v. Auten*<sup>270</sup> and *Babcock v. Jackson*,<sup>271</sup> to Justice Roger Traynor's first efforts to guide California into modernity in *Grant v. McAuliffe*,<sup>272</sup> state high courts worked to adapt nineteenth century choice-of-law notions to twentieth century interstate (and international) realities. Their decisions either nudged—or in some cases, catapulted—their states' law forward. However, none of these courts chose to look back to the earliest days of statehood and find in those mists the supposed solution to modern-day problems, let alone a time-capsule of legal theory to be unleashed despite its obvious ossification and irrelevance to the present. There are even states that have managed to continue to hew to the “traditional approach” without allowing the legal theory to become a parody of itself.<sup>273</sup>

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the full faith and credit clause and of the responsibility thereby imposed on Congress.

Brainerd Currie, *Justice Traynor and the Conflict of Laws*, 13 STAN. L. REV. 719, 721 & nn. 21–22 (1961) (citing Robert H. Jackson, *Full Faith and Credit-The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1 (1945)). Among the many praises Currie sang of Justice Jackson's choice-of-law analysis in *Lauretizen* is that

there is no mechanical approach to the question of the applicability of American law. There is no preclusive ‘characterization’ of the case as one of contract or of tort; there is no slavish submission to the law of the place of contracting, nor of the place of injury, nor of the flag. There is no territorialist dogma. In *Lauritzen* there was only a construction of the Jones Act, made necessary by the ‘literal catholicity of its terminology’—a characteristic which the Jones Act shares with most legislation. The Act was construed in a spirit of ‘reconciling our own with foreign interests and . . . accommodating the reach of our own laws to those of other maritime nations.’

Brainerd Currie, *The Silver Oar and All That: A Study of the Romero Case*, 27 U. CHI. L. REV. 1, 65–66 (1959).

<sup>270</sup> See generally *Auten v. Auten*, 124 N.E.2d 99 (N.Y. 1954).

<sup>271</sup> See generally *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963).

<sup>272</sup> Herma Hill Kay, *Chief Justice Traynor and Choice of Law Theory*, 35 HASTINGS L.J. 747 (1983-1984).

<sup>273</sup> This is well represented in decisions by both the Supreme Judicial Court of West Virginia as well as the Maryland Court of Appeals. See, e.g., *Vest v. St. Albans Psychiatric Hosp., Inc.*, 387 S.E.2d 282 (W. Va. 1989); *Oakes v. Oxygen Therapy Servs.*, 363 S.E.2d 130, 131 (W. Va. 1987) (“In general, this state adheres to the conflicts of law doctrine of *lex loci delicti*. . . . Although in the past we have been critical of the fuzzy standards set forth in the Restatement (Second) of Conflicts, . . . we have, nonetheless, on appropriate occasions repaired to the standards set forth in the Restatement to resolve particularly thorny conflicts problems.”); *Paul v. Nat'l Life*, 352 S.E.2d 550 (W. Va. 1986); *New v.*

Even before the *Medical Center* case captured conflict-of-laws scholars' attention with its resurrection of antebellum doctrine in preference to the public policy escape device, Georgia's conflicts approach found its greatest consistency in the inconsistency of its judicial application. As shown above, while purporting to retain *lex loci delicti* due to its "virtues of consistency, predictability, and relative ease of application[.]"<sup>274</sup> Georgia courts have dispatched *lex loci delicti* whenever the *lex* of the *locus* was different in some respect from Georgia's law. Georgia courts have been quick to declare that difference to result in a violation of public policy, or if the law of the place of injury was common law, as opposed to statutory law, to simply disregard it, thereby allowing application of Georgia law. At other times, however, Georgia courts have blithely applied the law of the place of injury without any reference to either of these two complicating factors. Prior to the Georgia Supreme Court's pronouncement in *Dowis v. Mud Slingers, Inc.*, that Georgia is a *lex loci delicti* state and will not change its tune until a better rule comes along,<sup>275</sup> some courts invoked the Restatement (Second) of Conflicts of Law as Georgia's chosen choice of law methodology, notwithstanding the Georgia Supreme Court's assertion that *lex loci delicti* had served the resolution of conflict of law issues in

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Tac & C Energy, Inc., 355 S.E.2d 629 (W. Va. 1987) (adopting Restatement (Second) of Conflicts § 196 concerning "[t]he validity of a contract for the rendition of services and the rights created thereby"); *Erie Ins. Exchange v. Heffernan*, 925 A.2d 636 (Md. 2007); *American Motorists Ins. Co. v. ARTRA Group, Inc.*, 659 A.2d 1295 (Md. 1995); see also James Audley McLaughlin, *Conflict of Laws: The Choice of Law Lex Loci Doctrine, the Beguiling Appeal of a Dead Tradition, Part One*, 93 W. VA. L. REV. 957 (1991). The majority opinion in *American Motorists Insurance Co.* notes that a court following the traditional approach can nonetheless apply more modern ideas about law and choice of law within the traditional framework:

Many states using the traditional rule simply have not switched over to a more modern approach. By looking at the choice-of-law rule of another concerned jurisdiction, a court adhering to the traditional approach may be enlightened. Even if a state has recently reaffirmed its commitment to a traditional approach, giving some deference to how the case would have been decided in another concerned court improves interstate relations by demonstrating respect for the foreign jurisdiction's whole law.

*American Motorists*, 659 A.2d at 1313 (quoting Rhoda S. Barish, Comment, *Renvoi and the Modern Approaches to Choice-of-Law*, 30 AM. U. L. REV. 1049, 1075–1076 (1981)). If only the *Medical Center* opinion had taken such an introspective, rather than jingoistic approach.

<sup>274</sup> *Dowis v. Mud Slingers, Inc.*, 621 S.E.2d 413, 416 (Ga. 2005).

<sup>275</sup> *Id.* at 415–16.

Georgia for the preceding 100 years.<sup>276</sup> For example, two federal district courts determined that in the context of airplane crash cases, the Georgia Supreme Court would apply the Restatement (Second).<sup>277</sup> One of those district courts, *In re Air Crash Disaster at Washington, D.C.*, went so far as to find the ““strong implication””<sup>278</sup> that, although the district court for the Northern District of Georgia had not expressly addressed whether to cast off the *lex loci* rule in a contracts context, Georgia would now likely follow the Restatement (Second) in a torts context.<sup>279</sup> In a veil-piercing case in a bankruptcy setting, the district court for the Northern District of Georgia determined that the Georgia Supreme Court would apply the Restatement (Second) to the internal affairs doctrine when the issue involved alter ego claims and potential shareholder liability to the corporation.<sup>280</sup> In a case involving a malicious prosecution claim, the Georgia Court of Appeals cited the Restatement (Second) in support of its holding that the contours of the torts of malicious prosecution and abuse of process are determined by the law of the state where the proceeding complained of occurred, unless another state has a more significant relationship.<sup>281</sup>

The Georgia Supreme Court, however, made a pronouncement in *Dowis* similar to the one it had made roughly twenty years earlier in *General Telephone Co. of Southeast v. Trimm*.<sup>282</sup> In the *Trimm* opinion, the court noted that although there were more recent developments than the traditional approach, it was not convinced these more modern approaches were any better than the traditional approach.<sup>283</sup> Prior to the court's decision in *Trimm*, some federal courts thought Georgia might be on the way to adopting the Restatement (Second), at least in the contracts context. The *Trimm* opinion foreclosed that belief, and foreclosed the excess of opinions espousing alternatively that Georgia followed the traditional approach or Georgia followed the Restatement

<sup>276</sup> *Id.* at 416.

<sup>277</sup> *In re Air Crash Disaster at Sioux City, Iowa*, on July 9, 1989, 734 F. Supp. 1425, 1434 (N.D. Ill. 1990); *In re Air Crash Disaster at Washington D.C.* on Jan. 13, 1982, 559 F. Supp. 333, 359–60 (D.D.C. 1983).

<sup>278</sup> *Air Crash Disaster at Washington D.C.*, 559 F. Supp. at 360.

<sup>279</sup> *Id.* (citing *Ryder Truck Rental, Inc. v. St. Paul Fire & Marine Ins. Co.*, 540 F. Supp. 66, 68 (N.D. Ga. 1982)). The court ultimately did not rule that Georgia would apply the Restatement (Second). *Id.* The court reasoned that since Georgia courts will not apply law of another state that conflicts with its own policy, it would be inappropriate to rule that *lex loci delicti* was no longer the rule in Georgia. *Id.*

<sup>280</sup> *Realmark Inv. Co. v. American Fin. Corp.*, 171 B.R. 692, 694–96 (Bankr. N.D. Ga. 1994).

<sup>281</sup> *Great Western Bank v. Southeastern Bank*, 507 S.E.2d 191 (Ga. Ct. App. 1998).

<sup>282</sup> *Gen. Tel. Co. of the Southeast v. Trimm*, 311 S.E.2d 460, 462 (Ga. 1984).

<sup>283</sup> *Id.*

(Second).<sup>284</sup> Incidentally, the cases the Georgia Supreme Court cited in *Dowis* in support of its “Georgia will continue to adhere to a traditional conflict of laws rule until a better approach is found” assertion dealt specifically with application of the Restatement (Second) of Conflicts of Law in a contracts context.<sup>285</sup> Its reliance on these contract cases in support of the traditional rule injects uncertainty in the torts context. Notwithstanding the court’s commitment in *Trimm* to the traditional approach, in a case decided after *Trimm*, the Northern District of Georgia determined that Georgia would look to the Restatement (Second) to see if it would honor a choice of law provision in a contract,<sup>286</sup> thereby unsettling what was thought to be imperturbable waters. Clearly, other courts have seen the need for change that the Georgia Supreme Court has come to dismiss—defiantly so.

The approach Georgia has taken to deal with choice-of-law issues merits one description—ossification—from which two things have become plain. First, the Georgia Supreme Court has steadfastly asserted for nearly forty years that Georgia’s version of the “traditional approach” is superior to all others in choice of law. Second, the Georgia appellate courts’ application of that approach is anything but consistent, predictable, and easy. The Supreme Court thus need do no more to establish irrefutably that it will not change course in its rhetoric, regardless of the realities of the situation. The only avenue for meaningful change to Georgia’s choice-of-law methodology—by which the virtues of consistency, predictability, and ease of application can be realized—is for Georgia’s Legislature to adopt a “better approach,” since the state’s high court cannot seem to acknowledge one. That is the subject of Section VI, *infra*. Before embarking on that final leg of our journey, the authors first pause in the next subsection (V.B)

<sup>284</sup> Prior to the *Trimm* decision, the Georgia Court of Appeals determined that the traditional *lex loci contractus* approach was repealed by Georgia’s adoption of its Uniform Commercial Code. *Allen v. Smith & Medford, Inc.*, 199 S.E.2d 876, 879 (Ga. Ct. App. 1973). Moreover, in *Carr v. Kupfer*, the Georgia Supreme Court cited the Restatement (Second) for the proposition that, absent a contrary public policy, it would normally enforce a contractual choice of law clause. *Carr v. Kupfer*, 296 S.E.2d 560, 562 (Ga. 1982). See also *Nordson Corp. v. Passchaert*, 674 F.2d 1371, 1374 (11th Cir. 1982); *Nasco, Inc. v. Gilbert*, 238 S.E.2d 368, 369 (Ga. 1977). But see *Mathews v. Greiner*, 204 S.E.2d 749 (Ga. Ct. App. 1974) (determining that *lex loci contractus* is the rule in the state); *Ryder Truck Rental, Inc. v. St. Paul Fire & Marine Ins. Co.*, 540 F. Supp. 66, 68 (N.D. Ga. 1982) (noting that Georgia may apply either *lex loci contractus* or the center of gravity approach from the Restatement (Second)).

<sup>285</sup> *Dowis v. Mud Slingers, Inc.*, 621 S.E.2d 413, 416 (Ga. 2005) (citing *Convergys Corp. v. Keener*, 582 S.E.2d 84 (Ga. 2003); *Gen. Tel. Co. of the Southeast v. Trimm*, 311 S.E.2d 460 (Ga. 1984)).

<sup>286</sup> *Bryan v. Hall Chem. Co.*, No. 1:92-CV2621RLV, 1992 WL 515357, at \*2 (N.D. Ga. Dec. 30, 1992).

to discuss just how inconsistent the *Medical Center* opinion is with a recent and highly significant aspiration of the state as expressed in legislation designed to transform Georgia into a hotspot for international arbitration and dispute resolution.

*B. The State's Aspirations as an International Center For Trans-National Litigation, Arbitration, and Dispute Resolution Demand a New Day in its Choice-of-Law Approach*

The reactionary vision of the *Medical Center* decision will not play well with the international crowd Georgia hopes to attract in fulfilling its aspirations to become a twenty-first century international business and arbitration center.<sup>287</sup> To the contrary, this might very well frighten away their legal advisors, who will see—fairly or unfairly—the state's high court as a reactionary force continuing to wage another “lost cause” in the name of antebellum tradition.

“In an attempt to make their states attractive forums for conducting international commercial arbitrations, ten states have enacted state legislation applicable to international commercial arbitration.”<sup>288</sup> Typically, “[s]tate international arbitration statutes contain provisions concerning matters addressed expressly by provisions in chapter [one] or [two] of the” Federal Arbitration Act.<sup>289</sup> “Such state legislation” typically authorizes “state court intervention” (a) “to enforce international agreements to arbitrate within the respective state, by means of stay orders or orders compelling the parties to arbitrate,” and (b) “to confirm or vacate international arbitral awards rendered within the particular state.”<sup>290</sup> In 2012, “[t]he Georgia Assembly passed a new UNCITRAL-based International Commercial Arbitration Code,” which replaced “a prior international arbitration code adopted in 1988 (only the second such code enacted by any U.S. state).”<sup>291</sup> In May 2015, “the Supreme Court of Georgia approved a revision to the Business Court Division Rule to allow parties to transfer legal proceedings related to international arbitration agreements and awards to the

<sup>287</sup> Though one is constrained to admit that it might be a viewpoint more warmly received at a symposium devoted to the various flavors of the doctrine of originalism.

<sup>288</sup> Daniel A. Zeff, *The Applicability of State International Arbitration Statutes and the Absence of Significant Preemption Concerns*, 22 N.C.J. INT'L L. & COM. REG. 705, 709 (1996).

<sup>289</sup> *Id.*; see generally 9 U.S.C. §1–16 (2018); 9 U.S.C. §§ 201–208 (2018); 9 U.S.C. §§ 301–307 (2018).

<sup>290</sup> Zeff, *supra* note 288, at 709.

<sup>291</sup> Press Release, Superior Court of Fulton County, Superior Court of Fulton County's Business Court Division is Now Home to International Commercial Arbitration (June 17, 2015) (available at <https://www.fultoncourt.org/business/N-InternationalArbitration.pdf>).

Business Court Division.”<sup>292</sup>

Various stakeholders in Georgia have also pushed for and accomplished other legal reforms that are supportive of advancing Georgia as both a forum for international arbitration and trans-national litigation<sup>293</sup> as well as international mediation.<sup>294</sup> For example, Georgia’s Supreme Court amended Georgia Rule of Professional Conduct 5.5 (which addresses unauthorized practice of law and multi-jurisdictional practice of law) to provide that a foreign lawyer may provide legal services in Georgia “on a temporary basis related to a pending arbitration or other ADR proceeding held in this jurisdiction and related to the foreign lawyer’s practice in a jurisdiction in which the lawyer is admitted.”<sup>295</sup> “The Rule thus accommodates a foreign party using its own lawyer in an international arbitration based in Georgia.”<sup>296</sup> In addition, “under recent 2011 amendments to the Georgia Uniform Superior Court Rules, non-U.S. lawyers may now represent their clients on a *pro hac vice* basis in Georgia courts in judicial proceedings ancillary to international arbitrations.”<sup>297</sup> And in yet another step to increase international resort to Georgia for international arbitration and litigation, the Georgia Supreme Court amended the educational requirements for foreign lawyer admission to the State Bar by creating a set of LL.M. degree standards that allow foreign lawyers who earn an LL.M. degree to take the Georgia Bar Examination, despite the fact that they do not hold a J.D. degree earned from an ABA-approved law school.<sup>298</sup>

The Georgia Legislature also cleaned up its act with respect to

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<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> Peter B. Rutledge & Katherine M. Larsen, *Singapore Convention Presents an Opportunity for Georgia in Mediation*, POPULAR MEDIA (Aug. 22, 2019, 12:52 PM), [https://digitalcommons.law.uga.edu/fac\\_pm/311](https://digitalcommons.law.uga.edu/fac_pm/311).

<sup>295</sup> R. Daniel Douglass, *International Arbitration in Atlanta*, STITES & HARIBSON CLIENT ALERT (Feb. 16, 2013), <https://www.stites.com/resources/client-alerts/international-arbitration-in-atlanta>; Meghan Magruder, Brian A. White & Shelby S. Guilbert Jr., *Enactment of the New Georgia International Commercial Arbitration Code Solidifies Atlanta’s Status as a Hub for International Arbitration*, LEXOLOGY (June 5, 2012), <https://www.lexology.com/library/detail.aspx?g=d93a0f66-9785-449e-b271-d79fc2b85630>; see also GA. R. PROF. CONDUCT 5.5(e)(3).

<sup>296</sup> See generally Douglass, *supra* note 295.

<sup>297</sup> Magruder, et al., *supra* note 295; UNIFORM SUPERIOR COURT RULES OF GA. 4.4.

<sup>298</sup> See generally Jeffrey A. Van Detta *Transnational Legal Services In Globalized Economies: American Leadership, Not Mere Compliance With GATS Through Qualifying LL.M. Degree Programs For Foreign-Educated Lawyers Seeking State Bar Admissions*, 13 HOFSTRA J. INT’L BUS. & L. 1 (2014); Jeffrey A. Van Detta, *A Bridge To The Practicing Bar Of Foreign Nations: Online American Legal Studies Programs As Forums For The Rule Of Law And Pipelines To Bar-Qualifying LL.M. Programs In The U.S.*, 10 S.C.J. INT’L L. & BUS. 63 (2013).

enforcing foreign-country money judgments in Georgia's Superior Courts. For forty years (until 2016), Georgia had been a state that had enacted the Uniform Law Commission's Uniform Foreign Money Judgment Recognition Act ("UFMJRA").<sup>299</sup> However, Georgia's version of the act reversed one of the major reforms that the 1962 Act sought to achieve.<sup>300</sup> That form was the elimination of reciprocity as a condition of recognition which, in the pre-*Erie* days under the sway of *Swift v. Tyson*, the U.S. Supreme Court had included among the elements it established for enforcement of a foreign country judgment by a U.S. court in the iconic (but flawed) *Hilton v. Guyot* case.<sup>301</sup> Significantly—and regressively—Georgia's enactment was non-uniform in two respects. First, non-enforcement grounds in the UFMJRA in Georgia's enactment were *mandatory*—there was no discretion in the court.<sup>302</sup> Thus, if one of those grounds was found to apply, the court *had* to refuse enforcement. The ULC version, however, divided the non-recognition grounds between those that were mandatory and those that were discretionary. Second, in addition to the UFMJRA's stated grounds for non-enforcement, the Georgia Legislature returned reciprocity not only as a grounds for non-recognition, but as a mandatory grounds for non-enforcement.<sup>303</sup> This is, of course, a throw-back to *Hilton v. Guyot*<sup>304</sup> and is completely inconsistent with the intention of the ULC in promulgating the UFMJRA.<sup>305</sup> Nor has a reciprocity

<sup>299</sup> See Ronald A. Brand, *New Challenges in the Recognition and Enforcement of Judgments*, SSRN, 10–12 & n. 34 (Sept. 7, 2018), <https://ssrn.com/abstract=3246053>.

<sup>300</sup> Jerome A. Hoffman, *Recognition by Courts in the Eleventh Circuit of Judgments Rendered by Courts of Other Countries*, 29 CUMB. L. REV. 65, 71–72 (1999).

<sup>301</sup> *Hilton v. Guyot*, 159 U.S. 113 (1895); see *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842); Brand, *supra* note 299, at 7.

<sup>302</sup> GA. CODE ANN. § 9-12-114 (2019).

<sup>303</sup> GA. CODE ANN. § 9-12-114 (2019); Richard J. Graving, *The Carefully Crafted 2005 Uniform Foreign-Country Money Judgments Recognition Act Cures a Serious Constitutional Defect in Its 1962 Predecessor*, 16 MICH. ST. J. INT'L L. 289, 301 (2007).

<sup>304</sup> See *Hilton*, 159 U.S. at 228.

<sup>305</sup> See GA. CODE ANN. §§ 9-12-110 to 118 (2010) (superseded as of 2016); Katherine R. Miller, *Playground Politics: Assessing the Wisdom of Writing a Reciprocity Requirement into U.S. International Recognition and Enforcement Law*, 35 GEO. J. INT'L L. 239, 253 (2004). As Miller notes,

The Uniform Act's omission of *Hilton*'s reciprocity rule stemmed from the lack of support for the rule in most state courts, as well as the sentiment that '[s]ince the Act was designed as a means to create, reciprocity, it does not require reciprocity to operate.' While a few states chose to write a reciprocity requirement back into the Act, the vast majority of states followed the guidance of the Uniform Act, and adopted it without including a reciprocity requirement. Disapproval of the reciprocity rule had evidently spread from the state courts to the

requirement been seen as good public policy for at least a century.<sup>306</sup> Indeed, even the Reporter of the Restatement (First) Conflict of Laws was set against it<sup>307</sup> and highly critical of *Hilton v. Guyot*,<sup>308</sup> as were commentators thirty years later when the UFMJRA was sent to the states.<sup>309</sup> Yet, even so, Georgia clung to it and made it even harder to satisfy.<sup>310</sup> Under the Georgia UFMJRA, reciprocity was treated differently than the other non-recognition grounds. In Georgia, it was the party seeking enforcement (the plaintiff in the enforcement action) that had to prove as part of its case for enforcement that courts in the foreign judgment's country of origin would in fact recognize a similar judgment from a Georgia court—no easy feat, and one that could become

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state legislatures.

*Id.* Hoffman, *supra* note 300, at 127–28. In the same vein but targeted forcefully at Georgia, Hoffman observes the following:

Notwithstanding the many provisions in which the Georgia Act coincides with the Uniform Act, a provision not contained within the Uniform Act raises even more unsettling questions about recognition *vel non* than does the Florida Act or, for that matter, the Uniform Act itself. *The Georgia Act has a reciprocity provision, which confounds the Act's intention to publish a reassuring and easily proven floor under recognition vel non for the benefit of holders of Georgia judgments suing for recognition in a court of another country. This, of course, abates substantially, if indeed not completely, the principal purpose envisioned by the authors of the Uniform Act. If the Georgia Act has at all lightened the burden of proving Georgia's law of recognition vel non to a doubting other-country court, the Georgia Act has replaced that burden, or perhaps supplemented it, with the burden of proving to the other-country court that its own law of recognition would satisfy a Georgia court's notions about reciprocity.*

*Id.* (emphasis added).

<sup>306</sup> Comment, *Reciprocity and the Recognition of Foreign Judgments*, 36 YALE L.J. 542, 548 (1927) (“We seek, then, a rule requiring as full recognition to be given to judgments rendered by reputable foreign courts as is given to domestic judgments, but permitting a more extensive examination of other countries’ judgments. Does reciprocity help us thus to distinguish the wheat from the chaff? Obviously it does not. The quality of a court does not depend upon the particular theory it may have as to recognition of our judgments therein lies reciprocity’s salient defect. There being no diplomatic necessity for a system of reprisals, the theory seems entirely without merit.”).

<sup>307</sup> JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS 1364 (1935).

<sup>308</sup> *Id.* at 1382.

<sup>309</sup> Hans Smit, *International Res Judicata and Collateral Estoppel in the United States*, 9 UCLA L. REV. 44, 49–50 (1962) (noting that “neither th[e] [reciprocity] rule nor the reciprocity doctrine in general—both criticized severely by virtually all commentators—have any commendable quality”).

<sup>310</sup> See Hoffman, *supra* note 300, at 127–28.



well-nigh impossible if the judgment-rendering country were either part of the developing world with little reported commercial litigation or one to which American-court judgments had largely not been taken for enforcement.<sup>311</sup> However, Georgia's 2015 enactment of the UFCMJRA (which became effective May 3, 2016), entirely eliminated the reciprocity requirement in Georgia (though Georgia once again combined the mandatory and non-mandatory grounds into all mandatory grounds for non-enforcement).<sup>312</sup>

An even more recent development favorable to Georgia as a transnational forum is the 2018 amendment to the Georgia Constitution to create a state-wide business court, which has been followed up with the legislature's enactment of implementing legislation.<sup>313</sup> Georgia thereby joins "states, such as North and South Carolina, [that] have specialized courts dedicated to providing expedited resolution of cases for complex commercial lawsuits known as business courts."<sup>314</sup> For the out-of-state or international attorney or business, "[j]udicial expertise in these fields gives businesses security and some predictability about the outcome because they know the case will be heard by a judge who is familiar with the complex business issues at hand, which also shortens the average length of a case."<sup>315</sup> As the Georgia House extolls its virtues,

this system is designed to enhance Georgia's position as the number one place to do business and to allow Georgia to more effectively compete with neighboring states that have such courts. For local businesses, less time in litigation means lower costs. By funneling these cumbersome complex cases into a specialized court, this also unclogs the court system for parties and businesses that do not have a complex commercial dispute.<sup>316</sup>

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<sup>311</sup> See generally *Shehadeh v. Alexander*, 727 S.E.2d 227 (Ga. Ct. App. 2012).

<sup>312</sup> See GA. CODE ANN. § 9-12-113(a)(1) to (11)(b) (demonstrating that all burdens to prove grounds for non-recognition are now on the party opposing enforcement of the foreign-country money judgment); GA. CODE ANN. § 9-12-113(b).

<sup>313</sup> *Georgia State-wide Business Court*, GA. HOUSE BUDGET & RES. OFF. (June 2019), [http://www.house.ga.gov/budget/Documents/2019\\_Session/2019\\_Policy\\_Brief\\_Georgia\\_Statewide\\_Business\\_Court.pdf](http://www.house.ga.gov/budget/Documents/2019_Session/2019_Policy_Brief_Georgia_Statewide_Business_Court.pdf).

<sup>314</sup> *Id.*

<sup>315</sup> *Id.*

<sup>316</sup> *Id.*; see generally Laura A. Shoop & L. Whitney Woodward, Legislative Review, *HB 239 – Business Courts*, 36 GA. ST. U. L. REV. 1 (2019).

Of course, one is constrained to point out that the Georgia business courts are subject to the appeals power of Georgia's Supreme Court, and the latter court's rules on choice-of-law matters and on the proper view of the nature of common law and statutory law in Georgia will bind the business courts—and can either enhance, or detract from, their success.

The *Georgia Bar Journal* heralded the dawn of a growing age of Georgia as a set for international commercial arbitrations and the benefits of laws—and courts—favorable to the enforcement of both agreements to engage in international arbitration as well as enforcement of international arbitral awards as well:

Georgia is an arbitration-friendly state, and it is one of the few U.S. states with its own international arbitration code. The GAC contains a number of provisions that favor the use of international arbitration in Georgia to resolve conflicts arising out of international transactions. Moreover, federal courts in the Eleventh Circuit and state courts in Georgia have a good track record of enforcing agreements to arbitrate and in enforcing arbitration awards, both of which are critical to achieving credibility with the international arbitration community. As one recent example, the Georgia General Assembly passed a statute invalidating any agreement to arbitrate a medical malpractice claim unless the agreement is reached after the alleged malpractice has occurred. Although this provision is likely to apply in the domestic context, it is the sort of carve-out that the U.S. Supreme Court has condemned in warning of a 'parochial refusal by the courts of one country to enforce an international arbitration agreement.' In late 2009, however, the Court of Appeals of Georgia struck down the ban on pre-dispute agreements to arbitrate medical malpractice claims on the grounds that this provision was preempted by the FAA. *International observers pay attention to these issues* as an indicator of whether a particular forum is "pro-arbitration" or hostile to arbitration.<sup>317</sup>

International observers also pay heed to the legal climate of the

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<sup>317</sup> See generally Daniel J. King et al., *International Arbitration In Georgia*, GA. BAR J. (April 2011) (emphasis added).

jurisdiction's judicial attitudes towards foundational issues of law, jurisprudence, and private international law (e.g., conflict of laws).<sup>318</sup> Indeed, as knowledgeable commentators have observed, "[t]ransnational litigation is global in the sense that it involves parties of more than one nationality or activity with connections to more than one country's territory," yet, "[the] conventional wisdom seems to suggest that the transnational litigation system is essentially unipolar, or perhaps bipolar, with the United States and the United Kingdom acting as the leading providers of courts and law for transnational disputes."<sup>319</sup> However, that conventional wisdom has grown long in the tooth; "this unipolar (or bipolar) era—if it ever existed at all—has passed, and that transnational litigation is entering an era of ever increasing multipolarity."<sup>320</sup> Thus, "it will be increasingly important for U.S. judges and lawyers to be comfortable handling a wide range of conflict-of-laws problems, and prepared to consult closely with their colleagues abroad."<sup>321</sup>

It is here that antebellum legal philosophy behind the peculiarly archaic rule of *Latine* could prove quite troublesome. An international legal observer of some sophistication will be alarmed at the *Medical Center* opinion, both for its attitude and for its archaic substance. The legal environment for business in a particular forum is an important consideration both for foreign-direct investment (FDI) decisions as well as choices made in contractual arbitration, litigation, and judgment enforcement clauses.<sup>322</sup> Trans-national parties and lawyers seek jurisdictions committed to modern, twenty-first century legal procedures and norms.<sup>323</sup> Concerns raised over the semi-mystical incantations of

<sup>318</sup> Case Comment, *Smith, Kline & French Labs. Ltd. and Smithkline Corp. v. Bloch*, 15 L. & POL'Y IN INT'L BUS. 635, 648 (1983) (noting that some of the observers are astute foreign judges, such as Great Britain's legendary Master of the Rolls, Lord Denning, who said generally of the United States, "[a]s a moth is drawn to light, so is a litigant drawn to the U.S.").

<sup>319</sup> Marcus S. Quintanilla & Christopher A. Whytock, *The New Multipolarity in Transnational Litigation: Foreign Courts, Foreign Judgments, and Foreign Law*, 18 SW. J. INT'L L. 31, 31–32 (2011).

<sup>320</sup> *Id.* at 32.

<sup>321</sup> *Id.*

<sup>322</sup> See generally Jeffrey A. Van Detta, *Politics and Legal Regulation in the International Business Environment: An FDI Case Study of Alstom, S.A., in Israel*, 21 U. MIAMI BUS. L. REV. 1 (2013); Jeffrey A. Van Detta, *Some Legal Considerations for EU-Based MNEs Contemplating High-Risk Foreign Direct Investments in the Energy Sector After Kiobel v. Royal Dutch Petroleum and Chevron Corporation v. Naranjo*, 9 S.C.J. INT'L L. & BUS. 161 (2013).

<sup>323</sup> See Amanda Perry, *An Ideal Legal System for Attracting Foreign Direct Investment? Some Theory and Reality*, 15 AM. U. INT'L L. REV. 1627 (2000); Amanda Perry, *Effective Legal Systems and Foreign Direct Investment, In Search of the Evidence*, 49 INT'L & COMP. L. Q. 779 (2000); see also Daniel A. Farber, *Rights As Signals*, 31 J. LEGAL STUDIES 83

“brooding omnipresence in the sky” as the basis for a common-law legal system and an insistence the “common law” of some twenty other political sovereigns will be presumed “the same,” though demonstrably not, as the common law of Georgia could very well be a deal-breaker in a razor’s-edge assessment by foreign lawyers or foreign businesses whether to subject themselves to legal proceedings of any kind in the State of Georgia.<sup>324</sup> To achieve its objective of becoming a significantly more attractive center for trans-national arbitration and litigation, the State of Georgia has made great strides in the areas discussed in this subsection. The view of the law and of choice of law articulated in *Medical Center*, however, constitute a notable regression from, and potentially serious exception to, creating a legal environment to foster that progress.<sup>325</sup> The authors say, “*Let the State Legislature step in to set the engine of progress in Georgia’s legal environment for business back on its tracks,*” as discussed in Section VI, *infra*.

#### VI. HOW THE GEORGIA LEGISLATURE CAN SOLVE THE INCOHERENCE OF GEORGIA’S TORTS CHOICE-OF-LAW RULES THAT *COON V. MEDICAL CENTER* EXACERBATED

Even the most neutral of observers looking at Georgia’s appellate cases in conflict of laws might feel compelled to exclaim, “Let us stop the pretense, here and now!” Indeed, the *Medical Center* case makes it clear that the time has come to do so. To the extent the subtext of Georgia’s choice of law decisions belie a policy and practice of applying Georgia law whenever the U.S. Constitution permits Georgia to do

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(2002); Michael Trebilcock & Jing Leng, *The Role of Formal Contract Law and Enforcement in Economic Development*, 92 VA. L. REV. 1517 (2006); Christopher A. Whytock, *Domestic Courts and Global Governance*, 84 TULANE L. REV. 67 (2009).

<sup>324</sup> See Sash Ingber, *Media Companies May Stop Productions In Georgia Over New Abortion Law*, N.P.R. (May 30, 2019), <https://www.npr.org/2019/05/30/728232942/media-companies-may-stop-productions-in-georgia-over-new-abortion-law> (demonstrating that views of Georgia law have certainly influenced American businesses about whether they wish to affiliate themselves with the state); *What’s Going On In The Fight Over U.S. Abortion Rights?*, BBC NEWS (June 14, 2019), <https://www.bbc.com/news/world-us-canada-47940659>.

<sup>325</sup> As a commentator wrote over 120 years ago,

Laws in theory are framed to reflect the social condition of the people affected by them. When the social condition is altered, the continuance of antiquated law works injustice. New laws, suited to the social status, are required to secure justice in the community.

Mary A. Greene, *Married Women’s Property Acts in the United States, and Needed Reforms Therein*, 48 ALB. L.J. 206, 209 (1893).

so in its courts, such a clandestine policy need not change. It simply needs to be transparent. Considering the baroque quagmire into which the Georgia Supreme Court dug itself (along with all Georgia courts) with the unfortunate rationale of the *Medical Center* decision, only the Georgia Legislature can save the Court from itself and save the state (and its business aspirations) from the Court.

The legislature in Georgia has done this before. When the Georgia “common law” of evidence, codified in 1863,<sup>326</sup> became incredibly outmoded, the Georgia Legislature adopted a new Evidence Code. Up until this point, “common law evidence” was sometimes dependent on which courtroom the parties found themselves in, and the rules were so divergent from modern evidentiary rules that they threatened to make Georgia a litigation backwater.<sup>327</sup> When Georgia’s law of virtual non-

<sup>326</sup> See generally William B. McCash, *Thomas Cobb and the Codification of Georgia Law*, 62 GA. HIST. Q. 9 (1978).

<sup>327</sup> David N. Dreyer, F. Beau Howard & Amy M. Leitch, *Dancing With The Boys: Georgia Adopts (Most Of) The Federal Rules Of Evidence*, 63 MERCER L. REV. 1, 76 (2013) (noting that “the 2011 Evidence Study Committee Chair, Thomas M. Byrne, went so far as to state that ‘it’s not hypercritical to say that Georgia has the most antiquated and worst set of evidence statutes and lore of any of the fifty states.’”); Paul S. Milich, *Georgia’s New Evidence Code—An Overview*, 28 GA. ST. U. L. REV. 379, 379 (2012). As Ray Persons, Esq., noted in describing how Georgia codifiers in 1863 simply ensconced in the “evidence code” the common law of evidence as understood in the Antebellum Period, it “remained the primary source of Georgia’s evidence code until only last year [2012],” dormant from the influence of how “trial practice ha[d] changed dramatically over the past 150 years.” Ray Persons, *Symposium on Evidence Reform*, 47 GA. L. REV. 657, 659 (2013). Because sins of the Georgia 1863 codification of the common law of evidence were numerous and remind us of the kind of unfortunate reasoning displayed by the Georgia Supreme Court in the *Medical Center* case, they merit a more extensive cataloguing here:

One hundred and fifty years of incremental and ad hoc changes created basic weaknesses in the substance and structure of Georgia’s evidence code. Substantively, Georgia simply had too many old rules that we did not need and too few modern rules that we did need. At times, this has left courts no alternative but to reject what was plainly authorized by the old Georgia law, sometimes without even acknowledging the law’s existence. For example, Georgia law explicitly authorized jurors to serve as witnesses in cases on which they sat, providing that a ‘juror shall not act on his private knowledge respecting the facts, witnesses, or parties unless he is sworn and examined as a witness in the case.’ The Georgia Supreme Court rejected this practice and held that a potential witness should be disqualified for cause from serving as a juror in the case. It reached this conclusion, however, without citing—much less discussing—the Georgia statute.

The presence of such anachronisms forced courts to ‘interpret’ the evidence statutes in awkward attempts to shape them to modern times. For example, Georgia’s best evidence rule, which was enacted when photography was in its infancy, applied only to documents and not to

photographs or videos. In one case, the prosecution wished to prove that the defendant assaulted the victim in a prison melee. The State offered the testimony of a prison guard, who explained that he had watched a videotape of the incident and saw the defendant strike the victim. The witness did not produce the videotape he had described, and Georgia's ancient best evidence rule did not require production of the video. The Court of Appeals, recognizing the problems created by this unfair presentation, creatively declared that the guard's testimony as to what he saw on the videotape was hearsay and, thus, inadmissible. Of course, it was not hearsay, but this was the court's best effort to remedy the obviously unfair result of a best evidence rule developed when silver plates were the photographic medium of choice.

As another example, the 'vouching rule'—which prohibits a party from impeaching his own witness's credibility—was still reflected in Georgia's evidence code, despite the fact that nearly every jurisdiction in the United States has abandoned it. Thus, while courts recognized long ago that there was 'no good reason for the rule' and had accordingly 'pruned' the statute to the point that it did 'not mean what it was formerly construed to mean,' the vouching rule survived, and courts continued to apply it in Georgia cases.

Georgia continued to follow the nineteenth-century rule allowing juries to resolve certain evidentiary questions of fact. For example, if a witness testified that he heard an employee of a party make a statement, the jury would be instructed that the statement was offered as an agency admission and that, before the jury could consider the statement, it must first decide whether the witness was an agent of the party and whether he was acting within the scope of his agency at the time the statement was made. This not only added unnecessary complexity to the jury's task but also exposed the jury to the evidence in question, relying on the jury's ability to 'disregard' the evidence it had already heard if it was ultimately deemed inadmissible. Of course, modern rules of evidence wisely leave questions of admissibility such as this to the trial judge rather than the jury, yet Georgia persisted in assigning these admissibility determinations to the jury.

Georgia was also the only jurisdiction in the United States that continued to follow the nineteenth-century rule that hearsay evidence was 'illegal' evidence that could not sustain a verdict—even if no objection was made at trial. This rule invited nothing but trouble. In one notable case, for example, the plaintiff presented his damages evidence using documents, but failed to lay a proper foundation for their admission under the hearsay rule. The defendant essentially sandbagged the plaintiff, making no objection and instead waiting until the jury returned a plaintiff's verdict. At that point, the defendant then moved for judgment on grounds that the only evidence of damages was illegal hearsay and thus not evidence at all. The trial court granted the motion, and the court of appeals affirmed. Yet, despite results like this, the rule persisted in Georgia—and Georgia alone.

Likewise, Georgia's rule against character evidence in criminal cases had drifted over time far away from its common law moorings until it had become just a shadow of its former self. Georgia was the only jurisdiction in the United States that routinely allowed evidence

enforcement of covenants not to compete became completely at odds with the interests of international employers in technology industries that had relocated, or were contemplating relocation, to Atlanta,<sup>328</sup> the

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of other crimes to show the defendant's 'bent of mind' toward the criminal conduct in question. How 'bent of mind' differs from impermissible 'bad character' evidence was never clear, and it created an obvious risk that the jury would infer that defendants were more likely to have committed the crime charged simply because they had committed other crimes in the past. This is, of course, precisely why evidence of bad character should be excluded from criminal trials and why the Federal Rules do not permit the introduction of other bad acts to prove conduct in conformity therewith. Nevertheless, admission of other bad acts to show 'bent of mind' was common in Georgia, no doubt to the prejudice of many criminal defendants.

*Id.* at 660–63; see also Michael Scott Carlson & Ronald L. Carlson, *Davis Violations Dissected: "New" Georgia Law and the Crisis in Evidence*, 9 J. MARSHALL L.J. 1, 7–20 (2015–2016).

<sup>328</sup> In 1982, a commentator described the outlier status of Georgia's case law concerning employee challenges to covenants not to compete in their contracts of employment in stark words:

Covenants not to compete and the doctrine governing them in Georgia have received a tremendous amount of bad press recently. Among the milder comments made by various judges have been that noncompetition covenants in Georgia have 'caused great difficulty for the courts and practitioners over a long period of time,' and that 'a doctrinal "trend" in the area of restrictive covenants has been somewhat difficult to divine . . . in light of a high precedential mortality rate.' More vocal critics have made stronger remarks concerning the Georgia tribunals ruling upon these covenants, stating that 'ten Philadelphia lawyers could not draft an employer-employee restrictive covenant agreement that would pass muster under the recent rulings of this Georgia court;' and that the Georgia courts' reasonableness analysis 'has been rendered hollow and meaningless.' One federal court candidly admitted that, 'like the King of Siam, we express some "puzzlement,"' after it examined the Georgia courts' 'reasonableness' standard. Concluding that an uncertainty attended the draftsmanship of covenants not to compete in Georgia after noting the number of recent cases that had reached the Georgia Supreme Court and the high precedential mortality rate of cases in this area, the court, 'with deference,' suggested that the Georgia courts take 'a fresh look' at this troublesome area.

Gary P. Kohn, Comment, *A Fresh Look: Lowering the Mortality Rate of Covenants not to Compete Ancillary to Employment Contracts and to Sale of Business Contracts in Georgia*, 31 EMORY L.J. 635, 635–36 (1982). Nearly a decade after Mr. Kohn's article, another commentator was still compelled to write:

Even after more than ninety years of litigation, the application of an ex-employee's agreement not to compete against his former employer

legislature wiped away years of Georgia Supreme Court precedent with the Georgia Restrictive Covenants Act.<sup>329</sup> If the Georgia Supreme Court has not done anything positive for the judicial development of choice of law in the State, its *Medical Center* decision has at least provided a clear marker that the time for legislative action in this realm is now at hand, because Georgia's choice-of-law rules are no longer being superintended effectively by its judiciary.<sup>330</sup> Thus, in this section, we explore three plausible legislative responses to fix the choice-of-law problem. First, we discuss the possibility of the Georgia Legislature simply adopting the Restatement (Second) of Conflict of Laws *in toto* as Georgia's Choice-of-Law Code. Second, we consider whether it might instead be preferable—and whether it might be tenable—for Georgia to commission the drafting of its own choice-of-law code. Third—and most promisingly—we examine whether Georgia should simply acknowledge its *lex fori* tendencies by adopting a groundbreaking statute, which gives Georgia courts the power to choose Georgia law to govern any case (not already subject to an enforceable contractual choice-of-law clause) that has Constitutionally sufficient contacts with Georgia. Such a statute would work much the way that the “to-the-limits-of-Due-Process” long-arm jurisdiction statutes work, except that this statute would be conferring legislative jurisdiction to the full limits of the Article IV Full Faith and Credit Clause and the Fourteenth Amendment Due Process clause.

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continues to perplex the business community. This noncompete agreement (also known as a restrictive covenant) will be the subject of this comment. Despite the fact that the present-day standard for enforceable covenants has been established for at least forty years, Georgia courts still consistently refuse to uphold noncompete agreements because the covenants are unreasonable.

Thomas E. Jordan, Comment, *The Application of Contract Law to Georgia Noncompete Agreements: Have We Been Overlooking Something Obvious?*, 41 MERCER L. REV. 723, 723 (1990). The untoward economic impact of the Georgia Supreme Court's common-law approach is discussed in Jeffrey T. Rickman, *Noncompete Clauses in Georgia: An Economic Analysis*, 21 GA. ST. U. L. REV. 1107 (2005).

<sup>329</sup> GA. CODE ANN. §§ 13-8-50 to -59; (2018); see Tyler Watkins, *Interpreting the 2011 Georgia Restrictive Covenants Statute: How to Fix its Ambiguities and Allow the Blue Pencil while Deterring the In Terrorem Effect*, 10 J. MARSHALL L.J. 110, 111 (2016-2017); Alan Frank Pryor, Note, *Balancing the Scales: Reforming Georgia's Common Law in Evaluating Restrictive Covenants Ancillary to Employment Contracts*, 46 GA. L. REV. 1117, 1119-20 (2012).

<sup>330</sup> It is true that Brainerd Currie expressed some misgivings about codification, mostly because of the fear that codification would provoke a reactionary wave of opposition. BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 170-71 (1963). Events since 1963, discussed in this section, would ease Currie's concerns, and the *Medical Center* decision, we are confident, would transform him into a zealous codification advocate.



*A. Legislative Option 1: The Georgia Legislature Adopts the Restatement (Second) Conflict of Laws as Georgia's Choice-of-Law Methodology*

In terms of the easiest, “turn-key” solution to regularizing a more modern choice-of-law approach, legislative adoption of the Restatement (Second) of Conflict of Laws might look tempting. Professor Laura Little, a leading pragmatic teacher and scholar in the area, has observed that the Restatement (Second) “is now clearly the most important choice of law approach in the United States.”<sup>331</sup> At least “half of the states in the United States currently follow the approach, and the rest of the world regards the approach as the key indicator of United States law.”<sup>332</sup> Thus, it is not surprising that “federal courts have declared that the” Restatement (Second) “comprises the ‘federal’ choice of law principles for cases where such principles are needed.”<sup>333</sup> Moreover, as Professor Little observes, “even courts that do not officially follow the Restatement (Second) fall into the habit of occasionally relying on it.”<sup>334</sup> Indeed, the Restatement (Second) “is the closest the United States gets to having a uniform choice of law approach.”<sup>335</sup>

With all of that having been said, no state legislature has yet to simply adopt either a swath of sections or the entirety of the Restatement (Second) as its “conflict of laws code.”<sup>336</sup> Of course, a state could very well decide to do that, but several pragmatic reasons appear that may explain why that has not yet happened, and, in turn, why it is not likely that the Georgia Legislature would seriously consider becoming the first state to do so.

First, unlike the case of adopting the Federal Rules of Evidence as a state code of evidence, there is not one ultimate decisionmaker to settle the meaning of the Restatement (Second)’s provisions. Nor is there an ultimate decisionmaker to resolve ambiguities, fill gaps, or definitely resolve policy choices that may be determinative of how certain

<sup>331</sup> LAURA E. LITTLE, CONFLICT OF LAWS: CASES, MATERIALS, & PROBLEMS 381 (1st ed. 2013).

<sup>332</sup> *Id.* See Lesli P. Hiller, *The “Most Significant Relationship” Test of the Second Restatement of Conflicts and its Effect Outside the United States in the Area of Torts*, 12 N.Y. INT’L L. REV. 55, 56 (1999).

<sup>333</sup> *Id.*

<sup>334</sup> *Id.* at 381 (citing, for example, *American Motorists Ins. Co. v. Artra Grp., Inc.*, 659 A.2d 1295, 1301 (Md. 1995), in which Justice Raker noted “that although Maryland”—a First Restatement jurisdiction—“does not generally follow the Restatement (Second), Maryland courts have cited its sections ‘with approval’”).

<sup>335</sup> *Id.*

<sup>336</sup> See LAURA E. LITTLE, CONFLICT OF LAWS: CASES, MATERIALS, & PROBLEMS 580 (1st ed. 2013) (discussing the notion that Congress could “choose to embrace the Restatement (Second) as “the federal choice of law approach”).

provisions of the Restatement (Second) shall be applied. Instead, there are fifty state supreme courts and the high courts of territories and commonwealths which have contributed a myriad of rulings to the development of the Restatement (Second). This creates quite a trove of precedent to be mined but also an entire airport's worth of baggage to be sorted. While adopting the Restatement (Second) in Georgia was met with concerns almost forty years ago because of a paucity of precedent—a Georgia Professor then noting that “as the proponents of the Restatement Second freely admit, that method will require considerable time and judicial effort before the numerous narrow rules that will constitute a complete choice of law system can be developed”<sup>337</sup>—the situation today is at the other end of the spectrum, with a super-abundance of precedent that has not succeeded in making the Restatement (Second) easier to use. With a body of rules like the Federal Rules of Evidence, by contrast, the buck stops with the United States Supreme Court, and even for issues that have not yet reached that Court, they will have largely been addressed by at least one of the U.S. Circuit Courts of Appeals. This makes a body of rules such as the Federal Rules of Evidence much more amenable to state codification—as Georgia has done—than any of the American Law Institute's Restatements, including the Restatement (Second) of Conflict of Laws.

Second, the Restatement (Second) is in actuality a transitional product.<sup>338</sup> Even its august Reporter, Columbia's Professor Willis Reese, described it as “a transitional work.”<sup>339</sup> As the legendary scholar Russell Weintraub observed,

Professor Willis Reese, the Reporter for the *Restatement (Second) of Conflict of Laws*, acknowledged that the work was “written during [a] time of turmoil” in the subject. Work on the *Restatement (Second)* was started in 1951, twelve years before the first United States court abandoned the ‘place-of-wrong’ rule for choosing law in torts, and completed in 1969, after sixteen states, the District of Columbia, and Puerto Rico had adopted new tort choice-of-law rules. As the *Restatement (Second)* progressed, it was apparent that a ‘conflicts revolution’ was sweeping the land. The attempt to ‘restate’

<sup>337</sup> John B. Rees, Jr., *Choice of Law in Georgia: Time to Consider a Change?*, 34 MERCER L. REV. 787, 808 (1983).

<sup>338</sup> See, e.g., Symeon C. Symeonides, *The Need for a Third Conflicts Restatement (And a Proposal for Tort Conflicts)*, 75 IND. L.J. 437, 443–44 (2000).

<sup>339</sup> Willis L. M. Reese, *The Second Restatement of Conflict of Laws Revisited*, 34 MERCER L. REV. 501, 519 (1983).

law that was in the process of rapid change triggered suggestions to abandon the project and criticisms of drafts as insufficiently reflecting the theoretical bases for the changes that were occurring in the courts.<sup>340</sup>

Third, the Restatement (Second) is not necessarily easy to use. Justice Harris Hines's criticism of the Restatement (Second)'s choice-of-law rules for garden variety torts in *Dowis*, while incomplete, is not inaccurate. In a similar vein, the Alabama Supreme Court used academic commentary against the torts choice-of-law provisions in the Restatement (Second):

After careful consideration, we are not convinced that we should abandon the *lex loci delicti* rule for the approach of the *Restatement (Second)* on the facts of the present case. Professor Kay and other commentators tell us that the adoption of the approach of the *Restatement (Second)* has not brought certainty or uniformity to the law:

Some state courts routinely list [the Restatement's] relevant sections in their opinions and try to follow them; this task is easiest when the case is controlled by one of the Restatement Second's specific narrow rules. Other state courts have not been consistent in their terminology about what approach they are following, and others have retained primary emphasis on the place of the wrong in tort cases, even while abandoning the *lex loci delicti* for the Restatement Second. . . . This review of the cases suggests that, if the original Restatement was unsuccessful because

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<sup>340</sup> Russell J. Weintraub, "At Least, To Do No Harm": Does the Second Restatement of Conflicts Meet the Hippocratic Standard?, 56 MD. L. REV. 1284, 1284–85 (1997). Professor Weintraub's ultimate conclusion was that "[a] restatement, as indicated by the very name, is an inappropriate vehicle for law reform." *Id.* at 1315. He saw Restatements as working their best "[w]hen the law in a particular subject is stable and the results it is producing have triggered no cogent condemnation, a restatement can be a useful guide for the profession." *Id.* On the other hand, "[w]hen, on the contrary, courts and commentators are in the process of re-analyzing a subject, a restatement is a bad idea." *Id.*

of its dogmatic rigidity and its insistence on the uncritical application of a few specific rules, the Restatement Second may fail to provide enough guidance to the courts to produce even a semblance of uniformity among the states following its method. In the drafters' attempt to mollify their critics, they have created an umbrella for traditionalist and modern theorist alike: a fragile shelter that may prove itself unable to survive any but the most gentle of showers.<sup>341</sup>

Similarly, as Laura Little explains, the Restatement (Second) "approach is not a particularly easy one to pin down."<sup>342</sup> The Restatement (Second), particularly in its "core . . . section, §6," sincerely "aspires to predictability and uniformity" yet "most agree that [it] . . . does not achieve that aspiration."<sup>343</sup> The problem is that the Restatement (Second) was "[c]onceived to integrate the salutatory qualities of the earlier methodologies" but does so in a way that "gives us the 'kitchen sink' of choice of law tools," yielding as a "result . . . an approach making possible a huge variety of analyses: one can have a difficult time predicted what result will follow when courts get their hands on its octopus-like methodology" with the end result that its "tests and concerns often vary according to where a lawsuit is filed."<sup>344</sup> In at least one state, appellate justices have strongly disagreed whether they are applying the "governmental interest analysis" or the provisions of the Restatement (Second), causing unnecessary confusion (which, of course, that state's legislature could easily resolve if it chose to do so).<sup>345</sup>

<sup>341</sup> *Fitts v. Minn. Mining & Mfg. Co.*, 581 So. 2d 819, 823 (Ala. 1991) (quoting Herma Hill Kay, *Theory Into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521, 561–62 (1983)).

<sup>342</sup> LAURA E. LITTLE, *CONFLICT OF LAWS: CASES, MATERIALS, & PROBLEMS* 382 (1st ed. 2013).

<sup>343</sup> *Id.*

<sup>344</sup> *Id.*

<sup>345</sup> Compare, for example, the majority opinion of Justice Long and the dissenting opinion of Justice Hoens in *P.V. v. Camp Jaycee*, 962 A.2d 453, 468–69 (N.J. 2008). See also David Seidelson, *Interest Analysis or the Restatement Second of Conflicts: Which is the Preferable Approach to Resolving Choice-of-Law Problems?*, 27 DUQ. L. REV. 73, 73–74 (1988). Of course, Professor Rees predicted some forty years ago that states that first adopted "governmental interest approaches" would gradually flesh that out sufficiently to be able to adopt the Restatement (Second) methodology. See John B. Rees, Jr., *Choice of*

Another problem for going all-in on adoption of the Restatement (Second) as Georgia's—or any state's—comprehensive law choice-of-law code is that the unremitting challenges to it<sup>346</sup> by those who were disappointed that it did not go farther than it does in distancing itself from the Restatement (First) have finally borne fruit. After discussion of the idea for some years,<sup>347</sup> the American Law Institute has actually started the project to produce the Third Restatement of Conflict of Laws.<sup>348</sup> Whether that will be a product that would make for suitable legislation, or whether it will merely be a field manual for those judges in the state courts still willing to put forth the effort to reform choice-of-law, remains to be seen.<sup>349</sup> But it is certain to spark a new round of examination of the Restatement (Second) that will expose many flaws<sup>350</sup> in so large a body of work.<sup>351</sup> Those circumstances would not augur well for the Restatement (Second) to produce a “turn-key”

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*Law in Georgia: Time to Consider a Change?*, 34 MERCER L. REV. 787, 808 (1983) (noting that “Georgia could first adopt interest analysis and later change to the Restatement Second when that system fully develops,” in line with those “authorities [that] have characterized interest analysis as a preliminary step on the way to the Restatement Second approach”).

<sup>346</sup> There were certainly challenges were mounted against it even during its drafting stages. See, e.g., Albert A. Ehrenzweig, *The Second Conflicts Restatement: A Last Appeal for Its Withdrawal*, 113 U. PA. L. REV. 1230, 1231–32 (1965) (railing against the fundamental notion that choice-of-law rules can or even should be restated); Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1584–86 (1966) (criticizing the Restatement (Second)'s “mechanical rules,” while promoting the author's own methodological approach).

<sup>347</sup> See, e.g., Symeon C. Symeonides, *The Judicial Acceptance of the Second Conflicts Restatement: A Mixed Blessing*, 56 MD. L. REV. 1248, 1280 (1997) (“I submit that the next natural step is to begin the process of preparing for a third conflicts restatement.”); Symeon C. Symeonides, *The Need for a Third Conflicts Restatement (and a Proposal for Tort Conflicts)*, 75 IND. L. J. 437, 438 (2000).

<sup>348</sup> *The American Law Institute Announces Four New Projects*, AM. LAW INST. (Nov. 17, 2014), <https://www.ali.org/news/articles/american-law-institute-announces-four-new-projects>.

<sup>349</sup> See RESTATEMENT (THIRD) OF CONFLICT OF LAWS § 5.01 cmt. e (AM. LAW INST., Tentative Draft No. 2, 2017).

<sup>350</sup> See, e.g., Kermit Roosevelt III, *Annual Brainerd Currie Lecture: Brainerd Currie's Contribution to Choice of Law: Looking Back, Looking Forward*, 65 MERCER L. REV. 501, 514–15 (2014); Lea Brilmayer & Charles Seidell, *Jurisdictional Realism: Where Modern Theories of Choice of Law Went Wrong, and What can Be one to Fix Them*, 86 U. CHI. L. REV. 2031 (2019).

<sup>351</sup> Moreover, there is already a barracuda-like internecine conflict among today's leading conflict-of-laws scholars over the supposed merits and demerits of the drafts of the Restatement (Third) itself. Compare Lea Brilmayer & Daniel B. Listwa, *Change and Continuity in the Draft Restatement (Third) of Conflict of Laws: One Step Forward and Two Steps Back?*, 128 YALE L.J.F. 266 (2018), with Kermit Roosevelt III & Bethan R. Jones, *The Draft Restatement (Third) of Conflict of Laws: A Response to Brilmayer and Listwa*, 128 YALE L.J.F. 293 (2018).

solution for the Georgia Legislature. Indeed, it would likely bring calls for a variety of Restatement (Second) provisions to be amended or even replaced in light of the intellectual work product being put into the Restatement (Third). Once one reaches that point, one might as well just draft a choice-of-law code that is specially tailored to a state's needs. That is the subject of Section VI.B that follows.

*B. Legislative Option 2: Georgia Commissions the Drafting of a Conflict-of-Laws Code, As Louisiana and Oregon Have Enacted, And As Puerto Rico Has Completed But Not Yet Enacted*

The idea of customized conflict-of-laws codes has been discussed with increasing seriousness over the last thirty years.<sup>352</sup> Some have advocated for a national, “uniform” choice-of-law code.<sup>353</sup> Others have argued that states should individually create their own choice-of-law code based on the state’s case law—at least case law after the states have abandoned the territorial approach. The highly politicized nature of such a process, the vast amount of lobbying by special interest groups who would want to get their members’ views ensconced favorably in the statute, and the political inertia to be overcome to even get such a process started are considerable. They are ably discussed by Professor Wiegand, to whose thoughtful article the present authors refer the reader.<sup>354</sup>

In the United States, three jurisdictions have embraced the task of codifying choice of law.<sup>355</sup> Louisiana enacted its codification in 1992.<sup>356</sup> The Louisiana “codification”<sup>357</sup> covers the entire choice of

<sup>352</sup> See SYMEON C. SYMEONIDES, *THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE* 424, 434 n.65 (2006) (“[L]egislation is the most authoritative and can bring uniformity much more quickly, but it is politically difficult.”); Symeon C. Symeonides, *American Choice of Law at the Dawn of the 21st Century*, 37 WILLAMETTE L. REV. 1, 80–81 (2001); Willis L. M. Reese, *Statutes in Choice of Law*, 35 AM. J. COMP. L. 395 (1987).

<sup>353</sup> See, e.g., Ralph U. Whitten, *Curing the Deficiencies of the Revolution: A Proposal for National Legislation on Choice of Law, Jurisdiction, and Judgments*, 37 WILLAMETTE L. REV. 259, 263–64 (2001); Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L. J. 1 (1991); Larry Kramer, *On the Need for a Uniform Choice of Law code*, 89 MICH. L. REV. 2134 (1991).

<sup>354</sup> Shirley A. Wiegand, *Fifty Conflict of Laws “Restatements”: Merging Judicial Discretion and Legislative Endorsement*, 65 LA. L. REV. 1 (2004).

<sup>355</sup> Of course, many states have ad hoc choice-of-law statutes that are part of other codifications, such as the probate code and the Uniform Commercial Code. See, e.g., James A. R. Nafziger, *The Louisiana and Oregon Codifications of Choice-of-Law Rules in Context*, 58 AM. J. COMP. LAW. SUPP. 165 (2010); GA. CODE ANN. § 11-1-105 (2016).

<sup>356</sup> PETER HAY ET AL., *CONFLICT OF LAWS* § 2.27 (5th ed. 2010).

<sup>357</sup> LA. CIV. CODE ANN. arts. 3515–3550 (1992); see PETER HAY ET AL., *CONFLICT OF LAWS* § 2.11 nn.28–33 and accompanying text (5th ed. 2010).

law field,” and it “uses civilian drafting technique and draws elements from European codifications but, more than anything, it is a codification of the general American conflicts experience.” By contrast, Oregon’s approach was subject specific—limited to a code for resolving choice-of-law questions in contracts<sup>358</sup> and torts<sup>359</sup> cases. In both Louisiana and Oregon, the process was challenging, but was aided in Louisiana by that state’s long French civil law tradition and approach to lawmaking through codes, and in Oregon by the fact that the project was the first undertaken by a newly established Oregon Law Commission and that Oregon’s lead draftsman was a faculty member of an in-state law school, whose long-time Dean was recognized internationally as a leading scholar and reformer in conflict of laws.<sup>360</sup>

Inertia and suspicion seem to be the biggest obstacles in most states to dealing with choice-of-law through thoughtful, comprehensive codification. As Dean Symeonides has observed, “cultural skepticism towards statutes and lack of political will at the state level” are serious obstacles to codifying choice of law in the American states,<sup>361</sup> stumbling blocks which are largely absent in the civil law tradition of Europe and elsewhere.<sup>362</sup> Even in a civil law tradition jurisdiction such as the American Commonwealth of Puerto Rico, however, a choice-of-law code can get bogged down in politics and derailed. Dean Symeonides and the late Professor Arthur von Mehren were the co-chairs of a drafting effort commissioned by Puerto Rico to produce a meaningful choice-of-law code. Although the project was undertaken in 1990<sup>363</sup> and a code was completed in 1991, the draft code waited eleven years to be introduced in the Commonwealth’s legislature, only to languish thereafter as part of a larger bill to overhaul the *entire civil code* of Puerto Rico. The project was then withdrawn in 2002, languished further, and was reintroduced in the legislature—with no better success—in 2014 and 2016.<sup>364</sup> Thus, a codification project initiated thirty years

<sup>358</sup> See Symeon C. Symeonides, *Oregon’s Choice-of-Law Codification for Contract Conflicts: An Exegesis*, 44 WILLAMETTE L. REV. 205, 205 (2007).

<sup>359</sup> See Symeon C. Symeonides, *Oregon’s New Choice-of-Law Codification for Torts Conflicts: An Exegesis*, 88 OR. L. REV. 963 (2009).

<sup>360</sup> James A. R. Nafziger, *The Louisiana and Oregon Codifications of Choice-of-Law Rules in Context*, 58 AM. J. COMP. L. SUPP. 165, 168, 171–72 (2010).

<sup>361</sup> PETER HAY ET AL., CONFLICT OF LAWS § 2.26, n. 40 and accompanying text (5th ed. 2010).

<sup>362</sup> PETER HAY ET AL., CONFLICT OF LAWS § 2.27, nn. 7–62 and accompanying text (5th ed. 2010).

<sup>363</sup> Symeon C. Symeonides, *Revising Puerto Rico’s Conflicts Law: A Preview*, 28 COLUM. J. TRANSNAT’L L. 413 (1990).

<sup>364</sup> Symeon C. Symeonides, *The Third Conflicts Restatement’s First Draft on Tort Conflicts*, 92 TUL. L. REV. 1, 3 n.7 (2017). For a discussion of some of the realpolitik dynamics

ago, under the leadership of the two leading choice-of-law experts in America, remains a visionary but abandoned project—much like a legal Brasilia.

Thus, it is noteworthy that the Georgia Legislature did not write its own Evidence Code. It enlisted the aid of the State Bar of Georgia, which established a bench-bar committee to study the matter. In the 2000s, the Reporter of that Committee, Professor Paul Milich, worked to shepherd that code through what we would call a most unnecessarily arduous process but what he called more politely “a long and winding road.”<sup>365</sup> The details are provided in the footnote and are worth a read.

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involved, see Marta Figueroa-Torres, *Recodification of Civil Law in Puerto Rico: A Quixotic Pursuit of the Civil Code for the New Millennium*, 23 TUL. EUR. & CIV. L. F. 143 (2008).

<sup>365</sup> Paul S. Milich, *Georgia's New Evidence Code—An Overview*, 28 GA. ST. U. L. REV. 379, 380–81 (2012). As Professor Milich recalled,

In 1975, Congress passed the Federal Rules of Evidence and this inspired many states to modernize their own rules. By 1985, more than thirty states had adopted new rules of evidence based on the Federal Rules.

In 1985, the Board of Governors of the State Bar of Georgia ‘approved in principle’ a proposal to study whether Georgia should adopt new rules of evidence based more or less on the Federal Rules of Evidence. In 1986, Robert Brinson, the president of the State Bar, appointed Frank C. Jones chairman of the Evidence Study Committee. The committee’s mission was to explore reform of Georgia’s old evidence code. The committee undertook an intensive review of the differences between the Federal Rules and Georgia’s rules.

In 1987, the General Assembly adopted a joint resolution encouraging the study of Georgia’s evidence rules. In 1988, the State Bar Evidence Study Committee completed its report to the Bar with a full draft of the proposed new rules. The Board of Governors approved the new rules and they were introduced, with the State Bar’s support, in the 1989 legislative session.

The proposed new rules were warmly received in the Senate where then-Senator Nathan Deal sponsored them. They passed the Senate twice, unanimously in 1990, but with a few negative votes in 1991. The reception in the House, however, was less warm. Speaker Tom Murphy, a trial lawyer, was initially ambivalent about adopting new evidence rules. With his characteristic humor, he told this author that he was an old dinosaur and that old dinosaurs don’t like to learn new tricks. After numerous efforts to convince him that the new rules were right for Georgia, the Speaker told Chairman Jones and this author, ‘Georgia will someday have new rules of evidence—just not while I am Speaker.’ The proposed new rules of evidence were never scheduled for a vote in the House Judiciary Committee.

Taking the Speaker at his word, the State Bar backed off the project until 2002 when Speaker Murphy was defeated in his bid for



The bottom-line is that even if it were desirable for a state to supersede the two Restatements by drafting its own customized choice-of-law code, Georgia's history suggests a distinct possibility that the process could take years and be held up by politics entirely unrelated to the subject matter.<sup>366</sup> While such an endeavor, likely to be agonizingly protracted, would be better than leaving the matter to the Georgia courts, there is a third option, discussed below, which is much more practicable.

*C. Legislative Option 3: Georgia Adopts a Straightforward  
"Constitutional Limits" Choice-of-Law Statute that Simply  
Codifies the Allstate v. Hague Approach to Legislative  
Jurisdiction*

The third approach—and the one that the authors see as the only truly viable one—is for a choice-of-law statute to be introduced in the Georgia Legislature that would, for conflict of laws, serve the same purpose as a long-arm statute serves for personal jurisdiction. In the realm of personal jurisdiction, a long-arm statute simplifies the judicial task of determining when a forum court can exercise personal jurisdiction over a non-resident defendant in a lawsuit brought against that defendant in one of the forum's courts. Long-arm statutes are legislative responses to the U.S. Supreme Court's 1945 decision in *International Shoe v. State of Washington*,<sup>367</sup> which unfettered personal jurisdiction from the territorial limitations of the 1878 decision in *Pennoyer v. Neff*<sup>368</sup> and freed the courts to make personal jurisdiction work without resort to elaborate—and elaborately inconsistent—"cheats" around the nature of the forum court's power over non-resident defendants. Armed with this new view of personal jurisdiction announced from On High, the states quickly got about the work of exploiting it through the medium of statutes that permit the process of the forum court to be served outside of the forum state's boundaries with a presumption of constitutionality.

The Court's 1981 decision in *All-State Insurance Co. v. Hague*<sup>369</sup>

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reelection.

*Id.* at 380–81. Even then, it still took another *nine* years to get the new Evidence Code enacted. *See id.* at 381–83.

<sup>366</sup> Having been a member of the Georgia bar for over thirty years and located in Atlanta, Professor Van Detta gained some interesting insight into that particular topic; discretion, however, counsels saying nothing beyond that.

<sup>367</sup> *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

<sup>368</sup> *Pennoyer v. Neff*, 95 U.S. 714 (1878).

<sup>369</sup> *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981).

did something very similar for choice of law, as first and most forcefully pointed out by Professor Patricia Youngblood.<sup>370</sup> Using an approach that seemed rooted in the ideas that gave birth to *International Shoe*, the U.S. Supreme Court's decision in *Allstate* did the same thing for a forum court's ability to choose the substantive law that will apply in a case involving non-resident defendants and out-of-state events.<sup>371</sup> This is known as the concept of "legislative jurisdiction."<sup>372</sup>

<sup>370</sup> See Patricia J. Youngblood, *Constitutional Constraints on Choice of Law: The Nexus between World-Wide Volkswagen Corp. v. Woodson and Allstate Insurance Co. v. Hague*, 50 ALB. L. REV. 1 (1985). Professor Youngblood taught conflict of laws in Spring 1987 to the young law student who would become Professor Van Detta.

<sup>371</sup> Youngblood, *supra* note 370, at 14–15.

<sup>372</sup> Professor Willis Reese, Reporter of the Restatement (Second) of Conflict Of Laws, wrote the seminal article on the area before the Court decided *Allstate*. See Willis M. Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587 (1978). As Professor Van Detta has explained to apprenticing lawyers-in-becoming who take his conflict of laws course, legislative jurisdiction is a federal constitutional concept that encompasses state-specific choice-of-law rules and methodologies in the same way that personal (or "juridical") jurisdiction is a federal constitutional concept that encompasses long-arm jurisdiction and similar extraterritorial service-of-process statutes (such as motorists' statutes and out-of-state employers' amenability to service under state worker's compensation statutes). Professor Van Detta has also told his apprentices that the best way to understand the distinction between legislative jurisdiction and choice of law is to consider it this way:

1. Legislative jurisdiction is a *federal Constitutional* analysis. It applies the due process/FFC limitations as embodied in the *Allstate v. Hague* test. It operates for legislative jurisdiction in much the same way as *International Shoe* operates in personal jurisdiction.

The outcome of this test should be an identification of the specific states whose substantive law *might* be applied to resolve the case *without* violating either the 14th Amendment or the FFC clause. This analysis *does not*, however, tell us *which* of those states' law will actually be applied to the substantive issues in the case. It only tells which states' laws *might* be applied. We have to 'run' the case through the forum state's applicable conflict-of-laws test(s) to determine which state's law the forum court is likely to actually choose to resolve the dispute—recalling that the forum court will have a preference for applying forum law if possible and Constitutionally permissible.

2. Choice-of-law is a *state-law* matter. It basically asks whether *lex fori* (the law of the forum) can be applied, although most courts frame the issue more neutrally, especially if they purport to follow interest analysis. The court here isn't worried about what is constitutionally allowed; it has already determined that in the legislative jurisdiction analysis. Instead, the court here is concerned with getting on with the decision of the case by actually selecting which interested state's law the forum court will apply to decide the case. Applying the state's conflict of laws rules to the case is somewhat analogous to statutory interpretation issues that arise under long-arm statutes, once a court

On the personal jurisdiction side, Professor Youngblood reduced *International Shoe* to its basic components. As she demonstrated, the analytic framework for discerning the foundation of juridical jurisdiction, commonly called “personal jurisdiction,” is, like legislative jurisdiction, focused on a single word encapsulating manifold and interlaced concepts, issues, and policies: *power*.<sup>373</sup> The *powers* in question

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has determined that the forum may constitutionally exercise personal jurisdiction. Here, the court applies one of the six tests we’ve discussed to actually determine which of laws of the states with legislative jurisdiction of the matter will, in the end, be applied to decide the case.

*See, e.g.,* Cooney v. Osgood Mach. Co., 81 N.Y.2d 66, 70 (N.Y. 1993) (“An inevitable consequence of a mobile society, where people and goods routinely cross State and national borders, is that disputes may implicate the interests of several jurisdictions having conflicting laws. Choice of law principles become relevant, however, only when a State can, consistent with the Full Faith and Credit and Due Process Clauses of the Constitution (U.S. CONST. art. IV, § 1; 14th Amend, § 1), choose between the conflicting laws.”).

<sup>373</sup> Youngblood, *supra* note 370, at 10; *see* John B. Oakley, *The Pitfalls of “Hint and Run” History: A Critique of Professor Borchers’s “Limited View” of Pennoyer v. Neff*, 28 U.C. DAVIS L. REV. 591 (1995); LARRY L. TEPLEY & RALPH U. WHITTEN, CIVIL PROCEDURE 164 (2d ed. 2000). The origins of modern personal jurisdiction doctrine are rooted in “the concept that governments had *territorial* power over persons and things within their boundaries.” *Id.* at 125. This is reflected in the most famous personal jurisdiction opinion of them all, *Pennoyer v. Neff*, 95 U.S. 714 (1877). *See* Adrian M. Tocklin, *Pennoyer v. Neff: The Hidden Agenda of Stephen J. Field*, 28 SETON HALL L. REV. 75 (1997). In *Pennoyer*, Justice Field made it clear that his “territorial rule” is based on the enterprise regulation principle:

To prevent any misapplication of the views expressed in this opinion, it is proper to observe that we do not mean to assert, by anything we have said, that a State may not authorize proceedings to determine the *status* of one of its citizens towards a non-resident. . . . The jurisdiction which every State possesses to determine the civil *status* and capacities of all its inhabitants involves authority to prescribe the conditions on which proceedings affecting them may be commenced and carried on . . . . Nor do we doubt that a State, on creating corporations or other institutions for pecuniary or charitable purposes, may provide a mode in which their conduct may be investigated, their obligations enforced, or their charters revoked . . . .

*Pennoyer*, 95 U.S. at 734–35. The American model of personal jurisdiction that arose with *Pennoyer* has come under attack from numerous scholars, particularly on the constitutionalization of personal jurisdiction doctrine. It is true that the doctrine is less than perfect, and that the Supreme Court’s struggle to articulate workable common-law jurisdictional rules has left analytic holes and excessive judicial intervention due to the heavily factual nature of the multi-factored legal tests that courts employ. However, efforts to separate personal jurisdiction from the regulatory powers of the state, as much of the scholarship in this area of late has been devoted to attempting, is misplaced. For example, some commentators see *Pennoyer*’s influence differently—as undermining rather than strengthening personal jurisdiction law by placing the defendant’s in forum physical presence in a posture of primacy. Harold L. Korn, *Rethinking Personal Jurisdiction and Choice of Law in*

are those over the person of an extraterritorial defendant, who, once compelled to appear in the forum under the rubric of *personal jurisdiction*, could then be subjected to the forum's *legislative jurisdiction*, the power "of a state to apply its local law."<sup>374</sup> The classic expression of state juridical power is the minimum contacts rules articulated in *International Shoe v. Washington*.<sup>375</sup> Those rules are based on the internal structure of the litigation—they describe a fixed number of scenarios based on an internal structure composed of facts about the defendant, the litigation, and the forum.<sup>376</sup> The relationship among this triumvirate of variables can conveniently be called a litigation event,<sup>377</sup> and the litigation event is created by the common intersection at their domains, as illustrated by Diagram 1.

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*Multistate Mass Torts*, 97 COLUM. L. REV. 2183, 2190–92 (1997). In terms of defendants located outside of the forum, this is certainly true, but that observation is insufficient to undermine the territorial personal jurisdiction. To the contrary, the territorial principle still has validity for if it is not the defendant's contacts that justify the exercise of personal jurisdiction, then it may be the plaintiff's contacts—i.e., residence in and injury in the state—that give rise to the kinds of regulatory interests that justify application of jurisdiction and substantive law. Jeffery Van Detta, *The Irony of Instrumentalism*, 87 MARQ. L. REV. 425, 471–72 n.125 (2004). *Pennoyer* and the sovereignty model of personal jurisdiction continue to be the theoretical underpinnings that justify the core of most assertions of jurisdiction by state courts. See Stewart Jay, 'Minimum Contacts' as a Unified Theory of Personal Jurisdiction: A Reappraisal, 59 N.C. L. REV. 429, 434, 473 (1981) (noting that *International Shoe* is neither an exception to nor an overruling of *Pennoyer*, but is "representative of a different basis for approaching jurisdiction"); Arthur M. Weisburd, *Territorial Authority and Personal Jurisdiction*, 63 WASH. U. L. Q. 377 (1985) (arguing that, because assertions of jurisdiction are exercises of sovereignty, limits on judicial power must be derived from limits on the sovereignty of the states). But see Harold S. Lewis, Jr., *The Three Deaths of "State Sovereignty" and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction*, 58 NOTRE DAME L. REV. 699, 735–36 (1983) (criticizing the role of sovereignty and state interests in personal jurisdiction doctrine).

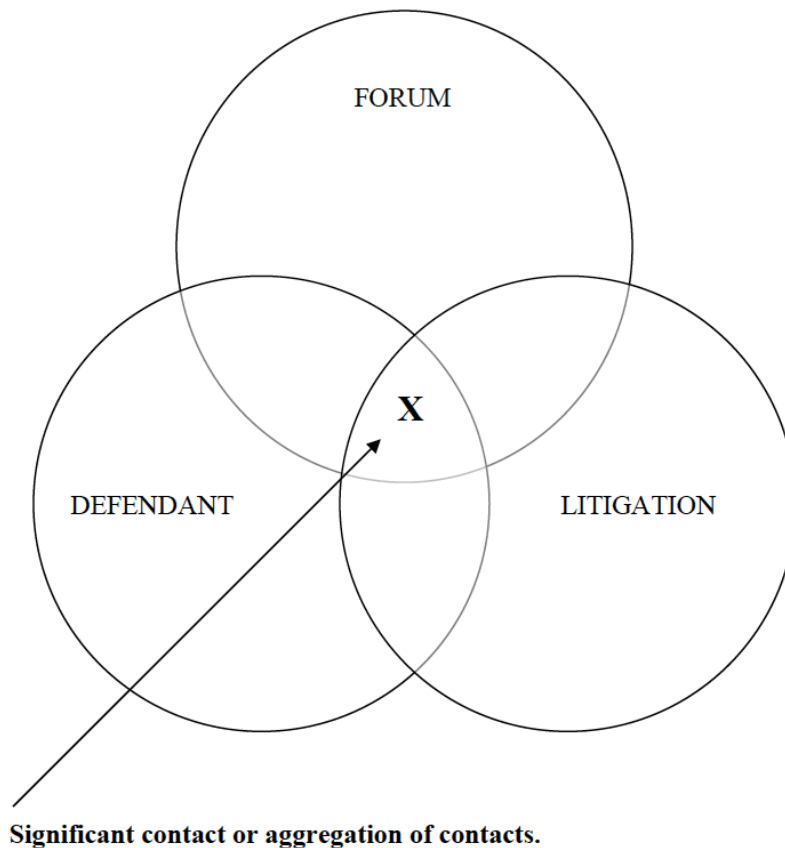
<sup>374</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 24 (AM. LAW INST. 1971); see Youngblood, *supra* note 370, at 1 n.4.

<sup>375</sup> 326 U.S. 310, 316 (1945).

<sup>376</sup> *Id.* at 317–18.

<sup>377</sup> For a complete discussion of the nature and significance of the concept of "litigation event," see Van Detta, *The Irony of Instrumentalism*, *supra* note 373, at 473–74.

DIAGRAM 1: CONSTITUTIONAL LIMITS ON PERSONAL  
AND LEGISLATIVE JURISDICTION: THE DOMAIN OF  
MINIMUM CONTACTS<sup>378</sup>



The intersection of the three fact domains in a common domain of overlapping operative facts produces a subset of minimum contact facts that create a litigation event and have significance for the operation of juridical jurisdiction rules. As Professor Youngblood pointed out in 1985, *International Shoe* “identified two jurisdictional variables of primary relevance” that function as the basis for the minimum contacts rules: (1) “the quantity or frequency of the defendant’s forum acts,” which “distinguishes continuous and systematic forum contacts from

<sup>378</sup> *Id.*; see Youngblood, *supra* note 370, at 10–11 (citing *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)).

single or occasional forum contacts”; and (2) “the relationship these acts bear to the cause of action upon which the plaintiff sues.”<sup>379</sup>

There are four possible combinations for describing the litigation event using these variables, as Professor Youngblood illustrated using the graphic metaphor of the Cartesian coordinate plane represented in Diagram 2.<sup>380</sup> Diagram 3 illustrates that each of the four quadrants of Professor Youngblood’s Cartesian metaphor is an archetypical litigation event to which one of the four general rules articulated in the *International Shoe* opinion directly corresponds.

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<sup>379</sup> Youngblood, *supra* note 370, at 5.

<sup>380</sup> *Id.* at 6.

## DIAGRAM 2: THE “SOVEREIGNTY BRANCH” – MINIMUM CONTACTS

SNAPSHOT OF *INTERNATIONAL SHOE* VARIABLES<sup>381</sup>

		CAUSE OF ACTION	
		CONNECTED	UNCONNECTED
TYPE OF CONTACT	CONTINUOUS &	Quadrant I  Continuous & Systematic Contact  &  Connected Cause of Action	Quadrant III  Continuous & Systematic Contact (Quantity Focus)  &  Unconnected Cause of Action (Quality Focus)
	SINGLE OR OCCASIONAL	Quadrant II  Single or Occasional Contact (Quality Focus)  &  Connected Cause of Action (Quality Focus)	Quadrant IV  Single or Occasional Contact  &  Unconnected Cause of Action

<sup>381</sup> *Id.* at 5–8; see also Van Detta, *The Irony of Instrumentalism*, *supra* note 373, at 475.

DIAGRAM 3: SNAPSHOT OF *INTERNATIONAL SHOE'S* FOUR VARIABLES (AND CORRESPONDING PERSONAL JURISDICTIONAL RULES):<sup>382</sup>

		CAUSE OF ACTION	
		CONNECTED	UNCONNECTED
TYPE OF CONTACT	CONTINUOUS & SYSTEMATIC	<p>Quadrant I</p> <p>Continuous &amp; Systematic Contacts &amp; Connected Cause of Action</p> <p>“‘Presence’ in the state . . . has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on . . .” 326 U.S. at 317.</p>	<p>Quadrant III</p> <p>Continuous &amp; Systematic Contacts (Quantity Focus) &amp; Unconnected Cause of Action (Quality Focus)</p> <p>“[T]here have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.” 326 U.S. at 318.</p>
	SINGLE OR OCCASIONAL	<p>Quadrant II</p> <p>Single or Occasional Contact (Quality) &amp; Connected Cause of Action (Quality Focus)</p> <p>“[T]he commission of some single or occasional acts . . . because of their nature and <i>quality</i> and the circumstances of their commission, <i>may</i> be deemed sufficient to render the corporation liable to suit.” 326 U.S. at 318 (emphasis added).</p>	<p>Quadrant IV</p> <p>Single or Occasional Contact &amp; Unconnected Cause of Action</p> <p>“Conversely it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation’s behalf are not enough to subject it to suit on causes of action unconnected with the activities there.” 326 U.S. at 317.</p>

For states that adopted long-arm statutes, these concepts became foundational, although they were not as clearly articulated seventy years ago as they are today. Youngblood next examined the Supreme Court’s cases dealing with issues of *legislative jurisdiction*. One line

<sup>382</sup> Int’l. Shoe Co., 326 U.S. at 317–18; see also Van Detta, *The Irony of Instrumentalism*, *supra* note 373, at 476.



of cases arose under the Due Process Clause of the Fourteenth Amendment. A separate line of cases arose under the Full Faith and Credit Clause of Article IV. The two lines of cases were inextricably merged and the law fully restated by the Supreme Court in *Allstate Insurance Co. v. Hague*.

Youngblood summarized her findings in Diagram 4, which, in mirroring the chart she constructed from *International Shoe* and its progeny, demonstrates the fundamental underpinnings of *both* legislative *and* personal jurisdiction in one or more relevant contacts that connect the parties, the litigation, and the forum.<sup>383</sup>

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<sup>383</sup> Youngblood, *supra* note 370, at 3–11.

DIAGRAM 4: USING THE PERSONAL JURISDICTION  
PARADIGM TO CONCEPTUALIZE LEGISLATIVE  
JURISDICTION RULES:

		CAUSE OF ACTION	
		CONNECTED	UNCONNECTED
TYPE OF CONTACT	CONTINUOUS & SYSTEMATIC	Quadrant I  Continuous & Systematic Contact  &  Connected Cause of Action	Quadrant III  Continuous & Systematic Contact (Quantity Focus)  &  Unconnected Cause of Action (Quality Focus) <i>[+forum/plaintiff or forum/transaction relationship]</i>
	SINGLE OR OCCASIONAL	Quadrant II  Single or Occasional Contact (Quality Focus)  &  Connected Cause of Action (Quality Focus)	Quadrant IV  Single or Occasional Contact  &  Unconnected Cause of Action

In Youngblood's approach, the "minimum contacts" theory as distilled from *International Shoe* also explains the scenarios and outcomes in the *legislative jurisdiction* question. Where the non-resident defendant has systematic and continuous contacts with the forum state, legislative jurisdiction surely exists for the forum state to apply its law to a cause of action that arises out of those contacts. Legislative jurisdiction likewise exists, albeit, at a more marginal level, to apply forum law to causes of action that arise out of single or occasional contacts. If the cause of action is unconnected to the forum state, then continuous and systematic contacts between the forum and the non-resident defendant must exist to justify application of forum law; however, Youngblood

points out that the standard under *Allstate* is more generous than it is under *Helicopteros Nacionales de Colombia, S.A. v. Hall*, which was decided shortly before Youngblood published her article, or under the more recent decision in *Goodyear Dunlop Tires Operations, S.A. v. Brown*. For most cases, however, using *Allstate*'s "legislative jurisdiction" approach to implementing a *lex fori* choice-of-law rule will be quite easy. Indeed, the threshold is a low one, and the Supreme Court defined its floor in *Allstate*.<sup>384</sup>

Thus, the basis for a "to-the-limits" choice-of-law statute is clearly shown. Provided that the courts use the statute in accordance with *Allstate*, there will never be another choice-of-law problem nor an unconstitutional assertion of legislative jurisdiction. Those who teach only conflict of laws will have one less state on which to expiate.

Beguiling, isn't it? Indeed, Georgia can become a path-setter. Taking a cue from long-arm statutes, Georgia can become the first state in the United States to adopt a "to-the-limits of Due Process" (and Full Faith & Credit) choice-of-law statute. Such a statute would essentially provide that Georgia courts shall be empowered to apply Georgia law to any dispute which has minimum contacts with Georgia sufficient to create a state interest in Georgia to apply its own law to the dispute within the framework of analysis that is implicit in *Allstate*. As Professor Youngblood demonstrated thirty-five years ago,<sup>385</sup> the U.S. Supreme Court's legislative jurisdiction jurisprudence has come to mirror the technique and approach of the Court's personal jurisdiction jurisprudence.<sup>386</sup>

Drafting the statute itself is a straightforward task, using Youngblood's insights coupled with the "to-the-limits" long-arm statutory language. An early—and famous—edition of a "to-the-limit-of-Due-Process" long-arm statute was enacted by California in 1969, and became effective in 1970.<sup>387</sup> The statute, which has remained

<sup>384</sup> Van Detta, *The Irony of Instrumentalism*, *supra* note 373, at 514; see Youngblood, *supra* note 370, at 35. In Quadrant III, Professor Youngblood opines, to satisfy the due process requirements, the exercise of legislative jurisdiction must be based not only on the defendant's forum contacts, but also on substantial contacts between the forum and either the plaintiff or the transaction at issue. *Id.* at 49. In her view, that additional set of relationships justifies the exercise of the state's regulatory powers in Quadrant III cases. *Id.*

<sup>385</sup> See generally Youngblood, *supra* note 370. Professor Youngblood taught conflict of laws to Professor Van Detta in Spring Semester 1987.

<sup>386</sup> *Id.* at 38 (citing James Martin, *Personal Jurisdiction and Choice of Law*, 78 MICH. L. REV. 872, 872 (1980)).

<sup>387</sup> CAL. CIV. PROC. CODE § 410.10 (West 1969). See also John A. Gorfinkel & Richard A. Lavine, *Long-Arm Jurisdiction in California Under New Section 410.10 of the Code of Civil Procedure*, 21 HASTINGS L.J. 1163, 1165–66 (1970). California is one of six states to extend the reach of its long-arm statute to the limits of due process by legislative

unchanged in the fifty years since its enactment, simply says:

A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.<sup>388</sup>

The authors suggest a similarly Spartan, focused statute for Georgia's choice-of-law:

A court of this state may apply Georgia law in any civil case to the full extent permitted by the Constitution of this State and of the United States.

This statute would be a very polite and uncluttered way of saying, "Georgia is a *lex fori* state. All who sue or are sued here shall expect Georgia law to apply, unless it is one of those incredibly rare cases with so little connection to Georgia that the rule of *Allstate* would be violated."<sup>389</sup>

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enactment, rather than judicial interpretation. See Douglas D. McFarland, *Dictum Run Wild: How Long-Arm Statutes Extended To The Limits Of Due Process*, 84 B.U.L. REV. 491, 528–29 (2004) (highlighting California, New Jersey, Pennsylvania, Rhode Island, Vermont, and Wyoming as the six states to extend the reach of their long-arm statutes to the limits of due process). Of the six original states, Rhode Island enacted its statute first, in 1960. *Id.* at 528 n.176. As of Professor McFarland's writing, twenty states had adopted long-arm statutes that, by their statutory terms, extended their reach "to the limits" of due process. *Id.* at 528. Twelve additional states had enumerated long-arm statutes that, despite the limiting statutory language, the state courts (or federal courts sitting in diversity) had interpreted the statute to reach the limits of due process. See *id.* at 525–27. The problem of judicial extension of enumerated long-arm statutes to the limits of due process is discussed in Jeffrey A. Van Detta & Shiv K. Kapoor, *Extraterritorial Personal Jurisdiction For The Twenty-First Century: A Case Study Reconceptualizing the Typical Long-Arm Statute to Codify and Refine International Shoe After Its First Sixty Years*, 3 SETON HALL CIR. REV. 339, 345–46 (2007).

<sup>388</sup> CAL. CIV. PROC. CODE § 410.10 (West 1969).

<sup>389</sup> The parameters illustrated in Diagram 4, discussed by Professor Youngblood, *supra* note 370, at 6, and by Van Detta & Kapoor, *supra* note 387, at 387–88, could be formatted into official comments to accompany the statute. The statute could even include a set of presumptions, or the legislature might choose to include them in official comments. These might be helpful to Georgia judges—trying to adapt their thinking to the new, forthright *lex fori* approach—to stay within the broad constitutional limits. For example, in further refining Professor Youngblood's thinking on *International Shoe*, Professor Van Detta offered the following table of presumptions corresponding to the four combinations of level of contacts and connectedness of cause of action discussed in Chief Justice Stone's *International Shoe* opinion:

There is no shame to a *lex fori* approach, provided that it is done both (1) openly, rather than surreptitiously, and (2) within the wide berth of the constitutional limits on choice of law created by the interaction of the Due Process and Full Faith and Credit Clauses. While some have cast doubt on whether *lex fori* should be enumerated among the recognized choice-of-law methodologies (supposedly because it involves next-to-no method),<sup>390</sup> others have long treated it as a valid approach.<sup>391</sup> At least two states (at one time, three<sup>392</sup>) have openly

THE PRESUMPTIONS AS TO PERSONAL JURISDICTION RAISED BY THE 4 POSSIBLE VARIABLE COMBINATIONS OF *INTERNATIONAL SHOE*

Litigation Event Quadrant	Applicable Presumption
Quadrant I	Unrebuttable presumption of personal jurisdiction
Quadrant II	Rebuttable presumption—personal jurisdiction <i>exists</i> only if the claim for relief is closely connected [“arises out of”] the defendant’s forum contacts.
Quadrant III	Rebuttable presumption— <i>no</i> personal jurisdiction unless quantity of contacts is so substantial that the nonresident defendant can be said to be “doing business” in the forum as if it were a forum citizen.
Quadrant IV	Unrebuttable presumption of no personal jurisdiction.

See Van Detta & Kapoor, *supra* note 387, at 399–400. The authors see the legislative jurisdiction inquiry in *Allstate* as amenable to this kind of interpretation, except that the presumptions will be one of whether the forum state has legislative jurisdiction to prescribe *lex fori* as the law governing all issues in the litigation. But the authors question whether it will be necessary. Provided that there is at least one constitutionally relevant contact in common between Georgia, the parties, and the litigation, Georgia is constitutionally authorized to apply *lex fori*. Thus, this further refinement for personal jurisdiction cases would seem rarely to be brought into play for a choice-of-law statute founded on *Allstate*.

<sup>390</sup> Simpson, *supra* note 12, at 819–20, 834 (discussing the Georgia Supreme Court’s reason for declining to adopt a more modern choice-of-law doctrine in *Medical Center*).

<sup>391</sup> See, e.g., SYMEON C. SYMEONIDES & WENDY COLLINS PERDUE, CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL: CASES AND MATERIALS 261–66 (4th ed. 2019) (discussing various courts’ adoption of *lex fori*).

<sup>392</sup> Nevada has used the *lex fori* approach in the past. *Motenko v. MGM Dist., Inc.*, 921 P.2d 933, 935 (Nev. 1996) (“[T]he law of the forum . . . governs in a tort case, unless another state has an overwhelming interest.”); Symeon C. Symeonides, *Choice of Law in the American Courts in 1996: Tenth Annual Survey*, 45 AM. J. COMP. L. 447, 448–51 (1997). See also *Nw. Pipe Co. v. Eighth Judicial Dist. Court*, 42 P.3d 244, 245 (Nev. 2002) (adopting Nevada’s modified approach to *lex fori*); Symeon C. Symeonides, *Choice of Law in the American Courts in 2001: Fifteenth Annual Survey*, 50 AM. J. COMP. L. 1, 9–11 (2002). For cases decided under the *Motenko* approach, see generally *Kohlrantz v. Oilmen Participation Corp.*, 441 F.3d 827 (9th Cir. 2006) (involving tortious abuse of process); *Fifty-Six*

identified their torts choice-of-law methodology as *lex fori*,<sup>393</sup> and leading theorists have strongly advocated for *lex fori* to be at the epicenter of choice of law.<sup>394</sup> One of those theorists in the post-World War II era, Professor Ehrenzweig, wrote of how an honest reappraisal of choice of law would celebrate *lex fori* as its centering foundation:

Once a court has taken jurisdiction, it will usually apply its own law, unless the parties' own choice or an important foreign fact, such as a foreign domicile, a foreign situs, or a foreign conduct, appears to require application of another law. Most judges and lawyers will agree with this simple proposition—and yet text books, class notes, the Restatement, and even much language of the courts, would have it otherwise: foreign domicile, foreign situs, foreign conduct and other foreign

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Hope Rd. Music, Ltd. v. Mayah Collections, Inc., No. 2:05-CV-01059-KJDGWF, 2006 WL 1687451 (D. Nev. June 16, 2006) (involving tortious infringement of post-mortem publicity rights). The Nevada court found the approach more challenging to apply than it should have. See Symeon C. Symeonides, *Choice of Law in the American Courts in 2001: Fifteenth Annual Survey*, 50 AM. J. COMP. L. 1, 74–75 (2002). A decade later, the Nevada Supreme Court revisited the issue, and eschewed *lex fori* in torts in favor of adopting the Restatement (Second) Conflict of Laws provisions for tort conflicts. See generally Gen. Motors Corp. v. Eighth Judicial Dist., 134 P.3d 111 (2006); Symeon C. Symeonides, *Choice of Law in the American Courts in 2006: Twentieth Annual Survey*, 54 AM. J. COMP. L. 697, 699–701 (2006).

<sup>393</sup> Symeon C. Symeonides, *Choice of Law in the American Courts in 2018: Thirty-Second Annual Survey*, 67 AM. J. COMP. L. 1, 36 (2019); see, e.g., Foster v. Leggett, 484 S.W.2d 827 (Ky. 1972); Sutherland v. Kennington Truck Serv. Ltd., 562 N.W.2d 466 (Mich. 1997). See also Willis L.M. Reese, *The Kentucky Approach to Choice of Law: A Critique*, 61 KY. L.J. 368 (1973).

<sup>394</sup> See, e.g., Albert A. Ehrenzweig, *Lex Fori—Basic Rule in the Conflict of Laws*, 58 MICH. L. REV. 637, 643–45 (1959–1960); Albert A. Ehrenzweig, *A Proper Law in a Proper Forum: A "Restatement" of "Lex Fori Approach"*, 18 OKLA. L. REV. 340, 344–45 (1965); Albert A. Ehrenzweig, *Savigny and the Lex Fori, Story and Jurisdiction: A Reply to Professor Briggs*, 53 CALIF. L. REV. 535, 536 (1965) (responding to criticism of his support for *lex fori*); see, e.g., Michael S. Green, *Legal Realism, Lex Fori, and the Choice-of-Law Revolution*, 104 YALE L.J. 967, 990 (1995) (defending Brainerd Currie's advocacy of *lex fori*); Luther L. McDougal III, *The Real Legacy of Babcock v. Jackson: Lex Fori instead of Lex Loci Delicti and Now It's Time for a Real Choice-of-Law Revolution*, 56 ALB. L. REV. 795 (1993); Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357, 370–72 (1992). It is here, once again, that we find how *International Shoe*, as Professor Youngblood postulated, intersects with legislative jurisdiction and *lex fori*; as Professor Juenger observed, "Ehrenzweig's forum preference is partly motivated by the consideration that, in view of modern long-arm legislation, the *lex fori* rule 'will usually result in the plaintiff's option to choose the law most favorable to him.'" Friedrich Juenger, *Choice of Law in Interstate Torts*, 118 U. PA. L. REV. 202, 228 & n.187 (1969 (quoting ALBERT A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS 555 (1962))).

'contacts' are said a priori to require application of a foreign law, unless the court can be persuaded for special reasons to turn to its own law or to the law chosen by the parties. This blatant discrepancy between the actual doing of the courts and 'official' theory in the law of conflict of laws has made an awesome mystery or an object of ridicule of this subject in the eyes of many. The time has come for a stock taking and re-evaluation of accepted techniques in the light of practical needs, history and comparison.<sup>395</sup>

Indeed, Ehrenzweig aptly presaged *Allstate* in observing that the task was simply determining whether one has "a *forum legis*, i.e., a forum which, owing to its contacts with parties or case, can properly apply its own law."<sup>396</sup> While at the margins such an approach can be as intellectually challenging as any other, it would "at least be a[menable] to build[ing] anew, unhampered by the ghosts of five hundred years of obsolete doctrine."<sup>397</sup>

## VII. CONCLUSION

Georgia's choice-of-law methodology is in a state of decidedly reactionary disorder. When so many other areas of Georgia law have been rapidly advanced in the last decade, choice of law took a great leap backwards in 2017. Georgia's notions about choice of law as expressed in *Coon v. Medical Center* have made the state a backwater within the "dismal swamp" of choice-of-law methodology, as the legendary William L. Prosser once famously dubbed the subject.<sup>398</sup>

The authors certainly do not condemn Georgia courts for "getting to *lex fori*" whenever possible. That is neither a disagreeable nor improper pursuit. In fact, it is what almost all state courts do in almost every choice-of-law decision, truth be told. No, the authors are in no way opposed to a *lex fori* approach. They do, however, oppose

<sup>395</sup> Ehrenzweig, *The Lex Fori—Basic Rule in the Conflict of Laws*, *supra* note 394, at 637; see also Albert A. Ehrenzweig, *A Proper Law in a Proper Forum*, *supra* note 394.

<sup>396</sup> Ehrenzweig, *A Proper Law In A Proper Forum*, *supra* note 394, at 352.

<sup>397</sup> *Id.* The authors recognize that their proposal goes further than the vision articulated by Ehrenzweig, and that they would apply a "to the Constitutional limits *lex fori* statute" across the board to all choice-of-law cases (i.e., well beyond torts, to include contracts and other matters). See generally *id.* at 351–52. But that candor and uniformity is worth the risk of upending some comfortable rules from the past, such as *lex incorporationis*. See David M. Majchrzak, *Corporate Chaos: Who Should Govern Internal Affairs*, 24 T. JEFFERSON L. REV. 83, 84–86 (2001) (discussing the doctrine of *lex incorporationis*).

<sup>398</sup> William L. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953).

distortion of legal doctrine to preserve an illusion that a court is doing one thing when it in fact is doing something quite different. To claim the virtues of supposedly impartial rules while using them instrumentally to achieve substantive results is not a worthy pursuit. Courts should own up to it, rather than rationalize behind veils of mystery and history.

For some time now, our state's courts have been making liberal use of the public policy escape device in a vain attempt to avoid admitting (either to themselves or to the bar) that they lean *lex fori*. However, that might be termed the good news. For in 2017, the picture became decisively worse.

Even the most perfunctory examination of the *Medical Center* decision reveals flaws. Our closer examination here shows the full implications of those flaws. The Georgia Supreme Court's deviation from the course is so severe, and so intractable, that decisive legislative action is the only way forward. A deviation grounded in antebellum precedent of a most questionable pedigree—mired as it is in an era of slavery law and quite possibly the product of a strong forum bias to keep more humane sister-state laws on emancipation at bay—is one that should join other discredited antebellum notions in legal history's burgeoning dust-bin.<sup>399</sup>

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<sup>399</sup> *Medical Center* is yet another case exemplifying “legal monumentalism.” This was identified some years ago by Professor Norman Warren Spaulding as the problem of “monument and countermemory.” See Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992, 2004–08 (2003). After hearing Professor Spaulding present this article at the AALS Annual Meeting in Atlanta, Georgia, in January 2004, Professor Van Detta elaborated his concept into the following analytic template:

Professor Spaulding's theory of monument-countermemory can be extrapolated into the following terms: Monumentalism is a judicially created *lethe*—the Greek word for ‘forgetfulness’—by which societies (and the legal community) pour painful historical *mneme*—painful memories and persistent problems that stem from those painful memories—into the casements of grand monumental edifices to swallow them up, merging them into the edifices and thereby providing *paraphasis*, or consolation. Thus, my schema of monumentalism is composed of three discrete components—*mneme*, *lethe*, and *paraphasis*.

Jeffrey A. Van Detta, *Requiem For A Heavyweight: Costa As Countermonument To McDonnell Douglas—A Countermemory Reply To Instrumentalism*, 67 ALB. L. REV. 965, 967–69, 967 n.11 (2004) (internal citations omitted). In particular, what the twenty-first century *Medical Center* decision does with respect to the slavery-tainted element of antebellum jurisprudence is akin to “the Rehnquist Court's reading of Reconstruction out of our history while supposedly returning to ‘first principles’ to interpret state immunity under the Eleventh Amendment . . . .” See *id.* at 967, 967 n.14.



At this point, the Georgia Legislature will need to step up and cut this Gordian knot. How to do so is the critical question. The waning days of the Burger Court show the way. In 1981, the U.S. Supreme Court defined the limits of legislative jurisdiction in which choice-of-law must operate by requiring that before applying *lex fori*, a state must have minimum contacts with the forum, the parties (particularly a non-resident defendant), and the litigation.<sup>400</sup> The optimum solution, therefore, is simply making the due process and full faith and credit limits of legislative jurisdiction the test for permitting Georgia to apply *lex fori* in each case in which a choice-of-law issue presents itself. The Georgia Legislature can accomplish this by enacting the “to-the-limits” choice-of-law statute that the authors have tendered in a mere twenty-nine words:

*A court of this state may apply Georgia law in any civil case to the full extent permitted by the Constitution of this State and of the United States.*

Adopting the “to-the-limits” choice-of-law statute does not, however, change the outcome for a victim of an egregious tort such as Amanda Rae Coon. Her fate—infliction of severe and heart-rending emotional distress upon her, followed by subjugation to Georgia’s antiquated law on negligent infliction of emotional distress—was sealed when her well-meaning Alabama doctors referred her to a Georgia hospital, and she thereby created a constitutionally cognizable contact that would, consistent with the Full Faith and Credit Clause of Article IV and the Fourteenth Amendment’s Due Process Clause, empower Georgia to apply its law to her claim. And in so doing, the Georgia courts ended her quest for justice. Yet, at least the process by which this unhappy result was visited on a blameless victim would be, under a “to-the-limits” choice-of-law statute, predictable, transparent, consistent, and rational. That is a good deal more than can be said for *Coon v. Medical Center, Inc.*

The time has come for the Georgia Legislature to cut the ties of Georgia’s choice-of-law doctrine to a troubling antebellum past unwittingly resurrected by the *Medical Center* decision.<sup>401</sup> A constitutional-

<sup>400</sup> Allstate Ins. Co. v. Hague, 449 U.S. 302, 308 (1981).

<sup>401</sup> One has to wonder what Professor Currie would have made of the *Medical Center* decision. His commentary would no doubt have been most memorable, as the remembrances of those who knew him best suggest. For example, California Supreme Court Justice Roger Traynor recalled,

It is relevant to Brainerd Currie’s special concerns with the laws

limits choice-of-law statute would implement Professor Currie's groundbreaking reconceptualization of the choice-of-law problem as one best served by examining a state's interest in applying its own law in its own courts whenever there is a constitutional basis for doing so. The statute proposed by the authors should be introduced by a bill put before the Georgia Legislature and enacted by that body *post haste*.

In so doing, the Georgia Legislature can finally bring home, in a most meaningful way, a prodigal son of this State, the late Professor Brainerd Currie; and at last do that prophet the honor in his own land that his lifetime of work merits.

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of the land, as to much else in his life, that he was born and brought up in the South. One does not leap from such detail to facile characterization of either the procedures or the substance of his work; stereotypes are archaic in an age of near, though not quite bright enlightenment, and heredity, with its myriad quirks, still appears to have the last laugh on more or less identifiable environments. Nonetheless a man of genius is better able than most to be father to the child, to know by heart the inflections of speech and manner of the child's region, to draw upon his special knowledge of home even when he is at great remove from it.

Brainerd Currie came from the region whose society was seemingly the most settled in the United States and in reality the most unsettled. Tumult lay close to the surface of its convivial living . . .

Elvin R. Latty, *Brainerd Currie—Five Tributes*, 1966 DUKE L.J. 2, 10 (1966). How would Currie, a native son also educated in his birth state of Georgia, have seen a reactionary return by that State's highest court to antebellum notions of the nature of the common law? Sparks would have flown, one thinks, based on this souvenir of Currie recalled by Philip Kurland, one of his well-known colleagues on the University of Chicago law faculty: "This is not to suggest that Brainerd Currie did not frequently display a sharp and pungent wit. His prime targets, however, were pomposity and pedantry." *Id.* at 6.