University of Dayton Law Review

Volume 10 | Number 1 Article 5

10-1-1984

Choice of Law and the Corporation: The United States Supreme Court Expands the Doctrine of Public Policy

Roy E. Smith

CHOICE OF LAW AND THE CORPORATION: THE UNITED STATES SUPREME COURT EXPANDS THE DOCTRINE OF PUBLIC POLICY

*Roy E. Smith**

I. INTRODUCTION

The doctrine of public policy has caused havoc in choice of law problems for approximately 150 years. Justice Burrough forewarned that public policy "is a very unruly horse, and when once you get astride it you never know where it will carry you."[1] In 1846, Justice Story set forth his theory on choice of law, generally referred to as "comity,"[2] and stated:

> No nation can be justly required to yield up its own fundamental policy and institutions, in favor of those of another nation. Much less can any nation be required to sacrifice its own interests in favor of another; or to enforce doctrines, which, in a moral, or political view, are incompatible with its own safety, or happiness, or conscientious regard to justice and duty.[3]

Despite Burrough's warning, and the inherent problems in public policy doctrine, courts in the United States, including the United States Supreme Court, have continued to rely upon and expand the role of public policy in determining choice of law questions. Through Beale's theory of vested rights[4] and up to von Mehren's "conflicts justice,"[5] and von Mehren and Trautman's "regulating rules,"[6] the doctrine of public policy has thrived in choice of law analysis.

It is the purpose of this article to examine choice of law theories and the public policy doctrine as applied to the concept of corporate status in *First National City Bank v. Banco Para El Comercio Exterior de Cuba.*[7] In *Banco,* the United States Supreme Court relied upon

---

* Member, California and Nevada Bars. B.A., Wayne State University (1973); J.D., Wayne State University (1976); LL.M., Cambridge University (1984).

1. *See* Katzenbach, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law,* 65 YALE L.J. 1087, 1087 (1956) (quoting Justice Burrough in Richardson v. Mellish, 130 Eng. Rep. 294, 303 (1824)).

2. *Id.* at 1102.

3. *Id.* at 1104 (quoting J. STORY, CONFLICT OF LAWS 35 (3d ed. 1846)).

4. *See generally* J. BEALE, TREATISE ON THE CONFLICT OF LAWS (1935).

5. *See infra* text accompanying notes 92–95.

6. *See infra* text accompanying notes 96–98.

7. 505 F. Supp. 412 (S.D.N.Y. 1980), *rev'd,* 658 F.2d 913 (2d Cir. 1981), *rev'd,* 103 S. Ct. 2591 (1983). "Bancec" will be used to refer to the Cuban government instrumentality and "Citibank" will be used to refer to First National City Bank. The *Banco* decision has been noted by

choice of law and public policy to impose corporate responsibility on a government instrumentality for the Cuban expropriations. The focus of this article must be duly limited. It is beyond the scope and purpose of this discussion to consider the vitality of the Foreign Sovereign Immunities Act of 1976,[8] or the act of state doctrine,[9] or to examine the illegality of the Cuban expropriations,[10] or the duty to compensate for a taking of property as prescribed by international law.[11] Instead, the Supreme Court's development of a federal choice of law rule designed to reach a "just" result merits extended consideration.

II. FIRST NATIONAL CITY BANK V. BANCO PARA EL COMERCIO EXTERIOR DE CUBA: THE FACTS AND LITIGATION HISTORY

A. Factual Development

At the time of the Cuban revolution, United States citizens and corporations had significant investments in Cuba.[12] Several United States banks, including Citibank, had local branch offices in Cuba and, in addition, had extensive loan agreements and other commercial relations within Cuba.[13] While diplomatic relations between the Republic of Cuba and the United States did not terminate immediately following Fidel Castro's rise to power, relations certainly suffered. Shortly after the revolution, the United States enacted legislation which precluded importation of Cuban sugar.[14] Apparently as a result of this anti-import legislation, in July, 1960, the Cuban government passed legislation nationalizing all Cuban properties of United States citizens.[15] Subsequently, on September 17, 1960, Cuba adopted a resolution which specifically "nationalized through forced expropriation"[16] the Cuban properties of several United States banks, including Citibank. Finally, on October 13, 1960, the Cuban government passed the "Bank Nation-

---

other commentators. 78 AM. J. INT'L L. 230 (1984); 25 HARV. INT'L L.J. 212 (1984); 16 VAND. J. TRANSNAT'L L. 1130 (1983).

8. 28 U.S.C. §§ 1602–11 (1982).

9. For a discussion of the historical development of the act of state doctrine in the United States (including statutory modification of the doctrine), see Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875 (2d Cir. 1981).

10. The position of United States courts that the Cuban expropriations were a clear violation of international law is discussed in *Banco*, 505 F. Supp. at 429.

11. For a general discussion on the duty to compensate, see *Banco*, 505 F. Supp. at 431.

12. *See id.* at 420.

13. *See Chase*, 658 F.2d at 878–79.

14. *Banco*, 505 F. Supp. at 420. Under Castro, Cuba, as a sugar-exporting nation, commenced an extensive amount of sugar trading with the Soviet Union. Specifically, Cuba entered into a series of exchange agreements whereby sugar was exchanged for merchandise, including armaments produced in the Soviet Union. *Id.*

15. *Id.*

16. *Banco*, 103 S. Ct. at 2594; *Chase*, 658 F.2d at 878.

alization Law" which declared that banking could only be carried on by Cuban-created instrumentalities.[17]

Banco Nacional was ordered to give effect to the nationalization decree on behalf of the government.[18] Banco Nacional's status as an independent corporation was subject to question even before the revolution. Initially, the government of Cuba issued fifty percent of Banco Nacional stock while private banks held the remaining shares.[19] In addition to appointing the bank president and three of the five directors, the government shared in the bank profits.[20] Nonetheless, under Cuban law, Banco Nacional had a legal personality and was a separate juridical entity: Banco Nacional was capable of suing and being sued; it was not responsible for the obligations of the Cuban government, nor was the government responsible for Banco Nacional's debts because the bank's liability was limited to its own capital and assets.[21]

Following the Cuban revolution and the resulting economic, social, and political changes, "[t]here was a studied effort to preserve a continued corporate existence, while reorganizing the central bank to conform it to the new order."[22] There were, however, significant changes: first, Banco Nacional stock was wholly owned and controlled by the Cuban government; and second, pursuant to the Bank Nationalization Law, Banco Nacional administered the takeover of United States bank assets.[23] In administering nationalized bank assets, Banco Nacional thus played a significant role in the expropriating scheme.

In contrast to the development of Banco Nacional, Bancec was not established until April, 1960.[24] The Cuban government owned all of Bancec's stock and contributed one hundred percent of its capital.[25] Bancec's president was Che Guevara—who also served as post-revolu-

---

17. *Banco*, 103 S. Ct. at 2594.

18. *Banco*, 505 F. Supp. at 422.

19. *Id.* at 421. Banco Nacional was organized in 1948 as the central bank of Cuba. Similar to the Federal Reserve system in the United States, Banco Nacional "exercised administrative and fiscal powers of government over private banking," as well as having the powers of a commercial financial institution engaging in national and international banking. *Id.* at 420.

20. *Id.* at 421.

21. *Id.* It is significant to note that the relationship between Banco Nacional and the Cuban government, even prior to the revolution, conferred upon Banco Nacional the sole power to issue currency, fix maximum interest rates for private banks, and represent the Cuban government in the International Monetary Fund. *Id.*

22. *Id.*

23. *Id.* at 421–22.

24. *Banco*, 103 S. Ct. at 2593. Bancec was organized by the Castro regime as a successor to Banco Cubano del Comercio Exterior, which was a trading bank with an ownership scheme similar to Banco Nacional's. Under Cuban law, Bancec was established as an autonomous foreign trading credit institution, was responsible for advising Cuba on foreign trade, and was in fact authorized to act as the Cuban government's exclusive agent in foreign trade. *Id.*

25. *Id.*

tion president of Banco Nacional—and all of Bancec's profits were distributed to the Republic of Cuba's general treasury.[26]

Bancec, in August of 1960, entered into an agreement for the sale of sugar to the Cuban Canadian Sugar Company.[27] The sales agreement was supported by an irrevocable letter of credit issued by Citibank in favor of Bancec.[28] Bancec assigned the Citibank irrevocable letter of credit to Banco Nacional for collection, and on September 15, 1960, Banco Nacional submitted the letter of credit to Citibank for payment.[29]

Two days later, however, the nationalizations—which included Citibank's assets—occurred. On September 20, 1960, Citibank credited Banco Nacional's account for $193,280 and then "applied the balance in Banco Nacional's account as a setoff against the value of its Cuban branches."[30] Simply stated, Bancec delivered $193,280 worth of sugar to the Cuban Canadian Sugar Company, and Citibank then retained the $193,280 to set off against the value of its expropriated assets rather than pay Banco Nacional, an assignor of Bancec.

B. Litigation History

On February 1, 1961, Bancec filed an action,[31] based on federal diversity jurisdiction, for collection of the $193,280 letter of credit issued by Citibank. Citibank filed an answer seeking a setoff for the value of its assets seized as a result of the expropriations.[32] Citibank, therefore, sought a setoff against Bancec—a separate juridical entity under Cuban law—for the actions of the Republic of Cuba. Approximately three weeks after filing suit, on February 23, 1961, Cuba dissolved Bancec and distributed its stock to Banco Nacional and the foreign trade ministry. All of Bancec's rights, claims, and assets in the field of banking were disbursed to Banco Nacional, while all trading functions were disbursed to the foreign trade ministry.[33]

---

26. *Id.*
27. *Id.*
28. *Id.* at 2593–94.
29. *Id.* at 2594.
30. *Id.*
31. For an understanding of the protracted and complex procedural history of this case, see Banco Nacional de Cuba v. First National City Bank, 270 F. Supp. 1004 (S.D.N.Y. 1967), *rev'd*, 442 F.2d 530 (2d Cir. 1971), *rev'd*, 406 U.S. 759, *reh'g denied*, 409 U.S. 897 (1972), *on remand*, 478 F.2d 191 (2d Cir. 1973).
32. *Banco*, 103 S. Ct. at 2594.
33. *Id.* The Cuban Foreign Trade Ministry further complicated the corporate scenario by transferring former Bancec responsibility in commercial export activities to Empresa Cubana de Exportaciones, a Cuban corporation formed on March 1, 1961. This corporation was dissolved on December 29, 1961, with a reassignment of Bancec responsibility in foreign commerce to Empresa Cubana Exportadora de Azucar y sus Derivados, a Cuban corporation formed on January 1, 1962.

Trial was held in federal district court,[34] and a judgment was entered for Citibank. Based on equitable principles and a recognition of the practicalities of the situation, the district court held that Bancec was an alter ego of the Republic of Cuba, and therefore disregarded Bancec's separate corporate personality. The Cuban nationalization decrees had previously been declared to violate international law and the public policy of the United States; as a result, Citibank was entitled to a setoff for the value of expropriated Cuban assets, which was not to exceed the value of the letter of credit.[35]

On appeal, the Second Circuit Court of Appeals reversed and remanded for further proceedings in the district court. Under Cuban law, Bancec was established as a separate and distinct legal entity and was not an alter ego of the Cuban government. The court of appeals held that Citibank could not assert a setoff against a separate corporate entity based upon the government's illegal expropriations.[36] The court of appeals recognized the general rule that the laws of the creating state that confer separate and distinct status will normally be respected. The court noted, however, that there are circumstances when the separate corporate form may be disregarded. While not expressly following a "piercing the corporate veil" theory, the court of appeals indicated that the corporate veil will be disregarded when the state and the state instrumentality act collectively, and when the state instrumentality performs a "key role" in the state activity.[37] Under this formula, the court distinguished Banco Nacional from Bancec: Banco Nacional was an alter ego of the Cuban government because it actually administered the takeover of bank assets under the nationalization decrees; Bancec, however, was primarily responsible for foreign trade and had no role in the expropriation. Therefore, the court reasoned that Bancec was not an alter ego of the government and its separate corporate status under Cuban law must be recognized.[38]

Bancec's separate corporate status became the focal point of the Supreme Court's decision. The Supreme Court stated: "We must next decide which body of law determines the effect to be given to Bancec's

---

At the time of trial, therefore, it appears that Banco Nacional and Empresa Cubana Exportadora were the successors to the rights and duties of Bancec. To prevent further complications, however, the district court denied a pretrial motion to substitute proper parties in interest. *Id.* at 2494–95.

34. The presiding judge, United States District Court Judge vanPelt Bryan, died prior to rendering a decision. This case and several other cases involving the Cuban expropriations were therefore assigned to United States District Court Judge Brieant for decision on the trial record. *See Banco*, 505 F. Supp. at 418.

35. *Id.* at 428.

36. *Banco*, 658 F.2d at 916.

37. *Id.* at 919.

38. *Id.* at 918.

separate juridical status."[39] Thus, in terms of choice of law, there was an implicit recognition that respect for Bancec's corporate personality was, in fact, deference to the laws of Cuba, while disregard of the separate status was, in effect, a rejection of Cuban law.

Several alternative theories were presented to the Court, including application of Cuban law, the law of the state of New York, international law, and federal common law.[40] After rejecting application of New York law,[41] the Supreme Court considered the general choice of law rule that the internal affairs of corporations are determined according to the laws of the place of incorporation. The Court rejected the internal affairs rule and held that when the rights of third parties are adversely affected, external rather than internal corporate affairs are in issue, and different choice of law rules prevail.[42]

Regarding the suggestion that international law or federal common law be applied, the Supreme Court laid the foundation for creating a federal choice of law rule based on arriving at a "just" result. By applying *The Paquete Habana*[43] rule that federal common law includes international law, the Court held that the issue of Bancec's corporate status would be determined under principles shared by international law and federal common law.[44] Clearly, the Supreme Court believed the Cuban expropriations were in violation of international law and the public policy of the United States.[45] In light of the presumed illegality of the expropriations, therefore, the Supreme Court's decision to apply federal common law which embraced international law could lead to but one conclusion: for purposes of setoff, Bancec was responsible for the acts of the Republic of Cuba.

Relying on international law and federal common law, the Supreme Court reversed the court of appeals and disregarded Bancec's separate and shielding corporate status. The Court held:

---

39. *Banco*, 103 S. Ct. at 2597.

40. *Id.* at 2597–98 & n.11.

41. *Id.* at 2597–98 n.11.

42. *Id.* at 2597.

43. The incorporation of international law into the federal common law was first espoused by Justice Gray in The Paquete Habana, 175 U.S. 677 (1900). Speaking for the majority of the Court he wrote: "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." *Id.* at 700.

44. *Banco*, 103 S. Ct. at 2598. While *Banco* technically involved the separate status of governmental instrumentalities, the Supreme Court's analysis and, indeed, the analysis of this article rely on private corporation law. In deciding to apply federal common law, the Supreme Court expressly refers to private corporation law authorities. *See id.* at 2601 nn.19 & 20. Moreover, the Court acknowledges that the question of the separate status of government entities had not previously been before the Court. *Id.* at 2598 n.12.

45. *See id.* at 2597, 2601–03.

> Giving effect to Bancec's separate juridical status in these circumstances, even though it has long been dissolved, would permit the real beneficiary of such an action, the Government of the Republic of Cuba, to obtain relief in our courts that it could not obtain in its own right without waiving its sovereign immunity and answering for the seizure of Citibank's assets—a seizure previously held by the Court of Appeals to have violated international law. We decline to adhere blindly to the corporate form where doing so would cause such an injustice.[46]

Thus, a federal choice of law rule designed to arrive at a "just" decision was created. The Court permitted Citibank's setoff, advancing both equitable principles and United States public policy. To understand how such a choice of law rule was created, however, one must examine the history of conflict of law theory in the United States.

III. Development of Choice of Law Theories in the United States

For approximately 150 years, theoretical problems in choice of law have remained relatively constant. From Story's choice of law theory based on comity,[47] Beale's theory of vested rights,[48] Currie's governmental interest method,[49] up to modern theories envisioned by the *Restatement (Second) of Conflict of Laws*,[50] and by von Mehren and Trautman,[51] choice of law has had two main goals: first, similar treatment of similar cases; and second, the advancement of community interests, purposes, and policies. It is submitted that the United States Supreme Court, in developing a modern federal choice of law rule in *Banco*, has strongly advanced the public policy goal and, indeed, has gone riding on the "unruly horse" of public policy.[52]

Choice of law theory in the United States is still greatly influenced by the traditional doctrine of Professor Beale.[53] Under Beale's vested

---

46. *Id.* at 2603 (footnote omitted). Justices Stevens, Brennan, and Blackmun dissented in part from the majority opinion. The justices did not disagree with the choice of law development, but rather with the application of incomplete facts concerning Bancec's separate status to the selected law. After twenty years of litigation, and confronted with a sparse and uninformative record, the dissenting justices would have remanded for an additional factual determination. *Id.* at 2604–05.

47. *See supra* note 1 and accompanying text.

48. *See infra* text accompanying notes 53–55.

49. *See infra* text accompanying notes 69–72.

50. *See infra* notes 79–83 and accompanying text.

51. *See infra* text accompanying notes 92–99.

52. A recent case which discusses *Banco* at length demonstrates the problems public policy arguments cause in choice of law situations. *See* De Letelier v. Republic of Chile, 567 F. Supp. 1490 (S.D.N.Y. 1983). The court concluded that it must pierce the corporate veil of Chile's national airline in order to comply with "equitable principles." *Id.* at 1496. However, both parties believed that *Banco* supported their respective positions. *Id.* at 1495.

53. Beale's theories are embodied in the Restatement of Conflicts of Laws (1934), for

rights theory, all rights, duties, and obligations became vested and were governed by the laws in a specific territory.[54] Rather than searching for applicable law, the vested rights approach actually selected an appropriate governing system: the law of the place where the facts underlying the dispute occurred.[55]

Beale's vested rights theory, in pursuing uniformity and ease of administration, met its eventual demise: mechanical application of a governing system of law often led to irrational and arbitrary results. Perhaps the classic illustration of the vested rights theory is *Alabama Great Southern Railroad v. Carroll.*[56] In *Carroll,* the plaintiff was a resident of the state of Alabama, and was employed by the defendant railroad company which was an Alabama corporation. During the course and scope of his employment, the plaintiff sustained personal injuries while physically in the state of Mississippi. The place of injury, Mississippi, did not permit a cause of action for the injuries sustained, but Alabama had enacted an employers' liability act.[57] Plaintiff, therefore, filed his action in the state of Alabama.

The Alabama court entered judgment for the defendant railroad company and specifically held that because the injuries occurred in Mississippi, the plaintiff's cause of action or right to sue had to be measured by Mississippi law: "there can be no recovery in one state for injuries to the person sustained in another, unless the infliction of the injuries is actionable under the law of the state in which they were received."[58]

The use of the vested rights approach to choice of law was not limited to Alabama courts. Indeed, the United States Supreme Court stamped its approval on the theory. In *Kryger v. Wilson,*[59] the Supreme Court was confronted with a contract to purchase real property. The contract was between a Minnesota purchaser and a North Dakota seller, and the place of execution and performance was in Minnesota. The real property, however, was in North Dakota.[60]

A dispute arose regarding cancellation of the contract. Apparently, the seller cancelled the agreement in accordance with North Dakota law. The cancellation, however, was in violation of the notice require-

---

which he was the reporter. von Mehren, *Recent Trends in Choice-of-Law Methodology,* 60 CORNELL L. REV. 927, 930 n.5 (1975).

54. Harding, *Joseph Henry Beale: Pioneer,* 2 MO. L. REV. 131, 138 (1937).

55. von Mehren, *Choice of Law and the Problem of Justice,* 41 LAW & CONTEMP. PROBS. 27, 32 (1977).

56. 97 Ala. 126, 11 So. 803 (1892).

57. *Id.* at 129, 11 So. at 805.

58. *Id.* at 130, 11 So. at 805.

59. 242 U.S. 171 (1916).

60. *Id.* at 173-74.

ments of Minnesota law.[61] The Supreme Court indicated that determination of the applicable governing law was a matter for local courts. Thus, North Dakota's characterization of the lawsuit as a real property action subject to the governing law of the situs, rather than a contract action subject to the governing law of the place of contracting and performance, was not reviewable.[62]

Both *Carroll* and *Kryger* are illustrations of judicial acceptance of Beale's theory of vested rights. In addition, it must be remembered that Beale specifically recognized that there would be particular choice of law problems related to corporations.[63] Implicit in Beale's treatise and in early Supreme Court decisions[64] was the view that corporations were the exclusive subjects of the laws of the creating state. Even Beale, however, recognized that under appropriate circumstances the fictitious entity must be subjected to the laws of other states—especially after corporate actions were permitted beyond the territorial confines of the incorporating state.[65] Beale, therefore, concluded that internal affairs of a corporation were governed by the laws of the creating state, but ordinary actions of a foreign corporation within a foreign state would be subject to the laws of the foreign state.[66]

Beale's choice of law theory based on vested rights has been severely criticized.[67] An inherent weakness of vested rights was that the

---

61. *Id.* at 174–75.

62. *Id.* at 176.

63. *See* 2 J. BEALE, *supra* note 1, at 727. Beale adopted the traditional view that a state may "confer personality on a group, so that it shall have a personality of its own, apart from that of its members. . . . The process is called incorporation, and the group a corporation." *Id.*

64. *See* Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819); Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519 (1839). In *Dartmouth College*, Dartmouth had been granted a corporate charter by the King of England in 1769 whereby a private corporation was formed. Following the Revolutionary War, the New Hampshire legislature, without the consent of Dartmouth, altered the corporation's charter making it a public rather than a private corporation. The Supreme Court held that the legislature's act was beyond the scope of New Hampshire's power. The Court explained that a corporation is a mere creature of the law which creates it. 17 U.S. at 636. Therefore, since New Hampshire did not create the corporation under its laws, it had no power to alter the corporation's charter. *Id.*

In *Bank of Augusta*, the issue was whether a corporation could enter into contracts in a foreign state. The Supreme Court emphasized that a corporation is governed solely by the laws of the state which created it, but concluded that the corporation could engage in extrastate contracting as long as such conduct was permitted by the laws of the creating state. 38 U.S. at 588.

65. *See* 2 J. BEALE, *supra* note 1, at 781–82.

66. Beale stated that "[l]aws of a general nature which concern not the inner affairs of the corporation but their manner of doing ordinary acts would usually be held to apply to foreign corporations." *Id.* at 781.

67. *See* A. SHAPIRA, THE INTEREST APPROACH TO CHOICE OF LAW 21–22 & n.76 (1970); *see also* Currie, *The Constitution and Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 11–12 (1958) (criticizing Beale's choice of law method as "irrational altruism").

governing system, which was mechanically applied, was often unrelated or distant from the parties or issues in dispute. Moreover, gimmicks were developed—*renvoi*, recharacterization of the dispute, and classification of disputes as substantive or procedural—to avoid mechanical decisions.[68] Through these manipulative devices, courts deprived the vested rights theory of its main quality: uniformity.

With the demise of vested rights, the search for new choice of law methods commenced. Scholars, however, were long burdened with Beale's theories. As a result, Beale's mechanical vested rights approach was replaced with other mechanical theories. One of the most influential of these theories was the governmental interest method advanced by Professor Currie.[69] Currie's criticism of vested rights focused upon the belief that it was irrational for a state to sacrifice or subordinate a legitimate interest or public policy in favor of the traditional and mechanical application of the laws of another state.[70] Currie's recommendation was based on the "rational pursuit of self interest"[71] in attempting to find the appropriate rule of decision when the interests of two or more states are involved.[72]

---

68. *See* A. SHAPIRA, *supra* note 67, at 15–16.

69. *See* Currie, *supra* note 67, at 9; *see generally* B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963); Hill, *Governmental Interest and the Conflict of Laws—A Reply to Professor Currie*, 27 U. CHI. L. REV. 463 (1959); Currie, *The Verdict of Quiescent Years: Mr. Hill and the Conflict of Laws*, 28 U. CHI. L. REV. 258 (1960).

70. *See* Currie, *supra* note 67, at 10–12.

71. *Id.* at 12. Under the "rational pursuit of self-interest" theory, the forum state is justified in protecting, and indeed should seek to protect, its legitimate governmental interests. *See id.* at 11. In contrast, under Beale's traditional choice of law doctrine, the forum state is required to routinely and systematically sacrifice its own legitimate interests and apply the law of the foreign state when interests conflict. *Id.* at 11–12.

72. Currie proposed:

> 1. Normally, even in cases involving foreign factors, a court should as a matter of course look to the law of the forum as the source of the rule of decision.
>
> 2. When it is suggested that the law of a foreign state, rather than the law of the forum, should furnish the rule of decision, the court should first of all determine the governmental policy—perhaps it is helpful to say the social, economic, or administrative policy—which is expressed by the law of the forum. The court should then inquire whether the relationship of the forum state to the case at bar—that is, to the parties, to the transaction, to the subject matter, to the litigation—is such as to bring the case within the scope of the state's governmental concern, and to provide a legitimate basis for the assertion that the state has an interest in the application of its policy in this instance.
>
> 3. If necessary, the court should similarly determine the policy expressed in the proffered foreign law, and whether the foreign state has a legitimate interest in the application of that policy to the case at bar.
>
> 4. If the court finds that the forum state has no interest in the application of its law and policy, but that the foreign state has such an interest, it should apply the foreign law.
>
> 5. If the court finds that the forum state has an interest in the application of its laws and policy, it should apply the law of the forum even though the foreign state also has such an interest, and, *a fortiori*, it should apply the law of the forum if the foreign state has no such interest.

A basic criticism of Currie's governmental interest method of choice of law was that it always mechanically applied the laws of the forum in the event of conflict. This ignored the fact that selection of a forum, and hence application of a set of laws, may be just as fortuitous as the place of injury under vested rights.[73] As an alternative method, choice of law was sometimes determined by which state had the greatest connection with the facts of the dispute or transaction.[74] Another development was Baxter's principle of comparative impairment which, using governmental interest analysis, held that the state whose "internal objective" would be least impaired should subordinate its interests to another state's laws.[75]

Nonetheless, according to one writer, the governmental interest approach to choice of law has been utilized by the United States Supreme Court for decades.[76] An illustration of a modified governmental interest analysis is *Alaska Packers Association v. Industrial Accident Commission.*[77] In *Alaska Packers,* which involved constitutional choice of law issues concerning the full faith and credit clause, the Supreme Court affirmed an award of workers' compensation benefits under California law to a nonresident alien injured in Alaska. Regarding applicable law, the Court held:

> [T]he conflict is to be resolved, not by giving automatic effect to the full faith and credit clause, compelling the courts of each state to subordinate its own statutes to those of the other, but by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight.[78]

The Supreme Court decision in *Alaska Packers* is significant because it represents the dissatisfaction with Beale's vested rights theory and signifies the shift to a weighing of interests and contacts in choice of law theory. The shift in theory is manifested in the *Restatement (Second) Conflicts of Laws.* Merging interest and contacts analysis, the *Restatement (Second)* specified several factors to determine applicable

---

Id. at 9–10 (footnotes omitted).

73. *See* Baxter, *Choice of Law and the Federal System,* 16 STAN. L. REV. 1, 19 (1963) (citing Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method,* 25 U. CHI. L. REV. 227, 262 (1958)).

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

75. *See* Baxter, *supra* note 73, at 18.

76. *See* Hancock, "*In the Parish of* St. Mary le Bow, *in the Ward of* Cheap," 16 STAN. L. REV. 561, 627–28 n.213 (1964). Hancock adds, however, that although the Supreme Court had adopted and applied the "governmental interest" approach, most state courts have misguidedly failed to follow the Court's lead. *Id.*

77. 294 U.S. 532 (1935).

78. *Id.* at 547.

choice of law: needs of the legal systems; relevant policies and interests of the forum and other states relative to the particular issues in dispute; protection of expectations; policies of the particular area of law in dispute; predictability and uniformity; and, ease in application of selected law.[79] Consideration of these factors leads to application of the laws of the state with the most significant relationship with the dispute.

Not only does the *Restatement (Second)* contain a comprehensive list of factors to assist in choice of law, it also offers specific guidance on choice of law issues pertaining to corporations, and by express provision is applicable to interstate and international disputes.[80] The *Restatement (Second)* generally recognizes the choice of law rule that disputes relating to termination or suspension of corporate existence are determined by the laws of the place of incorporation.[81] The general rule, however, is not subject to mechanical application: the external affairs of a corporation, including rights and liabilities of the corporation to third parties, are subject to the laws of the state with the most significant relationship to the dispute.[82]

The *Restatement (Second)'s* most significant relationship formula is designed to promote a choice of law that is most closely related to the parties, the issues, and the interests of the states concerned with the

---

79. RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 6 (1971).

80. Section 10, "Interstate and International Conflict of Laws," of the RESTATEMENT (SECOND) provides:

> The rules in the Restatement of this Subject apply to cases with elements in one or more States of the United States and are generally applicable to cases with elements in one or more foreign nations. There may, however, be factors in a particular international case which call for a result different from that which would be reached in an interstate case.

Id. § 10. The *Restatement* also discusses recognition of a foreign nation's termination or suspension of corporate existence of an entity incorporated there. *Id.* § 299 comment i. Moreover, the Supreme Court applied the *Restatement (Second)* in *Banco.* 103 S. Ct. at 2597. *See also* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 41 & comment g (1965).

81. RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 299 (1971).

82. RESTATEMENT (SECOND) §§ 301 and 302 provide:

> § 301. Rights Against and Liabilities to Third Persons
>
> The rights and liabilities of a corporation with respect to a third person that arise from a corporate act of a sort that can likewise be done by an individual are determined by the same choice-of-law principles as are applicable to non-corporate parties.
>
> § 302. Other Issues with Respect to Powers and Liabilities of a Corporation
>
> (1) Issues involving the rights and liabilities of a corporation, other than those dealt with in § 301, are determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.
>
> (2) The local law of the state of incorporation will be applied to determine such issues, except in the unusual case where, with respect to the particular issue, some other state has a more significant relationship to the occurrence and the parties, in which event the local law of the other state will be applied.

Id. §§ 301-302.

dispute. Both Currie's concern for "selfish" application of forum law and Baxter's concern for "comparative impairment" are taken into account. Of primary concern, the *Restatement (Second)* finally gives consideration to the expectations and interests of the litigants. This merger of various interests into one formula for choice of law—most significant relationship—is illustrated in *Babcock v. Jackson.*[83]

In *Babcock,* the New York Court of Appeals faced the typical guest-passenger statute of Ontario, Canada, which purported to bar recovery for injuries to a New York plaintiff simply because the accident and place of injury was Ontario. New York did not have a guest-passenger statute and would have permitted recovery. In formulating the precise appellate issue, the court stated the ultimate controversy in choice of law: "Shall the law of the place of the tort *invariably* govern the availability of relief for the tort or shall the applicable choice of law rule also reflect a consideration of other factors which are relevant to the purposes served by the enforcement or denial of the remedy?"[84]

In reversing the lower court's dismissal of the complaint, the court of appeals expressly adopted the *Restatement (Second)* "most significant relationship" test and held that New York law was applicable. The court noted that when the automobile was owned, registered, and insured in New York, and the journey was to begin and end in New York, the state of New York's concern for providing a cause of action for its citizens, and protecting its residents from the negligence of New York residents, far outweighed any interest of Ontario, Canada, in precluding such an action. New York, therefore, had a more significant relationship to the dispute.[85]

As evidenced by *Babcock,* choice of law analysis has made tremendous advances since *Carroll.* With the adoption of the *Restatement (Second)* and with bold decisions such as *Babcock,* choice of law has perhaps lost some degree of uniformity and ease of application but, at the same time, it has gained a sense of fairness. As Leflar points out, judicial decisions in the United States have "settled down on a sort of policy plateau," and while some courts still apply traditional governing rules, most courts apply combinations of nonmechanical choice of law methods.[86] In many cases, however, it is impossible to determine

83. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

84. *Id.* at 477, 191 N.E.2d at 280–81, 240 N.Y.S.2d at 746 (footnote omitted).

85. *Id.* at 482, 191 N.E.2d at 284, 240 N.Y.S.2d at 750.

86. Leflar, *Choice of Law: A Well-Watered Plateau,* 41 LAW & CONTEMP. PROBS. 10, 10 (1977). Leflar observes that courts utilize "multiple citation, seldom relying solely upon any single modern choice-of-law theory, but combining two or more of the theories to produce results which . . . can be sustained under any or nearly all of the new non-mechanical approaches to conflicts law." *Id.*

whether a court is applying a recognized choice of law method.[87]

While courts were breaking away from the early rigid choice of law rules, modern scholars were responding to the advancements of the *Restatement (Second)*[88] by suggesting variations in choice of law that continued the search for fairness and justice, together with the more traditional goals of uniformity and predictability.[89] Cavers, for instance, has suggested that in multistate disputes, instead of finding a jurisdiction with substantial connections and applying all of the laws of that jurisdiction, a court should examine the substantive rules of each competing state with a view toward which state's laws lead to a proper resolution of the dispute.[90] Similarly, McDougal has suggested that choice of law methodology should develop into "comprehensive interest analysis" which applies a rule of law promoting the "net aggregate long-term common interests" of the states having a substantial connection with the controversy.[91]

Perhaps the most modern advancements in choice of law theory and leading contributions to "conflicts justice" have come from Profes-

---

87. *Id.* at 13.

88. The *Restatement (Second)* has not been received without criticism. *See* A. EHRENZWEIG, CONFLICT OF LAWS 307, 351 (1962) (criticizing the "most significant relationship" test as a circular formula).

89. *See* Baxter, *supra* note 73, at 2–3.

90. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 188–91 (1933); *see generally* De Nova, *Glancing at the Content of Substantive Rules under the Jurisdiction-Selecting Approach*, 41 LAW & CONTEMP. PROBS. 1 (discussing Caver's choice of law theory).

In order to determine which solution best fits the situation, Cavers suggested that courts should:

> (1) scrutinize the event or transaction giving rise to the issue before it;
>
> (2) compare carefully the proffered rule of law and the result which its application might work in the case at bar with the rule of the forum (or other competing jurisdiction) and its effects therein;
>
> (3) appraise these results in the light of those facts in the event or transaction which, from the standpoint of justice between the litigating individuals or of those broader considerations of social policy which conflicting laws may evoke, link that event or transaction to one law or the other; recognizing
>
> (a) in the use of precedent, that those cases which are distinguishable only in the patterns of domestic laws they present, may for that very reason suggest materially different considerations than the case at bar, and
>
> (b) in the evaluation of contacts, that the contact achieves significance in proportion to the significance of the action or circumstance constituting it when related to the controversy and the solutions thereto which the competing laws propound.

Cavers, *supra*, at 192–93.

91. McDougal, *The New Frontier in Choice of Law—Trans-State Laws: The Need Demonstrated in Theory and in the Context of Motor Vehicle Guest-Host Controversies*, 53 TUL. L. REV. 731, 775 (1979); *see generally* McDougal, *Comprehensive Interest Analysis Versus Reformulated Governmental Interest Analysis: An Appraisal in the Context of Choice-of-Law Problems concerning Contributory and Comparative Negligence*, 26 UCLA L. REV. 439 (1979).

sors von Mehren and Trautman.[92] Professor von Mehren recognizes that no choice of law method can harmonize the conflicting goals of equality of treatment *and* advancement of state policies in every case.[93] To avoid this conflict in goals and Currie's "self-serving parochialism,"[94] von Mehren suggests that courts should put conflicts issues aside and determine a case as if it presented wholly domestic issues[95] or, as an alternative, von Mehren and Trautman suggest formation of "regulating rules" or special substantive rules in multistate situations.[96] Under this latter approach, instead of vindicating the policies and laws of one jurisdiction, rules of compromise could be developed to combine the conflicting rules and policies of the interested states.[97] Conflicts justice and a just result would thereby be achieved by accommodating the interests of the various concerned jurisdictions and accounting for the legitimate expectations of the persons involved.[98] However, even von Mehren recognizes that formation of special substantive rules are quite unlikely "where the differences of values and purposes at issue are so fundamental as to make compromise unthinkable."[99]

It is with von Mehren and Trautman's call for development of conflicts justice and special rules in multistate situations in mind that an analysis of the Supreme Court decision in *Banco* must be viewed. The Supreme Court did not indicate that *all* Cuban laws or *all* Cuban corporations should be ignored; instead, the particular factual circumstances required that Bancec's status under Cuban law be disregarded in order to arrive at a "just" result. Thus, it appears that the Supreme Court has created a federal choice of law rule based upon public policy. The Court is on firm ground in using public policy to determine choice of law with respect to a corporation because as the case law demonstrates, public policy has often been invoked to determine legal issues involving corporations.

IV. THE ROLE OF PUBLIC POLICY

In *First National City Bank v. Banco Para El Comercio Exterior*

---

92. *See generally* A. VON MEHREN & D. TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS (1965); Trautman, *The Relation between American Choice of Law and Federal Common Law*, 41 LAW & CONTEMP. PROBS. 105 (1977); von Mehren, *supra* note 55; von Mehren, *Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology*, 88 HARV. L. REV. 347 (1974).

93. *See* von Mehren, *supra* note 55, at 32.

94. *Id.* at 34.

95. *See generally* von Mehren, *supra* note 92.

96. *See* A. VON MEHREN & D. TRAUTMAN, *supra* note 92, at 215–19; Trautman, *supra* note 92, at 106.

97. von Mehren, *supra* note 92, at 356–59.

98. *Id.* at 349–50, 352.

99. von Mehren, *supra* note 55, at 40.

de Cuba,[100] after determining that federal choice of law rules were controlling,[101] the Supreme Court had to determine what law was applicable pursuant to those federal choice of law rules. After prudent examination, the Court held that federal law will ordinarily determine corporate status by reference to the laws of the place of incorporation, subject to the caveat, however, that corporate form or personality will not be permitted to defeat United States public policy or equitable principles.[102] The Supreme Court's adoption of this federal choice of law rule is well founded in theory and practice.

An examination of the effect of public policy on corporate status leads to the conclusion that preservation of public policy and equitable notions of fair play are sufficient justification to disregard the corporate fiction and, at the same time, are sufficient justification to confer corporate personality even when such personality is lacking under the laws of the incorporating state. In essence, public policy is the master rather than the slave and it disregards or recognizes corporate status as deemed necessary. As public policy dictates, therefore, courts will either ignore corporate status and "pierce the corporate veil," or recreate the standing of a corporation by conferring the corporate personality.

A. Disregard of the Corporate Veil

The piercing of the corporate veil appears to be a common-law development of the United States.[103] Perhaps the classic statement for disregarding the corporate veil and the laws of the place of incorporation is found in *United States v. Milwaukee Refrigerator Transit Co.*:[104]

> [A] corporation will be looked upon as a legal entity as a general rule,

---

100. 103 S. Ct. 2591 (1983).

101. In diversity actions, federal courts are required to apply choice of law rules conforming to those of the forum state. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941). The continued endurance of the Klaxon Rule, as it has become known, is illustrated by Day & Zimmerman, Inc. v. Challoner, 423 U.S. 3 (1975) (court of appeals reprimanded for ignoring the Klaxon Rule).

However, an important exception to the Klaxon Rule has been developed. Where there is a need for uniform federal policy, state boundaries disappear and federal choice of law rules are applicable. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (dealing with confiscatory actions of the Cuban government); United States v. Pink, 315 U.S. 203 (1942) (dealing with the Russian expropriations); United States v. Belmont, 301 U.S. 324 (1937) (dealing with the Russian expropriations). Accordingly, the Supreme Court, pursuant to its own mandate, was compelled to apply federal choice of law rules in *Banco*.

102. *Banco*, 103 S. Ct. at 2602 (citing Bangor Punta Operations, Inc. v. Bangor & A.R.R., 417 U.S. 703 (1974)).

103. *See generally* Cohn & Simitis, *"Lifting the Veil" in the Company Laws of the European Continent*, 12 INT'L & COMP. L.Q. 189 (1963).

104. 142 F. 247 (C.C.E.D. Wis. 1905).

> and until sufficient reason to the contrary appears; but, when the notion of a legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons.[105]

Adopting this reasoning, courts in the United States, including the Supreme Court,[106] have consistently ignored the corporate fiction to effectuate public policy.[107]

The doctrine of disregarding the corporate veil has also been recognized by the International Court of Justice,[108] and by several foreign countries, including the United Kingdom, France, West Germany, and Switzerland.[109] On the international plane, corporate personality may be disregarded when third parties would otherwise be harmed, when the corporate form has been abused, when the corporate form does not protect those who have "entrusted their financial resources to it," and when the corporation has ceased to exist.[110]

B. Conferment of Corporate Personality

In advancing public policy rather than adhering to the corporate fiction, courts in the United States have also recognized corporate personality even after termination of the existence of the corporation under the laws of the incorporating state. This practice of conferment of corporate personality is of particular interest, especially when contrasted with *Banco,* in other cases arising out of the Cuban expropriations.

For example, in *Maltina Corp. v. Cawy Bottling Co.*,[111] a Cuban corporation was nationalized during the Cuban revolution and subsequently dissolved under Cuban law. In a suit to enjoin use of the corporation's trademark, the Fifth Circuit Court of Appeals ignored the Cuban dissolution of the corporation, noting that "our courts have developed a willingness to disregard technicalities in favor of equitable considerations."[112] The court held that the Cuban dissolution had effect in Cuba, but that a *de facto* corporation still existed in the United

---

105. *Id.* at 255.

106. *See* Cort v. Ash, 422 U.S. 66 (1975); Bangor Punta Operations, Inc. v. Bangor & A.R.R., 417 U.S. 703 (1974); Anderson v. Abbott, 321 U.S. 349 (1944).

107. *See* Hadari, *The Structure of the Private Multinational Enterprise,* 71 MICH. L. REV. 729, 771 (1973); Comment, *Piercing the Corporate Veil in Federal Courts: Is Circumvention of a Statute Enough?,* 13 PAC. L.J. 1245, 1245 (1982).

108. *See* Barcelona Traction, Light & Power Co., 1970 I.C.J. 3.

109. *See generally* Cohn & Simitis, *supra* note 103.

110. *Barcelona Traction,* 1970 I.C.J. at 39–40.

111. 462 F.2d 1021 (5th Cir.), *cert. denied,* 409 U.S. 1060 (1972).

112. *Id.* at 1028 (quoting Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 293 F. Supp. 892, 896 (S.D.N.Y. 1968)).

States.[113]

Similarly, in *Compania Ron Bacardi S.A. v. Bank of Nova Scotia,*[114] a New York federal district court recognized a Cuban corporation that had been dissolved by the Cuban nationalization decree. At issue was the plaintiff-Cuban corporation's standing to file suit. The defendant contended that Rule 17 of the Federal Rules of Civil Procedure expressly required application of the law of the place of incorporation to the standing issue and, therefore, corporate dissolution barred suit. The court rejected the contention and held that plaintiff's standing, and hence corporate existence, were recognized by the United States' public policy to not give effect to the Cuban expropriations.[115]

Now, after examining the major theories of choice of law in corporate contexts, the *Banco* case can be critically reviewed. Was the Supreme Court's resolution supported by past or current theory? Will it create a workable rule for the federal courts? The most important question may be whether the new rule will bring about "just" results or only the return of mechanical applications of choice of law theories.

V. APPLICATION OF FACT TO THEORY: A "JUST" CONCLUSION

It is difficult, if not impossible, to determine whether the Supreme Court in *First National City Bank v. Banco Para El Comercio Exterior de Cuba*[116] consciously applied a recognized choice of law theory. Based on initial consideration of a classification analysis—whether corporate status was an internal or an external issue—Beale would contend that the Court was applying a traditional vested rights approach as modified by public policy. Similarly, Currie and his governmental interest method would be satisfied: clearly the United States had a legitimate social, economic, and administrative policy to support the application of its forum's laws and to disregard Bancec's separate status.

It is more likely, however, that the most significant relationship test of the *Restatement (Second)* was applied. The Supreme Court did, in fact, specifically refer to the *Restatement (Second)* when analyzing applicable choice of law rules for internal and external corporate affairs.[117] Of particular interest was that the Supreme Court connected the *Restatement (Second)* analysis with the conclusion that external matters are subject to different choice of law principles to prevent a state from violating "with impunity the rights of third parties under

113. *Id.* at 1028.
114. 193 F. Supp. 814 (S.D.N.Y. 1961).
115. *Id.* at 815.
116. 103 S. Ct. 2591 (1983).
117. *Id.* at 2597.

international law . . . ."[118] Regarding the specific factors set forth by the *Restatement (Second)* to determine the state with the most significant relationship, the Supreme Court, it may be argued, was persuaded that the needs and policies of the United States required application of international law and United States principles condemning the illegal Cuban expropriations. Moreover, Citibank surely was entitled to protection: equitable principles require courts in the United States to permit a setoff against a foreign plaintiff that is owned and controlled by a foreign expropriating government.

While the Supreme Court decision in *Banco* is supported by several choice of law theories, it is submitted that the more contemporary proposals of von Mehren and Trautman have been adopted. The *Banco* decision emphasized equitable principles and, instead of using a detailed analysis to balance the competing laws and policies of Cuba and the United States, the Court clearly put aside international conflict of law issues. Moreover, the Court, on its way to an equitable result, duly emphasized the strange corporate scenario that occurred after the Cuban expropriations and, in fact, after filing of the suit by Bancec. Bancec's assignment of the letter of credit to Banco Nacional, the corporate dissolutions, and reassignment of Bancec's claims to post-expropriation separate juridical entities could not in fairness preclude the justness of Citibank's setoff. The *Banco* decision, then, comports with the basic thrust of von Mehren and Trautman's proposals that choice of law should achieve "conflicts justice" through an accommodation of the interests and legitimate expectations of the parties, and should arrive at a just decision, rather than adhere to strict mechanical rules. While "just" results are often elusive in multistate situations,[119] the Supreme Court has nonetheless adopted an approach to achieve such results.

VI. CONCLUSION

Through the use of the judicially recognized doctrine of public policy, the Supreme Court has created a federal choice of law rule that separate corporate status of governmental entities will ordinarily be determined in accordance with the laws of the creating state, unless a finding of separate corporate personality would alter or adversely affect United States policy. In arriving at the "just" result that Bancec should be held responsible for the expropriations of Citibank's property, it is indeed ironic that contemporary choice of law principles and the creation of a federal choice of law rule so closely parallel Justice

118. *Id.*

119. von Mehren, *supra* note 92, at 349.

Story's theory on conflict of laws. While the doctrine of public policy may be an "unruly horse," the Supreme Court of the United States has recognized its continued vitality in choice of law disputes.