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### The Myth of Choice of Law: Rethinking Conflicts

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# THE MYTH OF CHOICE OF LAW: RETHINKING CONFLICTS

*Kermit Roosevelt III\**

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## I. INTRODUCTION

Choice of law is a mess. That much has become a truism. It is a "dismal swamp,"<sup>1</sup> a morass of confusion, a body of doctrine "killed by a realism intended to save it,"<sup>2</sup> and now "universally said to be a disaster."<sup>3</sup> One way to demonstrate its tribulations would be to look at the academic dissensus and the hopelessly underdeterminative *Restatement (Second) of Conflict of Laws*.<sup>4</sup> Another would be to examine the Supreme Court's abdication of the task of articulating constitutional constraints on state choice-of-law rules.<sup>5</sup> This article will do both. At the outset, though, I want to suggest that one need look no further than the nomenclature of the subject. I do not mean the arcane terminology — *dépeçage*, *renvoi*, *retorsion*, false conflicts, comparative impairment, and unprovided-for cases — that falls liltily from the tongues of conflicts scholars and crushes listeners into bemusement or horror. I claim instead that the conceptual difficulties of this field can be discerned at the broadest level of generality, in the dual names of the subject itself: "Choice of Law" and "Conflict of Laws."<sup>6</sup>

1. William L. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953).

2. Lawrence Lessig, *The Zones of Cyberspace*, 48 STAN. L. REV. 1403, 1407 (1996).

3. William L. Reynolds, *Legal Process and Choice of Law*, 56 MD. L. REV. 1371, 1371 (1997).

4. See *infra* section II.D.

5. See *infra* section VI.A.

6. Joseph Beale, whose theory of vested rights was received wisdom for the first half of the twentieth century, considered the question of nomenclature sufficiently important to merit five sections of his treatise. See 1 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS §§ 1.15-1.19 (1935). Beale admitted that "conflict of laws" was not "exactly accurate" and commented that "[t]he only conflict is among the legal authors who are doing this

The mere existence of multiple monikers should not surprise. Areas of legal study often go by more than one name. The class called "Federal Jurisdiction" at one law school might be "Federal Courts" at another; the same is true for "Corporations" and "Business Organizations." Sometimes these names are synonyms; other times the relation is obvious enough to need no explanation. Federal courts exercise federal jurisdiction, and the study of one is the study of the other. Conflicts nomenclature is less transparent. An ordinary speaker of English might be puzzled to learn that "Choice of Law" and "Conflict of Laws" denote the same area. When laws conflict, one might think, the question is not which law should be chosen but rather which law prevails.<sup>7</sup>

Legal training teaches us otherwise. When laws conflict, we learn, courts decide which law to apply. There is almost never a unique "right" answer to the question. More precisely, there is no right answer that can be articulated without adopting what Lea Brilmayer calls the "internal perspective":<sup>8</sup> the perspective of a particular forum state. From the subjective perspective of a particular forum, there may be a determinate answer, given by the choice-of-law rules of that state. But different states will give different answers about the same set of facts. If a case has contacts with a number of different jurisdictions, each may apply its own law if the case comes to its courts.<sup>9</sup> Thus the answer to the question "what law governs this case?"<sup>10</sup> will often vary depending on the forum in which the suit is brought.

This result may seem natural if we suppose that choice-of-law rules simply compose part of a state's substantive law.<sup>11</sup> Substan-

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work." He continued, "[y]et since the expression is consecrated by good use and is simple we may well make use of it." *Id.* § 1.19 (quoting COMTE DE VAREILLES-SOMMIÈRES, *LA SYNTHÈSE DU DROIT INTERNATIONAL PRIVÉ* xviii (1897)). Interestingly, Beale also mentions Eduardo Cimbali, who argued that the "false designation of the subject" had led scholars astray. *Id.* (citing EDUARDO CIMBALI, *DI UNA NUOVA CATEGORICA DI CONFLITTI DE LEGGE* (1892)).

7. For precisely this reason Eugene Scoles and Peter Hay find fault with the phrase "Conflict of Laws," arguing that because forum choice-of-law rules will select a governing law, there is no conflict between laws. See EUGENE F. SCOLES & PETER HAY, *CONFLICT OF LAWS* § 1.1 (2d ed. 1992).

8. See LEA BRILMAYER, *CONFLICT OF LAWS* 1 (2d ed. 1995) (emphasis omitted).

9. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981) (plurality opinion).

10. One of my claims is that this is a counterproductive way of framing the question. See *infra* section IV.B. In fact, I will be changing a fair amount of what I find to be misleading terminology. At the moment, though, I am simply discussing the current understanding of conflicts.

11. See Nicholas deBelleville Katzenbach, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 *YALE L.J.* 1087, 1099 (1956) (stating that the task of courts always "involves a choice of law"). Beale also held the posi-

tive law differs from state to state, and states will reach different answers about the legal consequences of the same facts. Thus it is not surprising that a constellation of facts entitling the victim of a car accident to recover under the tort law of a state employing a negligence standard will not allow recovery under the gross negligence standard of another state. Similarly, one might think, it is not surprising that one state might conclude that the appropriate law is the law of the state where the accident took place, while another might look to the law of the victim's domicile.<sup>12</sup>

This inconsistency arises from, essentially, Brilmayer's "internal perspective." One of the major goals of this article is to suggest that this way of viewing the choice-of-law problem is mistaken — not because the alternative that Brilmayer mentions, the "external perspective," is correct,<sup>13</sup> but because the dichotomy itself is false and the internal perspective fails on its own terms. In fact, I will argue, conceiving of choice-of-law rules as substantive domestic law does not legitimize the variance of results across forums. It merely masks the illegitimacy, hiding the conflict between laws behind the veil of choice of law, and the veil does not stand up to analysis.

To start seeing this, take a step back. Return to the purely domestic context and imagine a plaintiff who comes to court alleging that a wrong has been committed against him. He claims that some

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tion that choice-of-law rules were part of forum law; in fact, it is a necessary consequence of his principle that law can operate only within a state. See 1 BEALE, *supra* note 6, § 5.4, at 53 ("Conflict of Laws is part of the law of the forum. It is quite obvious that since the only law that can be applicable in a state is the law of that state, no law of a foreign state can have there the force of law. . . . The foreign law is a fact in the transaction."). Of course, he did not conclude that variance was therefore permissible; he found general organizing principles in the nature of law. *Id.* § 4.12, at 46.

I think there is something different about choice-of-law rules, though it turns out to be essentially that they are so much a matter of federal concern as to be subject to severe constitutional strictures. (On my account, not the Supreme Court's. See *infra* Part V.)

12. In fact, variance between forums is more likely to take the form of each forum's looking to its own law. This tendency, which Michael Green calls "lexforism," is the deeply troubling aspect of disuniformity. See Michael S. Green, Note, *Legal Realism, Lex Fori, and the Choice-of-Law Revolution*, 104 YALE L.J. 967, 967 (1995).

13. The external perspective supposes that choice-of-law rules are uniquely determined by objective principles external to any state's law and hence that each forum must reach the same conclusion. See BRILMAYER, *supra* note 8, at 1. The theoretical approach that I advocate will destroy the dichotomy. The Constitution is, in an interesting way, both internal and external. It is internal in that, by virtue of the Supremacy Clause, it is part of the local law of each state. See, e.g., *Claffin v. Houseman*, 93 U.S. 130, 137 (1876). It is external in that it imposes rules state law cannot change — again, by virtue of the Supremacy Clause. See, e.g., *Felder v. Casey*, 487 U.S. 131, 138 (1988). And what I will suggest is that the Constitution dictates a mixed perspective — both internal and external. It does not require consistency across states, so that each state must adopt the same rules (the fully external perspective). Rather, it requires a sort of consistency within states, a lesser degree of freedom than that recognized by the internal perspective. This will surely seem cryptic, but a full explanation must await some ground-laying.

law — here, let us assume local tort law — gives him a right to relief. The court may disagree with this claim. It may be that the law gives him no right on these facts, or that the law provides the defendant with a defense that precludes liability. Either of these determinations is an appropriate judicial decision. But what if the court simply refuses to consider his tort claim because, it says, contract law governs the case? This should seem odd.<sup>14</sup> The plaintiff has asserted a right, and surely the court must either recognize that right or refuse to recognize it. Either he has stated a claim or he has not. To avoid this dichotomy by invoking a different law seems at best an oblique rejection of the plaintiff's claim, at worst a decision based on something other than whether he has an enforceable right.<sup>15</sup> It seems, in short, that the court has made a choice, not resolved a conflict.<sup>16</sup>

The substitution of choice for conflict, I will argue, is the fundamental error of conflicts jurisprudence.<sup>17</sup> It is an attempt to avoid difficult questions that succeeds only in resolving them *sub rosa*, and poorly. Conflicts between rights are a common feature of lawsuits, and in most circumstances, the legal system deals with them *as conflicts*: courts look to rules specifying which right shall prevail,

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14. I am not objecting to the idea that a court may tell a plaintiff that, although he cannot recover in tort, he may recover in contract. Cf. BRAINERD CURRIE, *Conflict, Crisis and Confusion in New York*, in *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 690, 693-94 (1963) [hereinafter *SELECTED ESSAYS*] (labeling as "anachronistic" criticizing a court for "tell[ing] a litigant that though he cannot recover in contract he may in tort"). The problem I am concerned with arises when the plaintiff pleads in tort and the court refuses to evaluate the tort claim.

15. Courts do not ordinarily apply law not invoked by the parties. Affirmative defenses, for example, are waived if not raised at the proper stage. If the court refuses to honor the law the plaintiff pleads, I will suggest, it must be because that law is legally unavailable. And that means either that some other law operates to interfere with it, or that the law the plaintiff invokes grants him no rights.

16. Of course, choosing one law effectively resolves the conflict between them: it awards victory to the chosen law. But it does so, we will see, without a consideration of the factors that should govern a resolution of the conflict. Identifying these factors is, of course, a difficult task. Common policy considerations include predictability, discouragement of forum shopping, and the rather amorphous goal of fairness to litigants. These are certainly values that a system for resolving conflicts between sovereigns should seek to promote. My prescriptions, when they come, will indeed seek to promote them. But they will not rest simply on those values; instead, they will be drawn from another body of law aimed chiefly at melding the several states into a federal union: the Constitution. Without the constraints I identify, states may succumb to the temptation to promote forum interests, slighting the concerns of other states. Within the constraints, states may do many things to promote the canonical conflicts values. But interstate discrimination needs to be addressed first; at this moment in our conflicts jurisprudence, it is the primary evil and the chief distraction from sound conflicts rules.

17. Consequently, I will refer to the subject as "conflicts," and continue to refer to "choice-of-law rules" where appropriate. My ultimate suggestion is that things will be clearer if we eliminate the idea of "choosing" a "governing" law, but that is a different stage of the rocket and must drop away later.

and then express their conclusions in such terms.<sup>18</sup> In cases where the conflicting rights originate from different states, however, a different description is employed. Courts speak not of deciding which right prevails but of choosing which law applies to the case. This resort to choice-of-law rhetoric is peculiar for two reasons. First, it is unnecessary. Multistate cases can be described and resolved perfectly easily within the vocabulary of conflicts.<sup>19</sup> Second, it is descriptively inaccurate. Interest analysis (the choice-of-law methodology I will consider in the greatest detail) simply does not select the law that applies to a case.<sup>20</sup> The rhetoric of choice persists in part as a conceptual hangover from the early days of conflicts theory,<sup>21</sup> but it also continues to allure because it makes less apparent the conflicts that have proven too hard to resolve.<sup>22</sup> Indeed, the Supreme Court swiftly backed away from its initial bold interventions into state conflicts practices; more recently it seems to have given up entirely.<sup>23</sup> Consequently, there is a temptation to deny problems we cannot solve, by framing the issue as one of choice.

This article aims to show that things are not as bad as all that. Interstate conflicts are a chief concern of the Constitution, and the Constitution will allow us to deal with them. Conflicts theory has failed to locate external constraints on state law and has actually urged states to adopt regimes that are blatantly discriminatory — regimes that, if not explained by parochialism, are in fact self-contradictory.<sup>24</sup> Judicious use of garden-variety antidiscrimination principles embedded in the Full Faith and Credit and the Privileges and Immunities Clauses will prevent such favoritism. These constitutional principles do not resolve conflicts by their own force —

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18. See *infra* section IV.B.

19. See *infra* section III.C.2.

20. See *infra* section IV.C.

21. The territorial approach to conflicts, discussed below, did in fact work by identifying the law that governed a transaction. Interest analysis retained this vocabulary, even though the description no longer fit the operation of the theory. See *infra* section IV.C.

22. When a state finds foreign law inapplicable, it may seem not to have rejected foreign rights. See CURRIE, *Notes on Methods and Objectives in the Conflict of Laws*, in *SELECTED ESSAYS*, *supra* note 14, at 177, 181-82. Effectively, of course, it has done so, and perhaps few will find the rhetoric of choice an effective fig leaf. Whether its potential for obscuring conflicts is the real reason for its continued popularity is a psychological question, and my suggestions along these lines are only hypotheses. It does seem to be the case that Currie saw a difference between applying local law and rejecting foreign rights, *see id.*, and without this difference, interest analysis's bias toward forum law is obviously problematic. See *infra* section IV.C.

23. See *infra* section V.A.

24. See *infra* section IV.C.

they do not dictate unique solutions — but they constrain the states' resolutions in ways that produce a coherent jurisprudence of conflicts.<sup>25</sup> In order to see how the Constitution works, we need a theory that frames the issue in terms of conflict, not in terms of choice.

Part II of the article sets the stage for that theory by briefly recounting the history of conflicts scholarship and offering a word on methods and objectives in the conflict of laws. Part III extracts appropriate building blocks from the rubble of previous theoretical constructs; it then puts the blocks together, demonstrating in outline what the theory should look like. Part IV defends the theory by examining two situations neglected by conventional conflicts theory: conflicts within one state's law, and conflicts between state and federal law. Part V examines the relevance of the Constitution, and Part VI applies the constitutional principles thereby derived.

## II. CONFLICTS THEORY

Articles about conflicts frequently begin with — or are entirely devoted to — a history of the subject.<sup>26</sup> The need for another such recapitulation may certainly be questioned. This recounting, though, is not mere intellectual dressage. Because I intend to argue that the correct way of thinking about conflicts may be derived from the historical approaches, it is worthwhile to show both how the essential concepts already exist and how they have been prevented from uniting into a coherent theory.

Conflicts has a rich history. To begin at the beginning might require a return to ancient Egypt and the wrappings of a crocodile mummy, which supposedly contain the first recorded choice-of-law principles.<sup>27</sup> A full account would then consider the theories of medieval Europe, the early English approach that did away with the problem of foreign transactions via the fiction that all events occurred in London,<sup>28</sup> and subsequent developments in the courts of America. The perspective afforded by a thorough historical exposition is of significant value, for conflicts revolves around a few great and recurring themes. But the full-dress reenactment has itself al-

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25. See *infra* Part VI.

26. See BRILMAYER, *supra* note 8, § 1.1, at 11-13.

27. See Hessel E. Yntema, *The Historic Bases of Private International Law*, 2 AM. J. COMP. L. 297, 300-01 (1953).

28. See Friedrich K. Juenger, *A Page of History*, 35 MERCER L. REV. 419, 436 (1984). This led to pleadings asserting, for example, that wrongful acts were committed on the island of Minorca, in the city of London. See *id.* at 436-37.



ready been done,<sup>29</sup> and only a few scenes are necessary to my project. Of course, any attempt to sketch the history as mere opening act for a theoretical venture will inevitably be selectively incomplete. What follows is an account that highlights those aspects important to my project — how the issue of conflict has been repressed, and how, in later theory, choice has taken its place.

### A. *Vested Rights: Joseph Beale*

Although Joseph Story exerted a profound influence on the early development of conflicts theory in America,<sup>30</sup> my story starts with Joseph Beale. Beale was the reporter of the *First Restatement*, and his three-volume treatise on the conflict of laws is structured as a commentary to the *Restatement*.<sup>31</sup> The *Restatement's* task — rationalizing the law of forty-eight states — was a formidable one. But Beale did not intend merely a catalogue of judicial decisions; his quarry was the general common law, of which the decisions of courts were evidence only.<sup>32</sup> Beale's task, as he saw it, was to derive the general common law of conflicts from the raw data of judicial decisions.

In this enterprise he was greatly aided by a few strong principles concerning the nature of law, rights, and remedies.<sup>33</sup> Law, for Beale, was fundamentally territorial, supreme within a jurisdiction but generally powerless outside it.<sup>34</sup> This principle gives a relatively easy answer to the question of what law governs a particular occurrence. Since local law, and only local law, applies within a given

29. "[E]verything worthy of trying has been tried before, under the same or other labels." Kurt H. Nadelmann, *Marginal Remarks on the New Trends in American Conflicts Law*, 28 LAW & CONTEMP. PROBS. 860, 860 (1963). For thorough recapitulations, see, e.g., Juenger, *supra* note 28; Yntema, *supra* note 27.

30. See, e.g., JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC (Melville M. Bigelo ed., Boston, Little, Brown, & Co. 1883). Story extensively developed the idea of comity as a basis for resolving conflicts. Comity does not govern interstate conflicts, however; the Constitution does. Story's work has value for this article primarily because it illuminates the original understanding of some constitutional provisions. Apart from that, I will largely ignore his contributions.

31. See 1 BEALE, *supra* note 6, at xv.

32. See *id.* § 1.12, at 10. This is, of course, the jurisprudential position of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), which Beale cited approvingly several times. See, e.g., 1 BEALE, *supra* note 6, § 3.3, at 22 & n.1, § 3.5, at 26, § 4.6, at 39 & n.1. *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), overruled *Swift* just three years after the publication of Beale's treatise. One cannot avoid some sympathy for an author whose 2000-page magnum opus, the product of over twenty years of labor, enjoyed such a brief reign before one of its primary supports was unceremoniously knocked away. Worse was to follow.

33. Nowadays Beale's first principles appear to be somewhat arbitrary assumptions, but within the jurisprudential climate of his day, they were fairly unremarkable.

34. See 1 BEALE, *supra* note 6, § 4.12, at 45-46, § 59.2, at 308, § 61.1, at 311.

jurisdiction, local law must determine the consequence of acts within that jurisdiction: "If two laws were present at the same time and in the same place upon the same subject we should also have a condition of anarchy. By its very nature law must apply to everything and must exclusively apply to everything within the boundary of its jurisdiction."<sup>35</sup> If suit is brought within that jurisdiction, courts will obviously apply local law. Indeed, Beale denied the ability of courts to apply any but their own local law — though this included his general common law.<sup>36</sup>

The transparent workings of the territorial model become somewhat more turbid when suit is brought in a jurisdiction other than the one in which the litigated transaction took place. In such circumstances, territoriality might seem at war with itself: If courts can apply only local law, but foreign law must determine the consequences of acts in foreign states, how are parties ever to obtain relief in courts of other jurisdictions? Beale's solution to this problem relied on a somewhat complicated taxonomy of rights, which he claimed to derive from the "difference made by our law in treating rights of the different classes with respect to the law creating and having power over them."<sup>37</sup> On his account, law protects interests; these protected interests he terms *primary rights*.<sup>38</sup> The violation of a primary right gives rise to a *secondary right* — a right of redress.<sup>39</sup> This right vests at the moment of the violation of the primary right and thereafter may be considered much like personal property of the injured party.<sup>40</sup> In particular, it may be brought into other forums and sued upon. Forum courts, in granting relief, are not applying foreign law but simply recognizing the secondary rights vested under foreign law.<sup>41</sup> To determine whether a right has

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35. *Id.* § 4.12, at 46.

36. *See id.* §§ 3.4, 5.4.

37. *Id.* § 8A.9, at 66.

38. *See id.*; *see also id.* § 8A.6. Thus, "[p]arties are bound, not by the law, but by obligations created by the law." *Id.* § 3.4, at 25.

39. *See id.* § 8A.25.

40. *See, e.g.*, *Slater v. Mexican Natl. R.R. Co.*, 194 U.S. 120, 126 (1904) (Holmes, J.); *Loucks v. Standard Oil Co.*, 120 N.E. 198, 200 (N.Y. 1918) (Cardozo, J.).

41. Indeed, the granting of what Beale termed a "remedial right" — an actual damages claim — was in fact a matter of forum law. *See* 1 BEALE, *supra* note 6, § 8A.28, at 85-86. This allowed the forum to recognize the right to redress while retaining some flexibility in crafting a remedy — a feature Holmes exploited in *Oceanic Steam Navigation Co. v. Mellor*, 233 U.S. 718 (1914).

vested, the forum court might need to examine foreign law, but as a question of fact, not law.<sup>42</sup>

One aspect of Beale's account is of special interest for my purposes. The aspect is this: given his territorial understanding of law, there is no such thing as conflict between laws. Each is supreme within its jurisdiction and does not, by the nature of law, extend beyond. Because laws operate only territorially, a state's law cannot create rights from transactions occurring outside its borders.<sup>43</sup> Denying the application of foreign law to a transaction occurring within the forum state, then, is not the denial of a foreign right but simply a recognition of the nature of law. On this account, laws cannot even come into contact with each other, much less conflict.<sup>44</sup> The task of courts in multistate cases is truly to identify which law applies, which law creates the parties' rights and obligations.

The elimination of conflicts made Beale's model pleasingly simple to operate,<sup>45</sup> but his approach would ultimately be judged not for its theoretical niceties but for its real-world results. From this perspective, hiding difficult questions is not a virtue. Metaphysical observations about the nature of law do not resolve concrete problems, and Beale's theoretical purity was purchased at the price of ignoring practical issues. This preference for theory over praxis made Beale an easy target for criticism. He suffered so at the hands of the realists that his conflicts theory was for quite a while dismissed as an arbitrary metaphysics, based on "jejune notions of an 'omnipresence' which cannot 'brood' more than three miles from home."<sup>46</sup> But it is more a vessel of reflection, and less a bark of dogma, than such appraisals indicate.<sup>47</sup> The internal structure is re-

42. See 1 BEALE, *supra* note 6, § 5.4, at 53 ("It is quite obvious that since the only law that can be applicable in a state is the law of that state, no law of a foreign state can have there the force of law. . . . The foreign law is a fact in the transaction.")

43. "Since the power of a state is supreme within its own territory, no other state can exercise power there." *Id.* § 61.1, at 311.

44. While canvassing objections to the name "conflict of laws," Beale offers a description that precisely fits his theory: "The laws of different sovereigns do not contend with one another for the mastery. Each one keeps within its sphere of operation, and only asserts its power in a foreign country when the law of that country commands or permits it. In practice, a conflict is impossible." *Id.* § 1.16, at 13 (quotation omitted).

45. Indeed, Beale believed that attempts to resolve conflicts were doomed to failure. "Which of the two independent sovereigns should yield is a question not susceptible of a solution on which all parties would agree." 3 BEALE, *supra* note 6, § 53, at 1929.

46. Katzenbach, *supra* note 11, at 1096.

47. See BRILMAYER, *supra* note 8, § 1.2, at 20 (calling Beale's theory "quaintly motivated" but "well-developed," and rejecting critics' accusation that it was "mindless dogmatism"). Beale did himself no favors with his vaguely Shakespearean response to accusations of dogmatism: "One cannot deny that most of the statements in this work will be dogmatic. Does not the Bar desire dogmatic statements?" 1 BEALE, *supra* note 6, at xiii.

ally rather elegant, its concepts interacting with a smoothness and complexity suspiciously reminiscent of celestial spheres, phlogiston, luminiferous ether, and other refined illusions. And many of Beale's claims have been taken up more recently by scholars as eminent as Ronald Dworkin.<sup>48</sup>

Admittedly, the practical effects of the theory were somewhat less pleasing. In order to pick a single jurisdiction where rights vested — as the territorial principle required — Beale needed to identify a specific act triggering the rights. Not unreasonably, given the alternatives, he decided that this should be the last act necessary to the existence of the cause of action.<sup>49</sup> But the rigidity of the last act doctrine interacted with the intricacies of tort law to produce results that were undeniably arbitrary and verged on the bizarre.<sup>50</sup> The serpent of the practical fatally compromised Beale's conceptual Eden, and soon enough came the "archangels of doctrinal destruction":<sup>51</sup> the legal realists.

### B. *Legal Realism: Walter Wheeler Cook*

In part of the Preface entitled "Apologia," Beale noted that his legal principles had been criticized by what he optimistically called "a current but ephemeral school of legal philosophy"<sup>52</sup> — namely, legal realism. The characterization was, if not whistling-past-the-graveyard bravado, a historic underestimation rivaling that of Louis XVI.<sup>53</sup> Beale struck closer to the mark when he commented that

48. Beale believed that cases had unique right answers and that courts enforce rights that exist prior to and independent of their decisions. See 1 BEALE, *supra* note 6, §§ 3.1-3.4. This cluster has obvious affinities with Dworkin's account in RONALD DWORIN, *LAW'S EMPIRE* (1986). Indeed, elements of Beale's conflicts theory are enjoying a modest resurgence as part of a conflicts counterrevolution. See Perry Dane, *Vested Rights, "Vestedness," and Choice-of-Law*, 96 YALE L.J. 1191 (1987). The present article belongs to the same tradition; like Dane's, it attempts to resuscitate a few key concepts that Beale got right.

49. See RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 377 (1934).

50. For example, the victim of a poisoning might travel through many states before the effects of the poison were felt. Beale, reasoning that no tort exists without an injury, would look to the law of the state where the poison took effect, since that effect is the last occurrence necessary to the vesting of the right. But which state the victim happens to be in when this occurs has little to do with any policy relevant to conflicts of law; nor, without the strong territorialist assumption, does it seem to have much to do with the nature of law. I owe this example to Lea Brilmayer, see BRILMAYER, *supra* note 8, § 1.3, at 25-26, who points out further that "it is no easy matter to determine [as the *First Restatement* requires] where the 'deleterious substance takes effect upon the body,'" *id.* (alteration in original) (quoting RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 377 cmt. 2, illus. 2 (1934)).

51. Katzenbach, *supra* note 11, at 1107.

52. 1 BEALE, *supra* note 6, at xiii.

53. Louis's diary entry for July 14, 1789, the date of the storming of the Bastille, reads simply "Rien." ("Nothing."). SIMON SCHAMA, *CITIZENS* 419 (1989). In fairness to Louis, this recorded an unsuccessful hunt.

"one who hears the evening bell must hasten his work, if he is to finish it."<sup>54</sup> The ferocity, and the success, of the realist assault on Beale's verities are well documented in the scholarly literature. Katzenbach says that the vested rights theory was "brutally murdered" by Walter Wheeler Cook,<sup>55</sup> and Brainerd Currie's oft-quoted evaluation was that Cook "discredited the vested-rights theory as thoroughly as the intellect of one man can ever discredit the intellectual product of another."<sup>56</sup> Cook, for his part, made no secret of his intent to uproot and discard Beale's approach in its entirety: "[U]ntil the intellectual garden is freed of the rank weeds in question," he wrote, "useful vegetables cannot grow and flourish."<sup>57</sup>

The realists directly attacked the idea of vested rights. In part this was a matter of pointing out practical difficulties with the approach. The principle that rights vest in the place of the tort seems easy enough to apply, but in fact it encounters serious difficulties when the events which make up the tort occur in different jurisdictions.<sup>58</sup> As mentioned earlier, Beale accorded decisive importance to the famous "last act" necessary to the vesting of the secondary right.<sup>59</sup> Unfortunately, the domestic laws of different jurisdictions might disagree about which act was the last one necessary to the vesting of a right, producing situations in which each state believed that rights vested within its territory — or, equally distressing, within the territory of the other state. To resolve this problem Beale had invoked the general common law,<sup>60</sup> a maneuver that became much less plausible after *Erie Railroad v. Tompkins*<sup>61</sup> rejected the existence of such an entity.

Still, problems of application were ancillary to Cook's project. His central attack was aimed at the jurisprudential groundwork of Beale's theory, his understanding of the nature of law and rights.

54. 1 BEALE, *supra* note 6, at xii.

55. See Katzenbach, *supra* note 11, at 1087-88.

56. CURRIE, *On the Displacement of the Law of the Forum*, in *SELECTED ESSAYS*, *supra* note 14, at 3, 6; see also David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 175-76 (1933) ("Indeed, one may now wonder how any juristic construct such as 'right' could have been accepted as fundamental in the explanation of any important aspect of judicial activity."); Juenger, *supra* note 28, at 435 ("pure sophistry").

57. WALTER WHEELER COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* at ix (1942).

58. See, e.g., *id.* at 314-18.

59. See *supra* note 49 and accompanying text.

60. See, e.g., 1 BEALE, *supra* note 6, § 3.1-3.6; RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 377 cmt. d (1934).

61. 304 U.S. 64 (1938).

Rejecting Beale's conception of "theoretical law" as "the body of principles worked out by the light of reason and by general usage, without special reference to the actual law in any particular state,"<sup>62</sup> Cook warned that "we must as always guard ourselves against thinking of our assertion that 'rights' and other legal relations 'exist' or have been 'enforced' as more than a conventional way of describing past and predicting future behavior of human beings — judges and other officials."<sup>63</sup> He therefore opposed the reification of rights, arguing, in the words of the ever-quotable Holmes, that "'a right is only the hypostasis of a prophecy.'"<sup>64</sup>

Cook's positive program for resolving choice-of-law questions was not as theoretically well-developed as that of his predecessor (Joseph Beale) or successor (Brainerd Currie).<sup>65</sup> This is understandable, given his pragmatic and antimetaphysical bent, but it means that his importance to this article lies largely in his critique.<sup>66</sup> His most notable positive contribution was the "local law theory," which asserted that states could apply only their own law. Beale, of course, agreed with this proposition; it was what necessitated his distinction between foreign law and the rights that vested under it. Cook went further, however, arguing that states did not enforce foreign rights but rather applied "the rule of decision which the given foreign state or country would apply, not to this very group of facts now before the court of the forum, but to a *similar but purely domestic group of facts involving for the foreign court no foreign element*."<sup>67</sup> This theory offered a solution to the problem of renvoi —

62. 1 BEALE, *supra* note 6, § 1.12, at 9.

63. COOK, *supra* note 57, at 33. One obvious problem with this "predictive" theory of law is that it fails to explain the thinking of a judge deciding a case, whose attempts to discern the correct rule of law are surely not attempts to predict his own behavior. Cook points out this difficulty, then comments that "our discussion at this point does not require further consideration of the matter." *Id.* at 30 n.52a.

64. *Id.* at 30 (quoting OLIVER WENDELL HOLMES, *Natural Law*, in COLLECTED LEGAL PAPERS 310, 313 (1920)). Of course, Holmes's Supreme Court opinions constituted canonical applications of the vested rights theory. See, e.g., *Western Union Tel. Co. v. Brown*, 234 U.S. 542, 547 (1914); *Slater v. Mexican Natl. R.R. Co.*, 194 U.S. 120, 126 (1904). Cook offers a creative reconstruction of *Slater* as rooted in policy judgment rather than in the vested rights theory, which he then cautiously attributes to Holmes. See COOK, *supra* note 57, at 35. It may be safer to rest with the observation that Holmes contained multitudes.

65. See, e.g., Larry Kramer, *Interest Analysis and the Presumption of Forum Law*, 56 U. CHI. L. REV. 1301, 1301 (1989) ("[W]hile [the realist] criticism successfully undercut the intellectual foundation of traditional choice of law theory, a plausible alternative was not proposed until the 1950s.").

66. Cook would probably not have been unhappy to be identified more with his negative than with his positive analysis; he believed that "[t]he removal of the weeds is . . . as constructive in effect as the planting and cultivation of the useful vegetables." COOK, *supra* note 57, at ix.

67. *Id.* at 21.

the interminable ping-pong created when the choice-of-law rules of two states each directed their courts to look to the other state's law — but had little other significance.<sup>68</sup> The elaboration of a choice-of-law theory robust enough to direct courts was the work of Brainerd Currie.

### C. *Interest Analysis: Brainerd Currie*

Currie's important contribution, and perhaps his most significant difference with Beale, was to analyze law not as an objectively existing entity but as a tool of state policy. Beale's theory determined which law applied by "deduction from territorial postulates,"<sup>69</sup> without examining the content of the law. Essentially a "jurisdiction-selecting" approach, it picked not a particular law but the sovereign with authority to legislate the consequences of the transaction.<sup>70</sup> In contrast, Currie realized that the first step in choice of law must be an analysis of the laws contending for application. If laws are instruments of state policy, it follows that when application of a state's law will not advance its policies, the state would not want its law applied.<sup>71</sup>

This analysis revealed the arbitrariness of the vested rights approach. Resolving all choice-of-law questions by territorial principles results in subordinating the interests of the nonselected state

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68. Hessel Yntema calls the local law theory "empty luggage." See Yntema, *supra* note 27, at 316.

69. See Cavers, *supra* note 56, at 192-94.

70. See *id.* at 194.

71. As the text above says, this "instrumental" approach to law is generally considered a significant difference between Beale and Currie. See, e.g., Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277, 1284 (1989). Yet it seems quite easy to assimilate Currie's insight into Beale's system by reasoning that if the state does not want its law applied, it does not extend its law to cover the transaction. Thus the law attaches no legal consequences; it creates no rights or liabilities for parties to sue on. (Following Perry Dane, I will call such restrictions on the extension of rights "rules of scope." See Dane, *supra* note 48, at 1203-04. I discuss rules of scope at more length in section II.E.) Beale never suggested that state laws must always have maximum scope — obviously, he was quite emphatic about territorial limitations. True, he did not see that limitation as the sovereign's choice, but if a state statute provided that only local citizens could recover for in-state torts, Beale would presumably not have maintained that out-of-staters acquired rights thereby. His fascination with the general common law obscures this point but provides no theoretical obstacle. In truth, it was Currie who tended to disregard states' expressions of intent not to have their laws applied to cases in which he found them "interested," creating willy-nilly the practical equivalent of rights. See BRILMAYER, *supra* note 8, §§ 2.5.2-2.5.4 (noting that Currie ignores state choice-of-law rules dictating application of another state's law, though these seem like expressions of lack of interest). The fact that the language of rights is more characteristic of Beale than of Currie has been made to bear more jurisprudential weight than it can easily support. See *infra* note 166. See generally Green, *supra* note 12. Now that the clamor has died down, the realist attack on vested rights looks rather like any other attempt to overthrow an entrenched vocabulary seen as essentially conservative. The rhetoric may be philosophical, but the stakes are political.

without even ascertaining that the selected state has an interest that will be promoted by application of its law.<sup>72</sup> Currie correctly suggested that this made little sense, and that the vested rights approach lumped together quite dissimilar cases precisely because it determined the applicable law without examining its content.

Currie's approach, by contrast, allowed for distinctions among cases with multistate contacts. Currie began with a presumption that the forum would apply its own law.<sup>73</sup> If one party suggested the application of another state's law, the court was to analyze the substantive law at issue to determine whether the forum or the other state had an interest in the application of its own law. If only one state has an interest, the case is what Currie called a "false conflict." In such cases, it is appropriate to apply the law of the only interested state. This allows for effectuation of that state's policies and does no harm to the policies of other states, since they are, by definition, not interested. If both states have an interest, the case is a "true conflict," and more difficult to resolve. Regarding true conflicts as insoluble, Currie suggested that the forum should simply apply its own law.<sup>74</sup> A preference for forum law is not an obviously desirable method of resolving true conflicts, and Currie later suggested that in such cases the court should reexamine the policies at issue to see if a more moderate reinterpretation might eliminate one or the other interest. The last category of cases,

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72. Readers may note that I have now moved from the question of whether application of a law advances a state's policies to the concept of a "state interest" without much discussion of either. Currie was similarly elliptical, an unfortunate parsimony that has engendered substantial confusion. A fairly authoritative source, Currie's student, coauthor, and defender Herma Kay, has suggested that a state is interested if the policies behind the particular law at issue — discerned by the ordinary process of statutory interpretation — would be promoted by the application of that law. See Herma Hill Kay, *A Defense of Currie's Governmental Interest Analysis*, 215 *RECUEIL DES COURS* 9, 50 (1984). This is the conventional way to determine if a law is intended to apply to a particular case. See, e.g., *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248-59 (1991) (discussing statutory interpretation and legislative intent with respect to extraterritorial application of Title VII). Thus, when Currie wrote that the proper role of courts was to promote forum policies, he was saying simply that they should apply laws with an eye to legislative intent. And that is simply enforcing the rights conferred by the law — neither an unusual nor an excessively instrumentalist approach. *But cf.* Dane, *supra* note 48, at 1259 (claiming that only a "Decision-Based" (realist) approach would claim that courts are "primarily charged" with advancing the policies of their states). What makes interest analysis problematic, I will suggest, is Currie's tendency to construct legislative intent around domiciliary status. See *infra* section IV.C.

73. Larry Kramer has criticized this presumption as unnecessary. See Kramer, *supra* note 65. I will suggest that it is unconstitutional, joining Dean Ely and others. See, e.g., John Hart Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 *WM. & MARY L. REV.* 173, 180-91 (1981); Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 *COLUM. L. REV.* 249, 310-12 (1992). I will also suggest that it is basically incoherent, which I think has not been done. See *infra* section IV.C.

74. See CURRIE, *supra* note 22, at 184.



those in which neither state has an interest, are “unprovided-for cases.” These also proved somewhat embarrassing to interest analysis.<sup>75</sup> Since a lack of interests provides no reason to disturb the presumption of forum law, Currie suggested that in this category of cases too, courts should apply the law of their own states.<sup>76</sup>

The jury is still out on interest analysis. In practice, it proves quite underdeterminative, given the difficulty in ascertaining the policy behind a particular law.<sup>77</sup> Issues of application aside, Lea Brilmayer has mounted a more serious attack on the central notion of governmental interest, suggesting that it is the product of a priori theorizing rather than conventional interpretation.<sup>78</sup> I will have more to say about her charges later. For present purposes, though, two observations will suffice.

First, interest analysis makes a very important advance by conceiving of multistate cases as clashes between sovereigns, each attempting to impose its own regulatory scheme in furtherance of its own policies. It is this perspective that reveals the conflict, which Beale’s analysis hid.

Second, like Beale’s vested rights theory, interest analysis avoids the difficult task of resolving conflicts between laws, though in a somewhat different way. While Beale’s account denies the possibility of conflict — only one law governs the transaction — interest analysis admits it: indeed, it is this recognition that allows the distinction between cases that present conflicts (“true conflicts”) and those that do not (“false conflicts” and “unprovided-for cases”). But having used the concept of conflicts to dispose of cases in which there are none, interest analysis deals with true conflicts by employing a technique that suggests they do not need to be resolved. The technique is what I will call “personal-jurisdiction-style” analysis, similar to the one courts use to determine whether a state’s attempt to exercise jurisdiction over a defendant violates due process.

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75. See, e.g., LEA BRILMAYER, AN INTRODUCTION TO JURISDICTION IN THE AMERICAN FEDERAL SYSTEM 240 (1986); Aaron Twerski, *Neumeier v. Kuehner: Where Are the Emperor's Clothes?*, 1 HOFSTRA L. REV. 104, 107 (1973).

76. See CURRIE, *Survival of Actions: Adjudication versus Automation in the Conflict of Laws*, in SELECTED ESSAYS, *supra* note 14, at 128, 156, 168.

77. See BRILMAYER, *supra* note 8, § 2.1.2, at 61-62.

78. See, e.g., Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392 (1980) [hereinafter Brilmayer, *Interest Analysis*]; Lea Brilmayer, *Methods and Objectives in the Conflict of Laws: A Challenge*, 35 MERCER L. REV. 555, 555 (1984) [hereinafter Brilmayer, *A Challenge*] (“[I]nterest analysis is methodologically bankrupt.”); *id.* at 563 (“Currie was as metaphysical as Beale.”). I discuss Brilmayer’s attack in more detail below. See *infra* section III.B.2.

The due process test for personal jurisdiction is the familiar minimum contacts analysis.<sup>79</sup> If the defendant has certain minimum contacts with the forum, it may exercise jurisdiction. Of course, other states may also have jurisdiction — indeed, they may have substantially greater contacts than does the forum — but this has no effect on the forum's ability to exercise its own.<sup>80</sup> The upshot is that personal-jurisdiction-style analysis does not select a unique state. It sets a certain baseline — the constitutionally required minimum contacts — and any state that meets that baseline requirement may exercise jurisdiction.

Interest analysis proceeds in a similar way, using the baseline of governmental interest. If a state has no interest, its law should not be applied.<sup>81</sup> But if a state does have an interest, there is no basis on which to prefer any other state. All interested states meet the baseline requirement: there is no way to choose between them, and therefore no grounds on which an interest analyst may direct an interested forum to apply another state's law.<sup>82</sup> Thus, just as a state may exercise personal jurisdiction without derogation of the jurisdiction of other states, it may exercise legislative jurisdiction — apply its own law — without claiming that its interest in the case is greater than that of other states.<sup>83</sup> Currie made this point quite explicitly, arguing that “[a] court need never hold the interest of the foreign state inferior; it can simply apply its own law as such.”<sup>84</sup>

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79. See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

80. The forum may of course dismiss the case on *forum non conveniens* grounds. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

81. The exception is the unprovided-for case, in which no state has an interest. Here Currie suggested forum law as the only plausible candidate. Larry Kramer suggests to the contrary that a lack of interest is a lack of interest in granting relief, and that consequently the plaintiff should lose. See Larry Kramer, *The Myth of the Unprovided-For Case*, 75 V.A. L. REV. 1045 (1989) [hereinafter Kramer, *Myth*]; see also Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 293-307 (1990) [hereinafter Kramer, *Rethinking Choice of Law*]. My analysis will suggest something similar.

82. This is essentially the Supreme Court's constitutional position, though its notion of interest is even weaker than Currie's. See *infra* section V.A.

83. Though I will argue that personal and legislative jurisdictions are quite different, they have similar histories. Both were originally territorial. Compare *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877) (holding that a state can exercise personal jurisdiction only over people present within its borders), with *Allgeyer v. Louisiana*, 165 U.S. 578 (1897) (rejecting application of Louisiana law to a contract formed in New York). The Court retreated from territorialism at about the same time in both contexts. The personal jurisdiction recantation came with *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); territoriality gave way with respect to legislative jurisdiction in *Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469, 476 (1947). But see *Quill v. North Dakota*, 504 U.S. 298, 319-20 (1992) (Scalia, J., concurring) (distinguishing between types of jurisdiction).

84. CURRIE, *supra* note 22, at 181-82.

I will claim — and this preview is for guidance only — that this characterization is misleading. Assertions of legislative jurisdiction involve the rejection of foreign rights; legislative jurisdiction, unlike personal jurisdiction, is a zero-sum game. We will consequently do better by abandoning the personal-jurisdiction-style analysis and thinking instead in terms of a conflict between rights created by different laws. The classic situation is one in which the plaintiff asserts a right derived from the law of one state, and the defendant counters with a right derived from the law of another. From this perspective, the fundamental question of conflicts law is simply the ordinary legal question that arises in every case: whether the plaintiff has a right to recover, or whether the defendant's asserted right blocks the plaintiff's claim. Whatever courts say they are doing, this is the question that conventional legal thinking implies they answer when they decide conflicts cases.

This perspective shows the difference between vested rights and interest analysis in a slightly different light. If we examine the vested rights theory while thinking in terms of conflicts between rights created by different laws, we see that they are always resolved on the basis of the territorial principle. The right created by the law where the last necessary act took place prevails. This resolution is arbitrary, in that territorialism does not capture the relevant policy concerns, but it is coherent.<sup>85</sup> Interest analysis, by contrast, denies the conflict in a way that produces incoherencies.<sup>86</sup> Currie's prescriptions for conflicts remain plausible only so long as the conflict is hidden behind the veil of choice, so long as conflicts are conceived of as giving rise to a choice-of-law question that can be resolved by personal-jurisdiction-style analysis.<sup>87</sup>

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85. It is coherent in that a conventional legal principle (territorialism) specifies which right prevails.

86. This is, I realize, a bold claim, and I do not attempt a justification at this point. What I will show is that interest analysis does not really choose an applicable law, as it claims. See *infra* section IV.C. If we examine interest analysis through the lens of conflicts, what emerges is not a conventional legal rationale for choosing applicable law but simple discrimination against foreign law and foreign litigants.

87. A more sophisticated version of interest analysis has been developed by Larry Kramer. See, e.g., Kramer, *Rethinking Choice of Law*, *supra* note 81. Because his approach is in many ways similar to the one I advocate, I will postpone consideration of his work, noting here only that it escapes many of the faults with which I charge Currie's approach.

D. *Current Theory*

The only accurate generalization one can make about current conflicts theory is that consensus is lacking.<sup>88</sup> Interest analysis is the leading scholarly position, and the only doctrine that could plausibly claim to have generated a school of adherents. It has been fiercely attacked, however, and the most thoughtful attempts to develop its insights have been condemned as heresy.<sup>89</sup> Other theories of choice of law, though less popular than interest analysis, have also been articulated. These approaches, which are not without appeal, urge courts to apply the law favoring the plaintiff,<sup>90</sup> the "better" law,<sup>91</sup> or the law whose policies would be more impaired by rejection.<sup>92</sup> Into this chaos came the *Second Restatement*, synthesizing a wide range of insights into an indigestible stew.<sup>93</sup> For torts, the *Second Restatement* urges application of the law of the state with "the most significant relationship" to the action;<sup>94</sup> it then lists a dizzying number of factors with no hint as to their relative weight.<sup>95</sup>

More recently, a counterrevolution of sorts appears to be emerging, marked by the insistence that the concept of rights should have a greater role to play.<sup>96</sup> Finally, there exists also a substantial body of scholarship insisting that, Supreme Court pronouncements to the contrary notwithstanding, the Constitution has

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88. This has been true for a while; more than sixty years ago David Cavers commented that "the article on a conflict of laws topic which does not deplore a current 'confusion of authority' is still a rarity." Cavers, *supra* note 56, at 177.

89. See Louise Weinberg, *Against Comity*, 80 GEO. L.J. 53 (1991) (criticizing Kramer).

90. See, e.g., RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 360 (3d ed. 1986).

91. See, e.g., ROBERT A. LEFLAR ET AL., AMERICAN CONFLICTS LAW § 107 (4th ed. 1986).

92. See, e.g., William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963).

93. See, e.g., Kramer, *Rethinking Choice of Law*, *supra* note 81, at 321-22 n.149 ("no explanatory power"); Laycock, *supra* note 73, at 253 ("Trying to be all things to all people, [the *Second Restatement*] produced mush."); Joseph William Singer, *Real Conflicts*, 69 B.U. L. REV. 1, 77 (1989) ("mystifies rather than clarifies").

94. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971).

95. See *id.* at *supra* note 94, §§ 6, 145. The *Second Restatement* may not be as worthless as it seems. It does at least identify relevant considerations. If states simply used these factors, sincerely and consistently, to create rules about which law prevailed, we would have a regime quite like the one I will claim the Constitution imposes. See *infra* section VI.C.

96. See, e.g., Brilmayer, *supra* note 71; Dane, *supra* note 48. It is odd that these scholars seem to think that interest analysis necessarily opposes the idea of rights. See Kramer, *Rethinking Choice of Law*, *supra* note 81, at 278. Brilmayer's rights lead to a personal-jurisdiction-style analysis. See Brilmayer, *supra* note 71, at 1279. Consequently, I do not endorse her account.

something to say about choice of law.<sup>97</sup> I think it surely does, and much of this article will be spent showing how two constitutional clauses, taken seriously, can dramatically change the face of conflicts theory.

E. *Methods and Objectives: What Interest Analysis Is, What a Conflicts Theory Should Be*

The preceding sections have labeled the objects of their discussion "conflicts theories," but this is not quite accurate. It is somewhat unfair to Currie, and somewhat generous to Beale. Explaining why this is so requires a look at conflicts analysis from a more structural perspective. The basic question in a conflicts case, I have said, is whether the plaintiff has an enforceable right. Later sections will make the argument for this perspective.<sup>98</sup> My aim here is to give a more fully developed theoretical account.

A plaintiff's claim may fail for two reasons. It may be that the plaintiff has no right — he might have pleaded a cause of action that simply does not exist, or failed to allege a necessary element. But a claim might also fail because the defendant has available a defense that defeats the plaintiff's right.<sup>99</sup> This might be an affirmative defense, such as mutual mistake in a contracts case or consent to a tort, or it might be something like official immunity.

Deciding whether the plaintiff has an enforceable right thus requires two quite different inquiries. The first is the determination whether the plaintiff has a right at all. This is a question of the scope of the right the plaintiff invokes — whether the law he appeals to grants rights to people in his situation. The rules consulted for this purpose are what I have called "rules of scope," following Perry Dane. If the plaintiff does have a right, the court must then perform a similar analysis of scope to determine whether the defendant has a contrary right. Only if the scope inquiry results in the conclusion that both parties have invoked appropriate rights is there a conflicts question. In such a case, the court must look to a

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97. See, e.g., Ely, *supra* note 73; Katzenbach, *supra* note 11, at 1093 ("Among the United States these are problems ultimately subject to Constitutional prescriptions."); Laycock, *supra* note 73.

98. See *infra* Part IV.

99. Those troubled by the possibility of unenforceable rights might wish to alter the terminology here, perhaps distinguishing "prima facie" rights, which can be defeated, from "true" rights, which permit recovery. Cf. Kramer, *Rethinking Choice of Law*, *supra* note 81, at 293-304. I do not think such semantic reticulation is necessary; where appropriate I will characterize some rights as "enforceable" without worrying about the implication that some are not.

different kind of rule to resolve the conflict — to what I will call a “conflicts rule,” which specifies which right shall prevail.

Obviously, then, there are two ways in which a theory might handle the issues raised by multistate cases. It might eliminate conflicts by aggressive use of rules of scope, or it might provide conflicts rules to resolve conflicts. Beale's theory is of the first sort. The reason that it is generous to characterize it as a conflicts theory is that Beale's approach has no conflicts rules at all. The territorial principle is a rule of scope — state laws grant rights only with respect to in-state occurrences — and it eliminates conflicts entirely.

Currie's theory is similar, but less extreme. In place of Beale's territorial rules of scope, Currie uses the concept of governmental interest to test whether rights exist.<sup>100</sup> Currie's rules of scope are not quite as powerful as Beale's, and consequently some conflicts do arise with his approach. But Currie has very little in the way of conflicts rules. He has, in fact, only one such rule — forum law always prevails. This is, as he readily admits, more a *faute de mieux* stopgap than a real attempt to create a conflicts rule.<sup>101</sup>

Currie had the misfortune to come up with a very troubling stopgap, and the obviously discriminatory character of the rule that forum law always prevails is the source of much of the criticism of interest analysis. But this criticism — unlike Brilmayer's attack on the notion of governmental interest — is somewhat misdirected. Currie conceded the jerry-built quality of his conflicts rule, and indeed did not claim to offer resolutions to conflicts; his aim instead was to show that not all multistate cases featured conflicts. He believed, in fact, that true conflicts could not be resolved by the body of law called “conflicts.”<sup>102</sup> What he hoped for was federal legislation under the Full Faith and Credit Clause, directed to particular areas of substantive law.<sup>103</sup> It is true, I think, that the preference

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100. This is not quite true to Currie's understanding of his theory. If interest analysis were truly a scope analysis, then unprovided-for cases (where neither state has an interest) would be cases in which the plaintiff simply had no right. Currie remained blinded by the idea that the task in a multistate case is to find which law governs, not which right prevails. He was unwilling to conclude that no law governs, and thus found it necessary to apply forum law in unprovided-for cases. Larry Kramer has redescribed unprovided-for cases from what I think is the correct perspective, making the point that a lack of interest implies simply a lack of rights. See Kramer, *Myth*, *supra* note 81, at 1064. He maintains (and I agree) that this is consistent with Currie's approach.

101. See, e.g., CURRIE, *supra* note 76, at 169 (“[The resort to forum law] is not an ideal; it is simply the best that is available.”).

102. See CURRIE, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, in *SELECTED ESSAYS*, *supra* note 14, at 77, 107, 117-21; CURRIE, *supra* note 22, at 181-83.

103. See, e.g., CURRIE, *supra* note 22, at 183; CURRIE, *supra* note 76, at 169-70. It is thus not quite true that Currie maintained that “[a]ll choice of law decisions should be simply

for forum law is unacceptable and must be rejected: Currie's conflicts rule is simply untenable. But the conflicts rule is not an essential conceptual part of interest analysis. Interest analysis is fundamentally a scope-based theory, and its conflicts rule can be discarded without compromising the methodology.

Having made the distinction between rules of scope and conflicts rules, we can describe the progress from Beale to Currie quite simply. Beale eliminated conflicts by territorial rules of scope. Imputing these rules to the states would have been implausible, and he stuck them instead in the twinkling heavens as part of the nature of law. The realists, rightly, did not believe that the "nature of law" was much of a constraint on what states did. Without an effective metaphysical imprimatur, Beale's rules of scope looked silly and wrongheaded, and Currie set out to show that different rules of scope were more sensible. The theories are first cousins: each relies on rules of scope to do all of its work. Neither Beale nor Currie said anything useful about conflicts.<sup>104</sup>

Because of their close relation, the two theories face common difficulties.<sup>105</sup> The problem with having rules of scope do all the work is that the scope of state-created rights is first and foremost a question of legislative intent (or judicial intent, with regard to common law rights). But if the intent of state officials is the whole story, then a scope-centered theory is normatively toothless: judicial or legislative statements about the scope of state rights are authoritative, and while the interest analyst may find them misguided, he cannot claim that they are wrong. To have prescriptive force, rules of scope must draw on some source external and superior to the authority of the states.<sup>106</sup> Beale relied on the nature of law, but that gambit is no longer plausible. Currie purported to uncover interests via the conventional process of statutory interpretation, but this required him to defer to legislative or judicial statements of

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substantive decisions about the substantive rules' proper reach." BRILMAYER, *supra* note 8, at 108. First, Currie did distinguish between scope analysis and conflicts analysis even within his theory — though admittedly, since an interested forum will always apply its own law, the scope analysis ends the matter if it uncovers a forum interest. Second, and more importantly, Currie realized — and hoped — that federal conflicts rules would displace his rule of preference for forum law. This latter point shows quite clearly his awareness of the distinction between scope decisions and conflicts decisions.

104. Please do not quote this out of context.

105. Brilmayer makes this point well in her extended critique of interest analysis. See BRILMAYER, *supra* note 8, § 2.5. My discussion here is indebted to hers on several points, most notably the tension between objectivity and subjectivity in the nature of governmental interests.

106. See *id.*

scope even if those conflicted with his standard domiciliary-focused approach to interests. Metaphysics and impotence are the Scylla and Charybdis of scope-centered theories. Beale's succumbs to the first while Currie's wavers between the two.<sup>107</sup>

Modern theory has advanced, of course, and we now have a wealth of suggestions for conflicts rules.<sup>108</sup> Many of these are good; a number are quite ingenious.<sup>109</sup> It is fortunate that scholars have turned their attention to conflicts rules. One of the arguments this article will make is that conflicts are more prevalent than Currie's rules of scope suggest.<sup>110</sup> In consequence, conflicts rules are where the action is.<sup>111</sup>

Unfortunately, modern suggestions for conflicts rules share something with scope-based theories: they are normatively weak. The rules they offer, if followed by all states, would probably make all better off; coordination can often be mutually beneficial in multiparty interactions. The problem lies in achieving coordination in the absence of external constraints.<sup>112</sup> As Larry Kramer has pointed out, conflicts presents a sort of Prisoner's Dilemma: states may do better by cooperating, but defection is a danger.<sup>113</sup> The existing suggestions for conflicts rules lack prescriptive force in that, if states decide instead to pursue narrow or selfish interests, the scholarship is merely hortatory.

This article will not attempt to prescribe particular conflicts rules, but will instead show how the Constitution constrains the states in their crafting of such rules. (It will not construct a building so much as give a perspicuous view of the foundations of possible buildings.) Beale and Currie both thought that conflicts were too

107. Currie's waffling is reflected in the alternately objective and subjective nature of governmental interests. Brilmayer's extended discussion of interest analysis reveals this well, although I think she goes too far in faulting Currie for not treating state choice-of-law rules as rules of scope. See *infra* section III.B.2.

108. See *supra* section II.D.

109. Baxter's comparative impairment principle, in particular, has the elegance and good sense that typically prompts scholars to think that we'd have come up with that idea if we'd thought about it first.

110. See *infra* section VI.B.

111. More generally, the conflicts problem is that state assertions of legislative jurisdiction overlap. Telling states that their rights do not extend as far as the legislature has said they do is pointless. In fact, I will argue, the Constitution tends to enlarge, rather than contract, the scope of state-created rights. What a conflicts theory must do is manage the competing claims of authority; it must oversee the conflicts between rights. This is obviously a matter of conflicts rules, not rules of scope.

112. See generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1971).

113. See Kramer, *Rethinking Choice of Law*, *supra* note 81, at 339-44. Kramer also suggests that coordination may naturally emerge, see *id.* at 343-44, although the history of conflicts should give optimists pause.



hard to resolve.<sup>114</sup> They are hard, and the task of deciding which interests are more important lies properly within the authority of the states. The Constitution does not prescribe unique conflicts rules, but rather restricts the permissible grounds on which states may assert that their interest in regulating a transaction prevails over the interest of another state. By so doing, the Constitution creates a situation in which mutually beneficial coordination is likely. The proper role of the Constitution has been obscured by the rhetoric of choice and the concomitant personal-jurisdiction-style analysis. If we think about the issue in terms of conflicts — which is to say, if we think about it as a conventional legal question — things become much clearer. But to make the case for this claim, I need to develop what I have been calling the conventional legal perspective.

### III. RETHINKING THE THEORY: FROM CHOICE TO CONFLICT

The goal of this article is to provide a workable framework for resolving conflicts of law, one that looks at them as conflicts and applies principles appropriate to their resolution. Neither the vested rights theory nor interest analysis fits the bill because both are scope-centered: neither makes a real attempt to deal with conflicts.<sup>115</sup> This sole reliance on rules of scope is both mistaken and unnecessary. A theoretically sound approach to conflicts can be constructed, and these theories give us the raw materials to do so. The framework proposed here will not be built from scratch; nothing in conflicts is at this point. The concepts I will deploy can be identified quite easily as originating in either vested rights theory or interest analysis. The aim of this Part is to show what each approach has to offer, as well as what must be discarded.

#### A. *Rights and Their Critics*

Legal realism utterly destroyed Beale's carefully constructed edifice. The revolution was necessary; the vested rights theory was as wrong as a legal theory can be. It was wrong, however, primarily because it produced the wrong results, not because of any metaphysical taint. The realist assault went beyond criticism of Beale's results, and in its more ambitious form it seriously overreached. The realists' success in dislodging Beale's rights-based framework

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114. See 3 BEALE, *supra* note 6, § 53, at 1929; CURRIE, *supra* note 102, at 107, 117-21; CURRIE, *supra* note 22, at 181-83.

115. See *supra* section II.E.

has led conflicts to its current straits. The rejection of the notion of rights is responsible for both the esotericism of conflicts and, relatedly, its disconnection from ordinary legal discourse in general and constitutional law in particular.<sup>116</sup> Rescuing the rights-based framework requires an evaluation of the legal realist criticisms.

There are two quite different components to the realist attack on Beale's approach. The first is practical and shows that the territorially based vested rights theory does not work, either positively or normatively. The second is theoretical and aims to eliminate the very notion of rights from legal discourse. The following section considers the first component, which is sound; the next addresses the second, which is not.

### 1. *The Failure of Vested Rights / Territorialism*

From a normative perspective, the most obvious problem with territorialism is its tendency to produce arbitrary results. Territorial connecting factors, triggered by the crucial last act, often point in odd directions. For example, if one resident of state *A* poisons another state *A* resident within the borders of state *A*, common sense political philosophy does not suggest that state *B*'s law should govern merely because the victim happens to have crossed into state *B* when the poison takes effect. In compensation for this arbitrariness, territorialism is generally supposed to offer predictability.<sup>117</sup> However, it turned out to be much less determinative than its proponents claimed. In part this was a consequence of the need to characterize actions and their elements. Courts needed to decide whether the suit sounded in tort or in contract before they could invoke the appropriate rules. Similarly, since the forum would apply its own procedural law regardless of whether it applied foreign substantive law, the characterization of particular issues as substantive or procedural could be dispositive. The related distinction between rights and remedies also allowed courts some latitude because under Beale's theory, forum law governed questions of remedy even when the rights were foreign.<sup>118</sup>

Underdetermination may not be a critical defect; indeed, territorialism's arbitrariness stemmed from its rigidity, and the elasticity provided by these "escape hatches" gave judges freedom to reach

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116. As Kramer succinctly puts it, "Our entire legal system rests on the concept of vested rights." Larry Kramer, *Return of the Renvoi*, 66 N.Y.U. L. REV. 979, 990-91 (1991).

117. See 1 BEALE, *supra* note 6, § 1.3; see also SCOLES & HAY, *supra* note 7, § 2.6, at 15 n.10.

118. See, e.g., *Oceanic Steam Navigation Co. v. Mellor*, 233 U.S. 718 (1914).

sensible results. More serious is the problem that territorialism works oddly, if at all, in the absence of substantive legal uniformity. The elements of a tort may differ across jurisdictions; similarly, jurisdictions may employ different rules to determine where a contract is formed.<sup>119</sup> Thus jurisdictions applying territorialist rules might still disagree about *what* the essential last act was, and consequently about *where* it took place. Beale attempted to smooth over these issues by appealing to general common law to determine the location of the triggering events, but general common law is no longer available. Since it is not even clear what results territorialism prescribes, it is hard to maintain that it reaches the right ones as a normative matter.

Of course, Beale proposed the vested rights theory not as a normative suggestion but as a positive statement of the law. From this perspective, the greatest defect of territorialism is that it is not true. States regularly assert the power to determine the legal consequences of events transpiring outside their geographical boundaries, and sometimes they succeed.<sup>120</sup> So too does the federal government.<sup>121</sup> In the face of this widespread disregard, territorialism can be defended as a positive theory only by metaphysical arguments about the nature of law, suggesting that actual practice is illegitimate, somehow "not law" despite the fact that everyone does it. But this style of argumentation is no longer convincing, nor should it be.<sup>122</sup> Law is a human practice, not an independent entity

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119. For example, one jurisdiction might have adopted the "mailbox rule," providing that the contract is formed as soon as the recipient of the offer sends acceptance; another might hold that the contract is formed only upon receipt of the acceptance. See BRILMAYER, *supra* note 8, § 1.3, at 26, § 1.5.2, at 40-41.

120. See, e.g., *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981) (upholding application of Minnesota law to accident occurring in Wisconsin); *Skiriotes v. Florida* 313 U.S. 69 (1941) (upholding Florida prosecution of Florida resident for actions on high seas); Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1241-42 (1992) ("It is also fairly well established that a state may regulate its residents, even when they are acting outside the state.")

121. See, e.g., *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992) (upholding kidnapping of Mexican national to be tried in United States for conspiracy to torture United States government agents in Mexico). See generally Brilmayer & Norchi, *supra* note 120, at 1229 (discussing rules on federal extraterritorial criminal prosecution). Even the operation of federal law within the states would seem to pose problems for Beale's theory of a single, territorially supreme sovereign. Beale admits no difficulty: he suggests that each state of the union remains a "separate legal unit," 1 BEALE, *supra* note 6, § 2.2 (discussing annexation of Hawaii), and then explains that federal law is local law everywhere, see *id.* § 2.3, at 18 ("It is perfectly correct to say . . . that the law of each of the states consists of the constitution, treaties, and statutes of the United States, the constitution and statutes of the particular state, and the common law of that state.") This analysis allows his theory to operate but, characteristically, suppresses the possibility of conflict between state and federal law.

122. In fact, Beale attempted to defend territorialism as a matter of positive law. "Since the power of a state is supreme within its own territory, no other state can exercise power

to which practice must conform.<sup>123</sup> Consequently, it cannot credibly be attacked for failure to abide by metaphysical principles. Criticisms of violations of territoriality must be made within the law, but Beale has no tools with which to make those criticisms.

This should be enough to condemn Beale's version of the vested rights theory. Territorialism is neither normatively attractive nor positively accurate. His rules of scope are simply wrong. What we are left with, then, is a machine missing a vital gear. Without the territorial principle, it does not run.

## 2. *Salvaging the Concept of Rights*

Beale's theory aims to help judges ascertain parties' rights. In criticizing Beale's results, legal realism left this aspiration undisturbed; it merely pointed out that territorialism did a bad job. The more ambitious aspect of the realist challenge consisted of the rejection of the goal itself, the denial of the concept of rights. This broader attack on received wisdom was part of a widespread reaction against formalism and metaphysics.<sup>124</sup> In a classic statement of the principles of realist jurisprudence, Felix Cohen affiliated himself with a laundry list of like-minded philosophers — Charles Pierce, William James, Bertrand Russell, and Rudolf Carnap, to name a few — and linked the realist movement to similar developments in physics, mathematics, psychology, and even grammar.<sup>125</sup> The common thread binding these thinkers, what Cohen called the "functional approach," was "an assault upon all dogmas and devices that cannot be translated into terms of actual experience."<sup>126</sup> Cohen thus demanded, with the pragmatism of William James, that concepts pay their way,<sup>127</sup> and asserted, with the verificationism of the logical positivists, that "[a]ll concepts that cannot be defined in

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there," he wrote. 1 BEALE, *supra* note 6, § 61.1. He then turned for support to Chief Justice Marshall's opinion in *Rose v. Himely*, 8 U.S. (4 Cranch) 241 (1808), but the quotation in fact suggests that personal and territorial traditions mingle: "It is conceded that the legislation of every country is territorial; that *beyond its own territory, it can only affect its own subjects or citizens.*" 8 U.S. (4 Cranch) at 279 (emphasis added). Law has never been purely territorial in practice.

123. Cf. PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 24 (1991) ("Law is something we do, not something we have as a consequence of something we do.").

124. See LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960*, at 14-15 (1986).

125. See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 822, 826 (1935).

126. *Id.* at 822.

127. See WILLIAM JAMES, *What Pragmatism Means, in PRAGMATISM AND THE MEANING OF TRUTH*, 27, 31-32 (1978) ("You must bring out of each word its practical cash-value . . .").

terms of the elements of actual experience are meaningless."<sup>128</sup> Armed with these principles, the realists went after the notion of rights, arguing, for example, that assertions of rights were no more than predictions of official behavior.<sup>129</sup>

The attack has been understood in two different ways. First, it can be seen as a denial that rights exist.<sup>130</sup> This argument is deeply out of tune with the philosophies Cohen invoked, for a denial of the existence of rights is just as metaphysical as the affirmation it opposes.<sup>131</sup> It is just as much an attempt to catalog the furniture of the universe, to provide a description that is not merely useful for particular purposes but, in the most robust sense of the word, true. Claiming that rights do not exist independent of their enforcement (or, equivalently, that law is "made" by judges, rather than "found") merely embroils law in the sort of ontological quarrel that has troubled philosophy for centuries — in philosophy of mind, between behaviorists and mentalists; in philosophy of science, between realists and antirealists; in epistemology, between realists and relativists.<sup>132</sup>

When philosophical disputes have gone on for so long, with so little in the way of resolution, it is a good bet that there is something wrong with the terms of the debate.<sup>133</sup> Rudolf Carnap's diagnosis suggests the problem is that questions at this level of generality are not ontological at all, but rather practical.<sup>134</sup> That is, within Beale's framework it makes sense to ask whether a particular party has a right. Asking whether rights exist at all, on the other

128. Cohen, *supra* note 125, at 826. The logical positivists maintained that the meaning of a sentence consists of its method of verification. See, e.g., Moritz Schlick, *Positivism and Realism*, in LOGICAL POSITIVISM 86-88, 106-07 (A.J. Ayer ed. & David Rynin trans., 1959). It follows immediately that an unverifiable proposition — one with no empirical consequences — is meaningless.

129. See, e.g., COOK, *supra* note 57, at 33; Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

130. See, e.g., BRILMAYER, *supra* note 8, § 1.5.2, at 37 ("[The realists] believed, in addition, that there simply were no such things as vested rights."); Dane, *supra* note 48, at 1225 (commenting that realists "have spent a good deal of ink denying the metaphysical reality of legal norms or rights 'existing' independent of their enforcement").

131. The logical positivists, at least, were clear that they were not denying the existence of anything but simply abandoning meaningless discourse. See, e.g., Schlick, *supra* note 128, at 106-07.

132. Law has, of course, endured this debate, though current theory wisely tends to characterize it as a waste of time. See, e.g., DWORKIN, *supra* note 48, at 225; Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1764 (1991).

133. See P.M.S. HACKER, WITTGENSTEIN'S PLACE IN TWENTIETH-CENTURY ANALYTIC PHILOSOPHY 100-03 (1996).

134. See Rudolf Carnap, *Empiricism, Semantics, and Ontology*, in MEANING AND NECESSITY: A STUDY IN SEMANTICS AND MODAL LOGIC 207, 207-08 (1956).

hand, is either trivial or nonsensical within the framework.<sup>135</sup> Answering that broader question, in a metaphysical sense, requires a true and singular description of the world, an ideal language among whose terms the disputed entities will or will not be found. However, we do not have such a language; what we have are different sets of linguistic practices adapted to different purposes and circumstances. We are dealing not with entities but with ways of talking.<sup>136</sup> Consequently, the decision whether to talk in terms of rights must be made on practical grounds.<sup>137</sup>

The better understanding of the realist attack thus takes the ultimate question to be not whether rights exist, but rather whether they are theoretically useful. From this perspective, the realist claim is that talking in terms of rights does not advance the ball. That claim is wrong, and demonstrating its error is the work of this article.

I obviously cannot argue here for the proposition that thinking in terms of rights is useful. I can only attempt to show it, and that is the task of later sections. I can say, however, that realism's attempt to bring scientific methods to bear on conflicts did not succeed in producing clarity. What it did succeed in doing was to cut conflicts loose from the remainder of legal discourse, which pervasively employs the concept of rights. That should be a *prima facie* reason to doubt the realist contribution.<sup>138</sup>

135. Cf. J.L. Austin, *The Meaning of a Word*, in *PHILOSOPHICAL PAPERS* 55, 57-58 (3d ed. 1979).

136. Cf. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* §§ 400-01 (1958).

137. Cohen certainly seemed to understand this point. See Cohen, *supra* note 125, at 835 ("A definition of law is *useful* or *useless*. It is not *true* or *false* . . .").

138. Another reason is the fate of the related movements to which Cohen pointed. Cook's realist approach to conflicts linked itself quite closely to the logical positivists; he identified himself explicitly as a "scientific empiricist," *COOK, supra* note 57, at 46, and took as his epigraph for Chapter III a restatement of their central principle of verification, attributing it to the Marxist and pragmatist philosopher Sydney Hook. See *id.* at 71. Logical positivism was a dramatic failure; when A.J. Ayer was asked for the chief difficulty in a television interview, he is reported to have responded, "I suppose its main defect was that it wasn't true." See Shusha Guppy, *Tom Stoppard: The Art of Theater VII*, reprinted in *TOM STOPPARD IN CONVERSATION* 177, 187 (Paul Delaney ed., 1994); see also *id.* (describing criticism of logical positivism as "attacking a dodo"). For a concise philosophical evaluation of logical positivism, reaching essentially the same conclusion as Ayer, see HACKER, *supra* note 133, at 64-65. Both positivists and realists, I suggest, erred by embracing a dogmatic reductivism rather than a sensitive analysis of the actual use of language. Realism's value lies in its skeptical contributions, not in any attempts to create a general theory of law, and it may be better understood as consisting simply of the former. See JEFFRIE G. MURPHY & JULES L. COLEMAN, *PHILOSOPHY OF LAW* 35 (1990).

## B. *Governmental Interests and Their Critics*

What I want to draw from Beale's work, then, is the principle that the basic task in conflicts is to determine whether the plaintiff has an enforceable right. As discussed above,<sup>139</sup> this determination requires a two-step inquiry. First, the court must analyze the scope of the laws invoked by plaintiff and defendant to determine whether a conflict exists. If it finds a conflict, it must employ conflicts rules to resolve it. The question at this point is how to arrive at the appropriate scope and conflicts rules. For that enterprise I will enlist parts of interest analysis, and before coopting the theory, I must evaluate it.

The realists attacked Beale's approach on two levels, faulting both its results and its theoretical orientation. Interest analysis has been subjected to the same dual challenge. At the level of result, the charge is that Currie erred in his creation of rules of scope and conflicts rules. At the level of theory, put forth most forcefully by Lea Brilmayer,<sup>140</sup> the realist argument is that the governmental interests Currie purported to identify are not part of a realist or functionalist analysis, but rather a metaphysical construct akin to Beale's vested rights, imported for a similar *deus ex machina* solution to conflicts questions. Once again, I will consider the specific criticisms before moving on to the general ones.

### 1. *The Weakness of Currie's Approach*

As a normative matter, Currie's rules are not very attractive. His examples are complex, but the tendency that emerges is unabashedly parochial. Generally speaking, as a matter of scope, state law grants rights only when to do so favors a local; and when rights conflict, forum law always wins.<sup>141</sup> Neither of these domiciliary-centered rules seems a good recommendation.

Like Beale, however, Currie advanced his scope analysis as a positive statement of the law. It is, he claimed, simply interpretation of the substantive laws at issue.<sup>142</sup> The utility of the concept of governmental interests depends on this claim, and I consider Brilmayer's challenge to it in the next section. The practical weakness of Currie's approach is more obvious, and it has to do with his conflicts rule.

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139. See *supra* section II.E.

140. See sources cited *supra* note 78.

141. See, e.g., BRILMAYER, *supra* note 8, § 2.1.2, at 65.

142. See, e.g., CURRIE, *supra* note 102, at 118.

Currie did not purport to derive his preference for forum law in true conflicts from analysis of state law. In fact, he advanced it with some embarrassment, as “not an ideal” but “simply the best available.”<sup>143</sup> It is not an attempt to resolve conflicts at all, and it produces a theory just as impotent as Beale’s without the territorial principle. Vested rights analysis worked only so long as its rules of scope suppressed the possibility of conflict; without these rules, conflict appears and cannot be resolved. Interest analysis, while no longer working explicitly in terms of rights, confronted the same problem. Currie’s rules of scope suggested that some multistate cases did not present conflicts. Because his rules of scope were more plausible than Beale’s, the approach had some practical value — identifying false conflicts is generally considered a real contribution. But it did not even pretend to solve the fundamental problem. In true conflicts, Currie suggested that courts should apply forum law, not because it was appropriate according to conflicts principles, but because such conflicts were at bottom insoluble.<sup>144</sup>

This is not much of a conflicts theory. If we grant that state interests are entities discernible by the methods Currie advocates, the theory shows that some cases do not present the basic conflicts issue: a clash between two sovereigns, each of which demands that its law be given effect. Where such conflicts do exist, however, interest analysis offers no solution.<sup>145</sup>

The only reason that this confession of weakness seems anything less than a confession of failure is that interest analysis employs what I have called a personal-jurisdiction-style analysis. This approach conceives the task as choosing applicable law, not resolving conflicts, and it suggests that choosing forum law does not imply that the interests of other states have been deemed inferior.<sup>146</sup> If choosing forum law is acceptable in true conflicts — Currie calls it “sensible and clearly constitutional”<sup>147</sup> — then true conflicts do not create a gaping hole in the heart of the theory. It is for this reason, I think, that interest analysis is forced to characterize away the conflict, to adopt the personal-jurisdiction-style choice-of-law approach. If the conventional legal perspective reveals that the

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143. See CURRIE, *supra* note 76, at 169.

144. See CURRIE, *supra* note 102, at 107, 117.

145. This is not precisely true; after all, Currie suggested that in true conflicts, courts should apply forum law. But he did not see this as a resolution. See *id.* at 117-21. Nor should he have; it is obviously discriminatory and, I will argue, unconstitutional.

146. See CURRIE, *supra* note 22, at 181-82.

147. CURRIE, *supra* note 102, at 119.



interest analysis approach to true conflicts is illegitimate — and I will show that it does, though the demonstration is still a ways off — the recharacterization is unavailing. In that case, interest analysis fails because it cannot handle conflicts.

## 2. *Salvaging the Concept of Interest*

Just as Beale's rights-based framework can survive without his territorial rule of scope, Currie's concept of governmental interest does not depend on his conflicts rule. Nor, of course, does it depend on the precise rules of scope he derived. Currie's admission that his analyses were only tentative and "subject to modification on the advice of those who know better"<sup>148</sup> — namely state courts and legislatures — shows that the theory can accommodate a wide variety of such rules.

Brilmayer's more ambitious attack on the notion of governmental interest begins with Currie's scope analysis. She rejects the idea that scope can be determined simply by analysis of the substantive law and faults Currie for ignoring state choice-of-law rules in his determination of governmental interests.<sup>149</sup> If correct, the criticism has serious implications; it shows that the key concept of interest is not something derived from state law but "an externally determined and objective concept that is imposed on state legislatures and state judges by scholars."<sup>150</sup> The criticism is not correct, however: it runs together scope analysis and conflicts analysis. Choice-of-law rules are not rules of scope, and Currie was right not to defer to them.

A functional analysis leads to this conclusion, for choice-of-law rules simply cannot do the work of rules of scope. To the extent that they might seem to grant or deny rights, they are trumped by substantive law. First, choice-of-law rules will never affirmatively produce a right denied by substantive law. If a Connecticut statute grants rights explicitly only to those injured within the state, a choice-of-law rule dictating the application of Connecticut law to an extraterritorial injury will not expand the statute's scope. Second, choice-of-law rules do not withhold rights affirmatively granted by substantive law. A state choice-of-law rule codifying the territorial principle that the law of the place of the tort governs might seem to indicate a lack of intent to grant rights to a domiciliary injured

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148. CURRIE, *The Verdict of Quiescent Years*, in *SELECTED ESSAYS*, *supra* note 14, at 592.

149. See BRILMAYER, *supra* note 8, §§ 2.5.1-4.

150. *Id.* § 2.5.5, at 110.

outside its borders, but this is not in fact so. Even the territorialists granted that if a tort occurred in a place with no local law, at least between two domiciliaries of the same state, that state's law would determine rights and obligations.<sup>151</sup>

Instead, choice-of-law rules typically prescribe which rights will prevail when rights conflict.<sup>152</sup> (It is because there are no conflicting rights that the law of common domicile applies in tort cases occurring in lawless lands, despite territorial choice-of-law rules.) They are, generally speaking, conflicts rules. The confusion over their nature results presumably from the fact that choice-of-law rules are drafted to answer the question "what law applies?" This question is part of the rhetoric of choice, and as I have suggested before, it prevents us from seeing clearly the structure of conflicts analysis.<sup>153</sup> The question "what law applies?" runs together the issues of whether a party has a right, and whether that right prevails against a conflicting right. It suggests that a choice-of-law rule is relevant to both. Thus Larry Kramer, maintaining that "choice of law is a process of interpreting laws to determine their applicability on the facts of a particular case," claims that consequently "the forum can never ignore other states' choice-of-law systems."<sup>154</sup> But if, as I have argued, choice-of-law rules are conflicts rules, not rules of scope, the conclusion does not follow. A conflicts rule that local rights will yield to foreign rights on a particular constellation of facts does not mean that the local rights do not exist.

Of course, the conclusion that choice-of-law rules are conflicts rules does not salvage Currie's positive analysis; the question remains why he did not defer to them instead of concluding that forum rights should always prevail over foreign rights. It might seem, however, to rescue his conception of governmental interests as things that an analyst can discern by analysis of substantive law. In fact, there is another element of the challenge that must be faced.

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151. See, e.g., *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 355-56 (1909) (Holmes, J.) ("No doubt in regions subject to no sovereign . . . [civilized nations] may treat some relations between their citizens as governed by their own law, and keep to some extent the old notion of personal sovereignty alive."); 1 BEALE, *supra* note 6, § 45.2 (discussing jurisdiction over actions arising on the high seas).

152. A rule looking to another state's law may also reflect an intention to give the same rights as that state's substantive law would in a domestic case. This is the most natural interpretation of a rule that, for example, provides that the rights of heirs shall be determined by the law of the testator's domicile. Cf. *In re Annesley*, 1 Ch. 692 (1926) (Eng.). This is what Perry Dane calls a "rule of assimilation": it incorporates the terms of foreign law in much the same way that federal copyright law looks to state law to determine who are the "children" entitled to share in renewal rights. See *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956).

153. See *supra* Part I.

154. See Kramer, *supra* note 116, at 1005.

Brilmayer's critique of Currie devotes much space to the claim that his "governmental interests" are objective, rather than subjective — that is, that their existence is determined by a priori theorizing, rather than analysis of state law.<sup>155</sup> I have suggested that they are subjective, and Currie, to the extent that he addressed the issue, said so explicitly.<sup>156</sup> Brilmayer's critique of the concept of governmental interests, however, is actually disjunctive. Like the realist attack on rights, it maintains not that these interests do not exist but that the concept is not useful, regardless of the nature of interests.<sup>157</sup> If interests are objective, they are metaphysical fictions that judges may safely ignore. If they are subjective, then they are determined, in the absence of legislative specification, by the judge's own decision. Interest analysts may seek to free judges from territorialist dogma by showing them a wider range of options, but that is the extent of their contribution. If the judge decides upon reflection that state law is nonetheless territorial in scope, the interest analyst can only carp from the sidelines.<sup>158</sup>

The horns of the dilemma converge on the same point: the concept of governmental interests cannot direct the resolution of cases. Interest analysts have no footing for "normative critique of existing case law."<sup>159</sup> This is true — but it is also true of most current conflicts scholarship. Suggestions for conflicts rules or rules of scope are always mere suggestions; states may decide otherwise. Still, this hardly shows that the concept is useless; proposals of better law can be invaluable. My analysis actually aspires to slightly greater normative bite: it seeks to show the constitutional limits on state conflicts practices. From this perspective, Currie's approach has great utility. The methodology of interest analysis is useful because it foregrounds the question of what states are attempting to do. Currie's particular suggestions are especially useful precisely because they are so parochial. Currie posits a maximally selfish state, interested only in advantaging its domiciliaries. Starting from this position and investigating the extent to which the state can achieve its selfish ends produces a "bad state" view of conflicts, which is what the field needs at this point. If states cannot be compelled to

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155. See, e.g., BRILMAYER, *supra* note 8, § 2.5-2.6, at 99-119.

156. See CURRIE, *supra* note 148, at 592.

157. Brilmayer actually concludes that Currie's interests are objective and hence denies their existence. See BRILMAYER, *supra* note 8, § 2.5.5, at 115. She does, however, give a quite complete statement of the weaknesses of subjective interests as well. See *id.* § 2.5.3.

158. See *id.* § 2.6, at 117-18.

159. See *id.* § 2.5.3, at 104.

take the high road, the important question is what barriers exist along the downward path.

### C. *The Positive Account*

Despite the criticisms of vested rights and interest analysis, conceptual building blocks remain. Joseph Beale posed the key question: Does the plaintiff have an enforceable right? And Brainerd Currie identified the correct way to begin the inquiry: apply the tools of statutory construction to determine whether the law the plaintiff invokes seeks to give him a right, and whether the law the defendant invokes seeks to restrain that right. This scope analysis disposes of some cases — those in which the plaintiff pleads a law that gives him no right, and those in which the defendant interposes a law that gives him no defense. On its face, and as developed by Currie, that is as far as it goes. Larry Kramer has taken interest analysis somewhat further,<sup>160</sup> in what I think is essentially the right direction, and the positive account I develop here is quite similar to his approach.

The previous sections clarified some foundational points. The idea that rights must vest under one, and only one, law, to be identified by appeal to a priori principles, is indeed misguided; but the idea that analysis must eschew the *concept* of rights is no better. Conflicts scholarship has thus conformed (metaphorically, of course) to Newton's laws of motion: Beale's misguided metaphysics are matched by an equal and opposite error in the realist reaction. If there is progress in the scholarship, we might hope for ever more gradual oscillations of the pendulum between vested rights and realism. Such is, in essence, the aim of this article: to show that there exists a happy medium. The two approaches are not incompatible but in fact have much to offer each other.

#### 1. *Thinking in Terms of Rights*

Both vested rights and interest analysis, I have said, suppress the notion of conflict. The vested rights theory simply denies the possibility; interest analysis hides it behind the idea of choice. Ultimately, both theories effectively resolve conflicts by invoking principles — territorialism and forum-preference — that serve policies of conflicts jurisprudence accidentally, if at all. It would be better for everyone, I suggest, if we stopped hiding conflicts and started thinking about how they are resolved. I will ultimately ar-

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160. See, e.g., Kramer, *Rethinking Choice of Law*, *supra* note 81.

gue that the Constitution speaks to this point, but the first step is to take conflicts out of the shadows in which the choice-of-law perspective shrouds them.<sup>161</sup>

The easy way to do this is to return to the idea of rights. This is a venture one might hesitate to undertake, given the amount of criticism the concept has absorbed,<sup>162</sup> but I have suggested that the criticisms are overstated. Nor am I alone in suggesting that a greater focus on rights would benefit conflicts theory.<sup>163</sup> Perry Dane, in particular, has defended at length what he calls the "Norm-Based" view of law — essentially, commitment to the rule of law<sup>164</sup> — and argued that it implies "vestedness" (the principle that a party's rights should not depend on the forum).<sup>165</sup> While I sympathize with Dane's project, I do not intend to make a jurisprudential argument.<sup>166</sup> I suggest instead that a description that oper-

161. Resolving conflicts is hard, and abandoning the personal-jurisdiction-style analysis will force us to confront some new difficulties. Currie similarly found that his approach faced problems that the vested rights theory did not — notably, the issue of discrimination between citizens and noncitizens of a state. His diagnosis was one we should keep in mind:

The fact that these problems come immediately into view when conflicts problems are approached in this way does not mean that they are generated by the method. Indeed, their prompt appearance is ground for an inference that they have been present from the beginning, obscured and suppressed by the traditional conflict-of-laws system.

CURRIE, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, in *SELECTED ESSAYS*, *supra* note 14, at 445, 448.

162. "Indeed, one may now wonder how any juristic construct such as 'right' could have been accepted as fundamental in the explanation of any important aspect of judicial activity," wrote David Cavers. Cavers, *supra* note 56, at 175-76; *see also* Juenger, *supra* note 28, at 435 (vested rights theory is "sheer sophistry").

163. *See generally* Brilmayer, *supra* note 71.

164. *See* Dane, *supra* note 48, at 1218.

165. *See id.* at 1245. I will claim that the Constitution requires a neutrality quite similar to Dane's vestedness. *See infra* Part VI.

166. In particular, I do not mean to be endorsing a "deontological" rather than a "consequentialist" approach to conflicts. Dane and Brilmayer, unlike Kramer, become philosophically self-conscious when they talk of rights. *See* Dane, *supra* note 48, at 1218-23; BRILMAYER, *supra* note 8, § 5.2 (describing modern choice of law theory as instrumentalist); Brilmayer, *supra* note 71, at 1278 ("There is more at stake than semantics. Choosing to talk in terms of rights rather than policies or interests represents a fundamental jurisprudential commitment which is reflected in the way that concrete problems are resolved."). The suggestion that the language of rights implies a deontological rather than consequentialist theory of law is, however, overstated. Michael Green, for example, has shown that a realist approach (policy analysis) is in fact compatible with deontological principles. *See* Green, *supra* note 12, at 968-86. A more obvious objection is that the "instrumental" goal that judges seek to maximize might be vindication of parties' preexisting rights in general. More seriously, Brilmayer begs the question by assuming that whether application of a law will achieve its purpose is a different question from whether its application will vindicate preexisting rights. *See* BRILMAYER, *supra* note 8, § 5.2, at 225; *see also* Dane, *supra* note 48, at 1243-44 (suggesting that only the "Decision-Based" view of law would propose that courts, in adjudicating disputes, are "primarily charged" with advancing the policies of their states). As Larry Kramer sensibly suggests, these are basically the *same* question: if allowing a party to appeal to a particular law will not effectuate the law's purpose, it is quite likely that the law does not give that party any rights. *See* Kramer, *Myth*, *supra* note 81, at 1064; Kramer, *Rethinking*

right to win a judgment upon a showing of the required elements.<sup>168</sup> A judgment is a judicial determination that the showing has been made. It also confers a right, namely the right to the damages awarded. The next question is what happens to rights created by one state when they meet the rights of another.

## 2. *Thinking in Terms of Conflict*

When governments create rights, other governments may or may not respect those rights.<sup>169</sup> For example, if the law of a state does not authorize recovery upon a showing that allows a right to recover in another state, it gives people a right to engage in the conduct for which the plaintiff seeks damages.<sup>170</sup> We then have a conflict and must decide which right prevails. There is no reason to describe this as a question of choosing which law applies, and, as we shall see, this notion of choice does not comport with current conflicts methodology.<sup>171</sup> Further, speaking in terms of conflicts may change the way we think about these cases. A conflict is not typically resolved by a personal-jurisdiction-style analysis that identifies a number of permissible options, but it is rather a legal question of whether the plaintiff's or the defendant's claimed right must

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168. There is no need, for my purposes, to suppose that these rights vest at the time of any particular action. A state tort law will give certain people a right to recover damages if they make the required showing. Whether a tort has been committed will obviously have a bearing on whether or not the showing can be made, but it need not affect our characterization of the right. Beale, on the other hand, did need to identify a unique moment of vesting. The territorial principle could not operate without a method of determining in which state the rights vest, and without the last act doctrine, Beale would have been forced to confront conflicting rights. But my point is exactly that these conflicts exist, and that an analysis that hides them does us no favors.

169. With judgments, they typically do; a judgment obtained in one state confers rights enforceable in any state. See, e.g., *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996). There is nothing analytically special about judgments; they are simply one instance of state-created rights. The difference between rights based on judgments and those based on legislation or common law is that there will seldom, if ever, be a right the defendant can assert against enforcement of the judgment. States have not adopted laws giving their citizens rights against foreign judgments. Indeed, Congress has specified that they may not, see Full Faith and Credit Act, 28 U.S.C. § 1738 (1994), and the Full Faith and Credit Clause prevents them from doing so of its own force, see, e.g., *Hughes v. Fetter*, 341 U.S. 609, 611 n.4 (1951). In consequence, cases in which a party asserts a right derived from a judgment tend not to feature conflicting rights, and a scope-based analysis will suffice.

170. See generally Wesley Newcombe Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16 (1913). To say that one has a right to engage in certain conduct means (roughly) that the conduct cannot form the basis for recovery or sanctions; to say that one does not have a right means the conduct may. (This is only roughly true because in some cases the exercise of constitutional rights may allow recovery of damages. For example, breaching a personal services contract is constitutionally protected in that a state may not use its criminal law to compel performance. See *Bailey v. Alabama*, 219 U.S. 219, 238-44 (1911). But the breaching party will still be liable in contract.)

171. See *infra* section IV.C.

ates in terms of rights is more consistent with ordinary legal discourse, and that it will prove more useful in developing a jurisprudence of conflicts. My claim that both vested rights theory and interest analysis hide real conflicts between laws is not meant as a metaphysical assertion. It is not a claim that "rights exist independent of their enforcement" — whatever that means. I describe conflicts decisions from a conventional legal perspective because they are legal decisions. I talk in terms of rights because that is how lawyers and judges talk, and it is useful to talk in that way.

The description I propose is, essentially, a reworking of interest analysis that operates in terms of rights and thereby makes explicit the conflicts that had been hidden by the personal-jurisdiction-style analysis of "choice of law." I will start with first principles. These need not be accepted, though I hope that they will be uncontroversial enough to arouse little opposition. The ultimate test of the theory should be its utility; whether it seems natural is not as important as whether it handles conflicts effectively.

Law is an instrument of social organization, designed to allow society to function and to resolve disagreements without resort to private violence.<sup>167</sup> Consequently, law establishes constraints on permissible behavior. Transgression of these limits may authorize the government, if it can prove the proscribed conduct, to impose civil or criminal sanctions to deter such conduct. It may also authorize other private parties, upon lesser but similar proof, to win a damages judgment in order to be made whole. This authorization of recovery may be characterized as the creation of a right: the

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*Choice of Law*, *supra* note 81, at 291-303. Indeed, this is conventional statutory interpretation, *see* Kramer, *Rethinking Choice of Law*, *supra* note 81, at 291-303, employing standard reference to the intent and purpose of the drafters, *see, e.g.*, *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248-59 (1991).

Conversely, references to parties' rights need not suggest a deontological morality at work. The language of rights may be used simply because determinate rules (which is what rights talk leads to) maximize utility. That is, rights talk might just be rule-utilitarianism. Legal scholars are bafflingly blind to the existence of this approach and tend to think that any invocation of a rule is deontological. The blindness is the more surprising because the law and economics movement has devoted much ingenuity and more ink to showing that particular allocations of rights are or are not efficient, *i.e.*, utility-maximizing according to the willingness-to-pay metric. *See generally* RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 12-17 (1998). Brilmayer does at least mention rule-utilitarianism. *See* Brilmayer, *supra* note 71, at 1291 n.53. Perry Dane suggests that commitment to the rule of law implies a commitment to the idea that a norm has an importance as "a goal in and of itself," and that vindicating that norm at a cost to its underlying purpose has "a special nobility." Dane, *supra* note 48, at 1219. But rule-utilitarianism surely is not committed to that proposition; rule-utilitarians may simply believe that rules are more efficient in general even if their fit is not perfect.

167. Larry Kramer starts from a very similar picture of civil society. *See* Kramer, *Myth*, *supra* note 81, at 1052.

yield.<sup>172</sup> What the law is that resolves this question I must leave for later.<sup>173</sup>

I therefore suggest the following analysis. The plaintiff may plead whatever law he desires. Courts are simply not in the business of amending complaints *sua sponte*. They are in the business of judging their sufficiency.<sup>174</sup> The defendant might argue that the law pleaded gives the plaintiff no rights at all — that it does not even purport to give a right to one in the plaintiff's situation.<sup>175</sup> This is the claim that the action falls outside the reach of the plaintiff's chosen law — it is an appeal to a rule of scope.

Such would ordinarily be the case, for example, if, in a suit between two Connecticut domiciliaries over a car accident in New York, the plaintiff claims a right under Oregon law. It is very unlikely that Oregon intends to give the plaintiff a right in this situation. This is, however, just a question of interpreting Oregon law. Absent some statement to the contrary, it makes sense to presume that a state's tort laws are intended to apply at most to torts involving its citizens and to torts committed within its borders. Quite possibly the intended reach is narrower, though this is more difficult to ascertain. My point here is simply that if the plaintiff invokes a law that has no application to him, the defendant can defeat the claim on that basis.

Suppose, however, that there is a generous Oregon statute claiming to give rights to all persons injured within the United States. If the plaintiff invokes this statute, the defendant cannot rely on the rule of scope argument that no right exists. He might, however, argue that some other law — presumably the law of either New York or Connecticut<sup>176</sup> — gives him a defense against the right asserted under Oregon law.

Both New York and Connecticut law satisfy the broad conditions set out above for presumptive applicability of law. The defendant is a Connecticut domiciliary, so Connecticut may well

172. Cf. Laycock, *supra* note 73, at 259.

173. I will claim that although the determination of the prevailing right lies within the legitimate authority of the states, the Constitution sets out parameters within which state conflicts rules must be drawn. See *infra* Part VI.

174. With regard to this point — that what happens in a conflicts case is that the plaintiff files a complaint alleging violation of some right and the court assesses its sufficiency — I am in complete agreement with Kramer. See Kramer, *Rethinking Choice of Law*, *supra* note 81, at 282.

175. Kramer characterizes this question as whether the law gives a *prima facie* right, presumably to indicate that *prima facie* rights may not be enforceable. As discussed *supra* note 99, I think we may speak simply of rights. But of course nothing turns on the terminology.

176. Or possibly federal law. I consider state-federal conflicts in *infra* section IV.B.



desire to protect him. And the tort occurred in New York, so New York may well intend to determine the situations under which people acting in New York will be forced to compensate those they injure. To determine whether the defense the defendant invokes is applicable, we need again to take a closer look at the law.

Let us consider a few possibilities. The defendant may argue that his driving met the standard of care established by Connecticut law, and that this absolves him of liability. It is unlikely, however, that Connecticut intends its domiciliaries to carry with them Connecticut's rules of the road. Generally speaking, rules directed to so-called "primary conduct" — the actions forming the basis for the lawsuit — should be presumed to have a territorial scope.

Alternatively, the law at issue might not focus on primary conduct. It might be a rule that has very little effect on the conduct forming the basis for the lawsuit, such as a rule providing that tort claims abate on the death of the tortfeasor.<sup>177</sup> Again, both New York and Connecticut laws meet the test of *prima facie* applicability. But would New York likely intend to prevent one Connecticut domiciliary from recovering against the estate of another, when this restriction would have so little impact on their actions within New York? Probably not; the defendant will have an easier time invoking the abatement rule if it is a provision of Connecticut law.<sup>178</sup> Rules that do not focus on primary conduct should generally be presumed to be intended for domiciliaries.

Let us suppose, finally, that the defense invoked is one that the state intends to offer to the defendant — it comes from a New York statute setting the standard of care for its highways. If the Oregon law at issue purports to hold the defendant to a higher standard of care, we have what my framework sees as a true conflict. How this

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177. A distinction is often drawn between "conduct-regulating" and "loss-allocating" rules. See, e.g., *Schultz v. Boy Scouts of Am., Inc.*, 480 N.E.2d 679 (N.Y. 1985). Currie draws a similar line between "rules of conduct" and "rules of decision." See CURRIE, *On the Displacement of the Law of the Forum*, in SELECTED ESSAYS, *supra* note 14, at 3, 68-69. I avoid the terminology because I doubt the distinction is tenable as a general matter. Charitable immunity, which *Schultz* treats as loss-allocating, will surely have some effect on how careful charities are; immunities obviously eliminate the deterrent effects of liability. Still, rules are directed at particular objects, though they may have broader effects. The question at this point is simply which parties and transactions a legislature intends its law to cover. An abatement rule will lift liability only from the dead, and death is generally an unimprovable deterrent. Thus its effect on primary conduct should be minimal, and its applicability presumptively domiciliary-focused.

178. It may be, of course, that New York cannot withhold from the defendant defenses made available to its own domiciliaries. See *infra* section VI.B.2.

conflict is to be resolved is a different question, and I claim it is a legal one, to which conventional legal reasoning applies.<sup>179</sup>

#### IV. DEFENDING THE THEORY: TWO EXAMPLES

My argument is that a conflicts case presents a conventional legal question. The plaintiff asserts a right, grounded in some law; the defendant asserts a contrary right, grounded typically in a different law. The court must decide which right prevails, and this is a legal question, to be determined by state conflicts rules operating within constitutional constraints. When a court "chooses" the "applicable law" it is really determining that one right will be recognized and the other subordinated.<sup>180</sup>

Given my disavowal of jurisprudential intent, it might be wondered how much force the word "really" can muster. Generally speaking, I think that claims about what "really" happens are arguments in favor of a particular description, to be judged by the utility of that description. If others prefer a different description, counterarguments may be persuasive, but they are never conclusive. Still, there should be a presumption in favor of the conventional legal perspective. If conflicts cases depart from this and employ a novel vocabulary to describe quite ordinary questions, we should ask why. Moreover, the principle that competing descriptions are essentially equals does not always hold in law; relativism comes to an end somewhere. The Constitution eventually takes over, in that if a description that sees a constitutional violation is sufficiently plausible, states may not defend their conduct by offering an alternate description on which there is no violation. That, finally, is what I claim happens here. The conflicts, or conventional legal, perspective makes the violation so clear that the Constitution forbids us from hiding behind the rhetoric of choice of law. This is a familiar point from conflicts jurisprudence; for example, states may not subordinate federal rights by claiming merely to have applied their own law.

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179. This assertion may seem so obvious as to be unnecessary. The question is resolved by the court, and courts resolve legal questions. But in making this claim I am neither flogging the choir nor preaching to a dead horse. Currie's interest analysis seems to suppose that it is not a legal question. See, e.g., CURRIE, *supra* note 22, at 182.

180. If the court actually decides that one law governs (to the exclusion of the other), it has likely awarded victory to a cluster of rights. This is an unfortunate consequence of the choice-of-law vocabulary. There is little reason to suppose that an intelligent conflicts rule would treat bodies of law as indivisible units. It might make good sense to look to the law of the place of a car accident for rules of the road but to another law for other purposes. In fact, current approaches to conflicts, while claiming to select "the applicable law," do not pick a law that governs in this sense. See *infra* section IV.C.

Two examples help substantiate the argument that multistate conflicts cases raise no distinctive legal issues. Both feature circumstances in which a conflict between laws cannot be denied, in which the court cannot invoke the idea of a "choice of law." Neither, consequently, is typically considered as raising a "choice-of-law" issue.<sup>181</sup> This is advantageous for my purposes; it suggests precisely that "choice of law" is an attempt to avoid conflicts rather than a sensible method of resolving them.

#### A. *The Unseen Conflict: Purely Domestic Cases*

The canonical conflicts cases are, without exception, cases that have contacts with more than one jurisdiction. From the perspective that takes conflicts cases to be about choice of law, this makes sense; if there is no possibility of choosing the law of another jurisdiction, there cannot be a choice-of-law issue. But there are purely domestic cases in which laws conflict, or seem to.<sup>182</sup> These cases, like the more conventional multistate conflicts cases, require courts to determine which law prevails, which right will be vindicated. An examination of such cases is fruitful because it tells us something about what conflicts analysis is. It lifts the veil of choice-of-law rhetoric and allows us to see what goes on when courts resolve conflicts between laws.

The first sort of domestic conflict arises from transitions between legal regimes.<sup>183</sup> When a state enacts a new statute, creating new rights or obligations, there will be cases in which the relevant transactions took place before the enactment of the new statute. Courts must then decide whether the new rights or obligations will be recognized in such cases — whether, for example, a defendant whose conduct met the old standard of care should be held liable because a new statute imposes a greater duty.

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181. The notable exception here is Larry Kramer, who argues that domestic cases and multistate cases raise similar "choice-of-law" issues. See Kramer, *Rethinking Choice of Law*, *supra* note 81, at 283.

182. In purely domestic cases, courts must also perform a scope analysis to determine if the law at issue grants the parties rights. See CURRIE, *supra* note 22, at 184. That is not very surprising, since scope analysis is just statutory interpretation. The presence of scope analysis in domestic cases might suggest that there are some similarities between conflicts cases and domestic cases — after all, Beale's theory had nothing more than rules of scope. It might also suggest the correctness of the initial scope analysis in conflicts cases. More significant for present purposes is the fact that courts actually employ conflicts rules in domestic cases. They do so rarely, because the detection of a conflict is frequently taken as an indication that the scope analysis has gone wrong — courts presume that legislatures do not intend to create conflicting rights. But the conflicts rules are there if we look for them.

183. Currie also noted the presence of scope analysis in retroactivity jurisprudence. See *id.* Again, my point is slightly different: courts also perform conflicts analysis.

This is, or may be, a conflicts issue; indeed, the Supreme Court has characterized it as a matter of intertemporal "choice of law."<sup>184</sup> The process of decision, however — at least where the new law is created by statute<sup>185</sup> — is no complex and murky choice-of-law calculus. Instead, the court engages in the conventional process of statutory interpretation to ascertain whether the new law purports to grant rights to, or impose liability on, the parties.<sup>186</sup> This is, of course, the scope-based first step of interest analysis: determining whether there is a conflict. Ordinarily, statutes operate only prospectively. The rights they create may not be invoked with respect to transactions occurring before their enactment, and so there is no conflict between old and new law. The legislature may also specify, however, that the new statute is to have retroactive effect. In this case, there will be a conflict: both the old and the new statute purport to grant rights. Such conflicts are easily resolved: the new law prevails, unless the Constitution restrains it.<sup>187</sup> That is the application of a conflicts rule; there is no reason to describe it as a choice of law.<sup>188</sup>

Thus it can be seen that at least some purely domestic cases involve conflicts, and the analysis performed in such cases fits comfortably within the approach I advocate. Retroactivity cases are not the only ones. In fact, the potential for a conflict exists in *all* cases. This may seem counterintuitive. After all, in purely domestic cases, once the plaintiff has made a claim that some law entitles him to relief, it usually does not matter what other laws say. For example, if the plaintiff makes out a tort claim, it does not matter that the defendant has available an adequate defense in contract. It will do him no good to argue that contract law applies to the case, unless the point is that the plaintiff has actually pleaded in contract and

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184. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 535 (1991).

185. The issue of the retroactive effect of a judicial decision, rather than a new statute, is quite murky. Oddly, the analysis now favored by the Court resembles Joseph Beale's vested rights theory: it hides conflicts between early and later law via the premise that only the law in effect at the time of the parties' actions can confer rights. See Kermit Roosevelt III, *A Little Theory is a Dangerous Thing: The Myth of Adjudicative Retroactivity*, 31 *CONN. L. REV.* 1075, 1080 (1999). This is not an encouraging sign, and I have argued that current retroactivity jurisprudence is the unfortunate legacy of an earlier mistake. See *id.* at 1087-91. Matters would be much clearer if the Court simply confronted the existence of conflict and adopted, as a conflicts rule, the principle that later rights prevail over earlier rights, as it has done in the statutory context.

186. See, e.g., *Landgraf v. U.S.I. Film Prods.*, 511 U.S. 244 (1994) (engaging in comprehensive interpretation of the Civil Rights Act § 102 to determine whether plaintiff, who argued for retroactive application, had a cause of action).

187. See *Landgraf*, 511 U.S. at 280.

188. Legislatures do, of course, choose whether their statutes apply retroactively or not, but that is a matter of choosing the scope of the rights.

not in tort. The contract defense the state has created does not interfere with the plaintiff's right to recover in tort; the two state-created rights do not, so to speak, touch each other. They coexist perfectly happily; the defense does not apply to the right to recover, nor does it purport to. This is, again, what scope analysis reveals.

But such is not always the case. The state may, for example, have created immunities. The question then is whether the immunity applies to the case at hand, whether the defendant's right interferes with the plaintiff's. It may or may not: this is a matter of scope analysis — that is, interpreting the law. Suppose, for example, that the plaintiff makes out a tort claim, but the defendant claims to be a state officer acting within the course of his duties. The state may have immunized such officers, or it may have placed a limit on damages recoverable in such actions.<sup>189</sup> The court must decide whether the state immunity may be invoked by the defendant — whether it grants him a right. If it does, the scope analysis has revealed a conflict. The court must then determine whether the immunity defeats the plaintiff's claim: it must decide whether the immunity prevails over the plaintiff's right to recover in tort.

This is, it should be evident, analytically identical to the issue that arises when a plaintiff relies on one state's law for his right to recover, and a defendant asserts a defense created by the law of another state. The court must decide if there is a conflict between the rights asserted and, if so, which prevails. Again, there is no obvious reason to describe this as a choice between laws.<sup>190</sup>

The suggestion that purely domestic cases may involve conflicts of law, like the analysis of the preceding section, bears an obvious similarity to some of Larry Kramer's work.<sup>191</sup> Kramer argues that all cases involve a choice of law.<sup>192</sup> I think this is an important insight, and correct, but I would phrase it somewhat differently: no cases involve a choice of law. Of course, this sounds rather more like a denial than a rephrasing. Kramer's point, however, is that cases in which courts perform an explicit "choice-of-law" calculus

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189. See generally, e.g., *Bott v. DeLand*, 922 P.2d 732 (Utah 1996) (discussing Utah Governmental Immunity Act).

190. This does not mean that it could not be described as a choice of law — though, as section IV.C shows, it cannot be described as a choice of which law *applies*. But the fact that in the domestic context there is no temptation to do so should suggest that something odd is going on in the realm of conflicts. My technique for revealing that oddity is basically to redescribe conflicts cases from the conventional legal perspective. I will argue that from this perspective, conventional conflicts analysis is fatally flawed, and that conflicts cases are described as involving choice precisely in order to mask these flaws. See *infra* section IV.C.

191. In particular, see Kramer, *Rethinking Choice of Law*, *supra* note 81, at 280-83.

192. See *id.*

do not differ in any fundamental way from those in which they do not; the same process goes on in determining whether the plaintiff has a right to relief. I claim that this determination does not require a court to "choose" which law to "apply." Now, of course, this claim is a bit hard to square with the practice of courts, and from the descriptive perspective, Kramer has things rather easier. It must seem more plausible to suggest that a similar process to the explicit choice of law goes on in all cases than to suggest that the explicit choice of law does not occur. I do not — and cannot — deny that courts often characterize their analysis as choosing between competing laws. I claim that "choice of law" is a misnomer; it is more accurate to say that when a court "chooses" one state's law over another's, it has actually rejected a claim of right based on the nonselected law.<sup>193</sup> It has refused to honor a right created by that law, and thereby determined that rights based in the law it "selects" prevail in a conflict between rights.<sup>194</sup> Courts find no need to talk of choice in the ordinary case, and there is no need to do so in multistate cases either.

Before moving on to the second example, I want to draw three points from the consideration of purely domestic conflicts. First, there are potential conflicts even where the law is all from one state. These conflicts are not considered to raise a choice-of-law issue because they are resolved by rules. And they go away fairly quickly — they do not persist as troubling questions. Again, this is

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193. It is more accurate because, among other things, it makes clear that a court might enforce rights created by more than one state, rather than determining that one state's law "applies" to the entire case. Because conflicts theory historically tried to determine which law governs, this possibility appears anomalous and receives the appropriately exotic name of "dépeçage." See, e.g., SCOLES & HAY, *supra* note 7, at 38. More significantly, thinking in terms of conflicts focuses attention on the conflicts rule that determines which right prevails. Interest analysis relies on the choice-of-law vocabulary precisely to deflect attention from its conflicts rules.

194. For a description of this situation we might turn again to Beale, who in the conflict between law and equity had to confront a situation in which — much as the current situation under interest analysis — two courts disagreed about which right prevailed.

[In common law jurisdictions] the theory upon which courts proceed is the theory of separate and independent systems of right. The court of law regards the equitable right as subordinate to the legal right, while the court of equity takes the opposite view. . . . It is clear, however, that there cannot be two separate and distinct laws prevailing in the same place at the same time; and therefore in fact, whatever may be the theory of the courts, one of the conflicting rights must be valid and the other invalid.

1 BEALE, *supra* note 6, § 4.8, at 41. I do not quote this passage for the correctness of its conclusion. In a conflict between rights of co-equal sovereigns such as sister states, I see no reason why there should be what philosophers call a "fact of the matter" about which right "really" prevails. The Constitution does not resolve conflicts of its own force, and, absent federal legislation, there is no other superior authority to make the decision. The point is rather that Beale correctly sees not a choice between laws but a conflict between rights requiring the subordination of one to the other.

because they are resolved by rules. The extent to which statutes can retroactively alter common law rights might once have been a difficult question — it was litigated<sup>195</sup> — but the rules are now established, and they govern.

Second, the conflicts rules for purely domestic cases are well established: statutes beat common law, and recent statutes beat earlier ones. Courts follow these rules as legal principles. They do not suggest that a choice must be made, whereby different results would be equally legitimate.

Finally, this analysis suggests that resolving a conflict between two laws does not amount to a determination that one law governs the transaction to the exclusion of the other. If the state officer defense applies, it may bar or limit recovery; this does not mean, however, that the tort cause of action is somehow excluded, that it is part of a body of law that does not apply. This observation buttresses my claim that a conflicts case does not require a court to identify the law that governs. The question is which right prevails. Of course, where both contending rights originate from the same sovereign, it is not clear what it would mean for one body of state law to apply to the exclusion of the other. This point will be made somewhat more strongly by the next section.

### B. *The Easy Conflict*: State Law vs. Federal Law

Conflicts between state and federal law are easy: federal law wins.<sup>196</sup> They are so easy that conflicts scholars tend to them give little attention,<sup>197</sup> presumably because they pose no choice-of-law question.<sup>198</sup> My argument, however, is that *no* case presents a

195. See, e.g., *Munn v. Illinois*, 94 U.S. 113, 134 (1876) (rejecting the idea of vested rights in common law rules); see also *Landgraf v. U.S.I. Film Prods.*, 511 U.S. 244, 271 n.25 (1994) (collecting cases discussing retroactive alteration of property and contract rights).

196. That federal law defeats contradictory state law follows directly from the Supremacy Clause of Article VI, which provides that the Constitution and federal laws “shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. CONST. art. VI.

197. By “state-federal conflicts” I mean preemption of state law by federal law. Neither Brilmayer’s treatise nor the Scoles and Hay hornbook discusses preemption as a choice-of-law issue — presumably for the reason that there is no choice. They do discuss state attempts to withdraw jurisdiction for federal causes of action, which I see as a somewhat more refined attempt to subordinate federal rights.

198. It might of course be suggested that there is no issue of choice because federal law is literally local law everywhere. See, e.g., *Claffin v. Houseman*, 93 U.S. 130, 137 (1876). Beale took this tack:

There cannot be two independent laws within a territory, even though that territory be subject to the legislative jurisdiction of two independent sovereigns. The law of the territory, resulting from the legislative action of both sovereigns, is a single law. The law of a single legal unit must be one law, the one and undivided law of that territory.

“choice of law,” and for this reason I think that state-federal conflicts are importantly illuminating. Federal law wins, and the conflict cannot be denied — it cannot be hidden behind the choice-of-law veil. Consequently, as with domestic conflicts, we gain the opportunity to see what is really going on.

There are two different types of federal-state conflicts, depending on whether it is the plaintiff or the defendant who appeals to federal law. Where it is the defendant, analysis rather obviously follows the conventional legal model that I set out above.<sup>199</sup> The court must determine whether the laws invoked grant rights to the parties invoking them, whether those rights conflict, and which right prevails — all ordinary legal questions. *CSX Transportation, Inc. v. Easterwood*<sup>200</sup> illustrates this model.

That case featured a wrongful death suit brought by the widow of a man killed when a train collided with his truck at a Georgia crossing. The widow alleged that the railroad was negligent under Georgia law for failing to maintain adequate warning devices at the crossing and for operating the train at an excessive speed. The complaint stated a claim under Georgia law, or at least, no one suggested that it did not. The Court assumed that Georgia law had standards governing the duties of railroads with respect to train speeds and the safety of grade crossings, and that the plaintiff had alleged a violation of those standards.<sup>201</sup> Rather than challenge the sufficiency of the complaint under Georgia law, however, the defendant appealed to federal law, arguing that the Federal Railroad Safety Act (FRSA) gave it a defense against state law tort claims.<sup>202</sup>

The Court started with a scope analysis. Whether federal law preempts state law is a question of congressional intent, to be determined by an examination of the statute’s text, structure, and legislative history — the ordinary tools of statutory construction.<sup>203</sup> The FRSA preemption clause stated that “laws . . . relating to railroad safety shall be nationally uniform to the extent practicable. A State

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1 BEALE, *supra* note 6, § 2.4, at 17-18. This seems more like definition than argument, however, and of course there are obvious senses in which federal law is not local law. Most patently, it cannot be changed by the will of the state legislature. Equally significant, successive prosecutions under state and federal law are not barred by the Double Jeopardy Clause precisely because the laws emanate from different sovereigns. See, e.g., *Bartkus v. Illinois*, 359 U.S. 121, 121-24 (1959). At any rate, I have already suggested that purely domestic cases may present conflicts.

199. See *supra* section III.C.

200. 507 U.S. 658 (1993).

201. See *CSX Transportation*, 507 U.S. at 666.

202. See *CSX Transportation*, 507 U.S. at 665.

203. See *CSX Transportation*, 507 U.S. at 664.



may adopt or continue in force any law . . . relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement."<sup>204</sup> Thus the existence of federal regulation provided a defense to any state-law claim on the same subject. As it turned out, the Court determined that federal regulation barred the negligence claim based on excessive speed, but not the claim relating to the warning devices.<sup>205</sup>

This resolution might seem inconsistent with the suggestion that federal law provides a defense against state-created rights, or at least the defense might seem to be of an odd type. In the example I turned to in section III.C.2, the defendant appealed to New York law not as a force that displaced the Oregon tort action but rather as the source for the standard of care. The effect of that maneuver, if successful, would have been to allow him to argue that he had met the applicable standard of care, not that no cause of action could be maintained. The federal preemption in *CSX Transportation*, by contrast, did not change the question to whether the train company had complied with the federal speed limit, but actually prevented a state tort suit based on excessive speed *regardless* of how fast the train was going.<sup>206</sup> Thus it might seem that federal law actually governed the suit.

That would be a misinterpretation. It is one of the axioms of federal jurisdiction that federal law is interstitial,<sup>207</sup> and the claim that federal law "preempts" state law is not fundamentally different from the appeal to a defense created by sister-state law. The complete preemption of the excessive speed claim was a consequence of the statutory language; federal law frequently works only to alter the standard of care and not to prevent the assertion of state tort claims.<sup>208</sup> Some federal laws are even more permissive, preserving all state laws that do not proscribe actions permitted, or require

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204. See *CSX Transportation*, 507 U.S. at 662 n.2 (quoting 45 U.S.C. § 434 (1970)).

205. See *CSX Transportation*, 507 U.S. at 673, 676.

206. This is not entirely true; it might have been possible for the plaintiff to bring a state-law claim based on failure to comply with a (federal) statutory speed limit. See *CSX Transportation*, 507 U.S. at 677 (Thomas, J., concurring and dissenting). Her complaint conceded, though, that the federal speed limit had not been exceeded. See *CSX Transportation*, 507 U.S. at 672.

207. See, e.g., RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 521-22 (1996).

208. For example, the National Highway Safety Act allows states to enforce laws whose safety standards are identical to the corresponding federal standard. See 49 U.S.C. § 30103(b)(2) (1994). It also preserves all claims at common law. See *Freightliner Corp. v. Myrick*, 514 U.S. 280, 284 (1995).

actions forbidden, by federal law.<sup>209</sup> This is also the result where Congress has not specified the scope of preemption. Without an explicit congressional statement, the rules of “implied conflicts preemption” direct that state law is nullified only to the extent that an actual conflict exists.<sup>210</sup> Moreover, appeals to sister-state law do sometimes prevent a particular cause of action from being maintained at all. If the cause of action the plaintiff invokes does not exist under sister-state law, it may be wiped out just as if it had been preempted by federal regulation.<sup>211</sup>

This, then, is what happens when the defendant appeals to federal law: the court must decide whether Congress intended that the defense be available. If it did, the defense prevails over the state-created right. Sometimes this is a relatively easy question: a federal law explicitly authorizing certain conduct clearly bars the imposition of liability for that conduct under state law.<sup>212</sup> Similarly, a federal law placing a cap on tort damages would create a right available to defendants in any state tort suit. The difficult questions are ones of preemption, when the extent of preemption will not always be obvious. Plaintiffs seeking to circumvent federal defenses can thus argue that the preemption is narrow and permits the state law cause of action. All of the action in state-federal conflicts takes place at the level of scope, because the conflicts rule is clear.

When the party appealing to federal law is the plaintiff, avoidance seems more difficult. No defendant could suggest that a state-law defense vitiates a federal cause of action; this would run directly counter to the Supremacy Clause. Consequently, a defendant must find some way to deny the conflict, to suggest that only state law applies to the action. Phrasing the issue as choice of law is one way to do so — I have suggested that this is currently done with interstate conflicts. But the characterization as a choice, rather than as a conflict, will be effective only if a choice-of-law rule points away from federal law. This requirement created some problems for defendants. Our canonical state-federal conflicts cases come from the territorialist era, and the defendants seeking a territorial choice-of-

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209. Title VII expressly preserves state laws that do not conflict. See 42 U.S.C. § 2000e(7) (1994); *Shaw v. Delta Air Lines*, 463 U.S. 85, 101 (1983).

210. See *Myrick*, 514 U.S. at 287. For this reason, I think that “preemption” is a somewhat unfortunate term. What happens is simply that federal rights defeat state rights.

211. In such a case, the law’s denial of the cause of action should be seen as granting parties a right to engage in the conduct at issue.

212. See *Hamm v. City of Rock Hill*, 379 U.S. 306, 309-11 (1964) (describing availability of federal defenses to prosecutions for attempts to obtain service in places of public accommodation).

law rule selecting state law will have great difficulties: federal sovereignty extends through every state, and acts anywhere in the United States thus create rights under applicable federal laws. Fortunately for such a defendant, the territorial choice-of-law system was replete with escape devices that allowed judges to mitigate the rigidity created by the last act doctrine. A defendant trying to use choice-of-law analysis to privilege state rights over federal rights could thus exploit the flexibility of the system to argue for the application of state law.

Appeal to these escape devices by defendants is exactly what we see in state-federal conflicts. In *Mondou v. New York, New Haven & Hartford R.R. Co.*,<sup>213</sup> the defendant won in state court with the claim that the federal statute was contrary to the public policy of the state of Connecticut and could not be enforced in its courts.<sup>214</sup> This is, of course, a conventional choice-of-law maneuver. States have traditionally declined to permit causes of action based on sister-state law on the grounds that the causes of action offend their public policy.<sup>215</sup>

If the choice-of-law perspective were valid — if describing cases as involving a choice somehow meant there was no conflict<sup>216</sup> — this approach would have been satisfactory. But the Supreme Court was not fooled; it rejected the suggestion that contrary public policy could lead to the application of Connecticut law.<sup>217</sup> With the public policy escape hatch closed, defendants turned to others — and the Supreme Court shut them as quickly as they opened.<sup>218</sup> Employing a choice-of-law methodology will not allow states effectively to decide that their rights prevail in conflicts with federal

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213. 223 U.S. 1 (1912).

214. See *Mondou*, 223 U.S. at 55-56.

215. See, e.g., *Mertz v. Mertz*, 3 N.E.2d 597 (N.Y. 1936) (rejecting interspousal tort claim). Oddly, the invocation of the public policy exception does not seem to correlate with the repugnance of the foreign law — the New York Court of Appeals used it to reject the Connecticut law of interspousal tort liability but accepted Hitler's Nuremberg laws. See Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1975 (1997); see also Monrad G. Paulsen & Michael I. Sovern, "Public Policy" in the Conflict of Laws, 56 COLUM. L. REV. 969, 980-81 (1956).

216. See, e.g., CURRIE, *supra* note 22, at 181-82; SCOLES & HAY, *supra* note 7, at 2.

217. See *Mondou*, 223 U.S. at 57-58.

218. See, e.g., *Testa v. Katt*, 330 U.S. 386 (1947) (rejecting the argument that the federal statute was "penal"). Early cases such as *Mondou* and *Testa* do, interestingly, stay within the choice-of-law paradigm. *Mondou* holds not that public policy must yield to the Supremacy Clause but rather that because federal policy is local policy everywhere, there is no contrary local policy. See *Mondou*, 223 U.S. at 57. *Testa* similarly relies on the argument that, while the federal statute might be penal, it is a local penal statute. See *Testa*, 330 U.S. at 392-94. More recently, the Court has also considered such cases from the conflicts perspective, noting that state law must yield to federal rights. See *Howlett v. Rose*, 496 U.S. 356, 375-81 (1990).

rights. This comports with what I have been arguing: "choice of law" is a flight from conflicts that redescribes, but does not substantively alter, the underlying issue. This is the main lesson I want to draw from the consideration of domestic and state-federal conflicts.

Additionally, these cases show that deciding a particular law prevails in a conflict does not mean that law governs the action. Consider a federal law that imposes a cap on tort recoveries, providing every defendant with a resource against state-created rights. The result, in a case where the plaintiff wins, will be that the federal defense imposes a limit on the permissible recovery: the state law right is restricted by the federal defense. This does not mean the transaction is *governed by* federal law, however; federal law gives no right to recovery, and if the entire case were really governed by federal law, the plaintiff would get nothing. It is not clear why a similar approach would not make sense in multistate cases — why it should not be the case that nonconflicting rights from both states are recognized.<sup>219</sup> Saying that the court's task is to "choose" the law that "applies" obscures this possibility; choice-of-law theory exoticizes the ordinary by calling it "dépeçage."<sup>220</sup>

### C. *Back to Choice?* State Law vs. State Law

The preceding section has argued that there is nothing analytically special about multistate cases. Purely domestic cases, or state-federal conflicts, may raise the same issues. These latter two types of cases, however, are not generally considered to raise choice-of-law issues. This is so, I suggest, because the results are clear, and choice-of-law rhetoric will not change them. Attempts to use choice-of-law methodology to reach prohibited conflicts results — the defeat of federal rights by state rights — have been consistently rejected. Choice-of-law rhetoric may have a use, though, if the conflicts results appear unacceptable but the appropriate solution is not clear: it may mask the illegitimacy. That, I believe, explains its continuing allure in multistate cases. The correct way of implementing constitutional restrictions on state conflicts rules has not yet been discerned, and the rhetoric of choice makes the constitutional

219. In fact, Currie suggested that while a state would apply its "rules of decision" to an accident between two domiciliaries, it would determine negligence by looking to the "rules of conduct" (such as speed limits) of the place of the accident. See CURRIE, *supra* note 177, at 68-69.

220. The *Second Restatement*, to its credit, explicitly contemplates dépeçage; it advocates a choice of law calculus for each issue in a case. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145, cmt. d (1971).

problems with the Supreme Court's current laissez-faire approach less obvious.

Describing the Court's failed attempts and uncovering the appropriate methodology is the task of the subsequent Parts of this article. The point here is simply that *if* conflicts results are illegitimate, resort to a choice-of-law description will not save them. That is the lesson of state-federal conflicts. Given that premise, interest analysis can be rejected if the conflicts perspective reveals that it reaches unacceptable results. This section will attempt to show precisely that. But first I want to make a more ambitious claim: interest analysis is incoherent on its own terms. It simply is not a method of determining what law applies to a case. The conflicts perspective is not just more useful; it is the only intelligible choice.

Imagine a married couple with different domiciles. Husband's domicile (say, Connecticut) has interspousal tort immunity; Wife's domicile (say, New York) does not. Driving in separate cars, they collide; both are injured, and both are arguably at fault. Husband sues Wife in Connecticut, and she files a counterclaim. According to interest analysis, what law applies to this case?

The result is relatively easy to discern. Connecticut has an interest in affording Husband the protection of interspousal immunity, so it will. Connecticut law applies to Wife's counterclaim, and she cannot recover. But Connecticut has no interest in affording Wife the benefit of that immunity, and it does have an interest in compensating Husband. Husband will recover from Wife, under the law of New York.<sup>221</sup>

Thus interest analysis directs application of one state's law to Husband's claim and another state's law to Wife's counterclaim. (It parcels out these results so as to favor its domiciliary, but let us ignore that for the moment.) Yet not only are both these claims part of the same case, they both arise from the same collision. It is untrue that one state's law applies to this case, or even to this accident; consequently, it is untrue that interest analysis allows courts to choose which law to apply.<sup>222</sup>

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221. This example is analytically similar to the married women's contracts case discussed by Currie; I have tinkered with it a bit in order to generate a counterclaim arising from the same transaction. For Currie's similar conclusions, see CURRIE, *supra* note 102, at 90-91 (finding that a court in a state with married women's disability should apply local law to a claim by foreign creditor against domestic married woman but should apply foreign law to a claim by domestic creditor against foreign married woman).

222. The example works with regard to interest analysis, but it should be clear that similar examples can be generated for any conflicts theory that is not jurisdiction-selecting.

It is true, of course, that interest analysis chooses the law that applies to a particular *claim*, but at this point the choice-of-law rhetoric is idling. There is really no difference between “choosing” law claim-by-claim, and accepting or rejecting the rights undergirding each particular claim. Under even modest analytical pressure, the choice-of-law perspective seems to collapse into the conflicts perspective.

A modern interest analyst such as Kramer might have an answer here. Only one law applies, he might say, and it is forum law; the law just does not give the same rights to Wife as it does to Husband.<sup>223</sup> That account rescues the claim that interest analysis selects a law to apply, but at some cost. Interest analysis not only directs that forum law prevail against foreign law, it alters forum law to disfavor foreigners. That raises the question of discrimination, which is the main focus of this section.<sup>224</sup> I have said that if the conflicts results of interest analysis are unacceptable, the rhetoric of choice will not save them. It is time to consider those results.

Interest analysis is biased in two distinct ways: against foreign domiciliaries, and against foreign law. I will use two hypotheticals to highlight these different forms of discrimination. For the first, I can do no better than an example contrived by Douglas Laycock.<sup>225</sup> Laycock asks us to imagine two acquaintances, Mary from Maryland and Del from Delaware. They drive together, taking turns behind the wheel, and each is injured in an accident with the other driving. (I will suppose, though Laycock is not explicit on this point, that the accidents take place in the same state.) Mary sues Del in Delaware, and Del files a counterclaim. Delaware has a statute preventing guests from suing hosts for injuries in auto accidents, and Maryland does not.

According to interest analysis, Mary's claim will be barred but Del's will not. Delaware has an interest in applying its guest statute to protect its domiciliary Del, so it will. But it has no interest in protecting Mary, and it does have an interest in compensating Del, so the guest statute will not prevent Del's suit.

What does this mean from the conflicts perspective? Delaware's guest statute grants drivers of automobiles rights against their guests: it grants them the right not to be held liable for their guests' injuries. This right is not given to everyone driving in Dela-

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223. Cf. Kramer, *Myth*, *supra* note 81, at 1054-55.

224. In fact, Kramer finds that selectively granting rights to forum domiciliaries but not others will sometimes violate the Privileges and Immunities Clause. See *id.* at 1065-74.

225. See Laycock, *supra* note 73, at 276.

ware, however — according to the interest analyst's scope-based approach, the right is not extended to out-of-staters at all. Del can assert it, but Mary cannot. Local law gives rights to locals but not to out-of-staters, simply because they are from out of state. This is discrimination against foreign domiciliaries.

What of the discrimination against foreign law? Suppose that Al, from Alabama, is driving near his house when he collides with Georgia resident George. Al sues George in Alabama. Suppose further that Georgia has a damages cap limiting recovery to \$50,000, while Alabama has a more generous \$75,000 cap. Under interest analysis, the court will apply Alabama law and reject the Georgia damages cap. Now suppose that Lou, from Louisiana, has a similar run-in with Al, this time in Louisiana, which has no damages cap. Lou sues Al in Alabama. Under interest analysis, the court will again apply Alabama law, giving Al the benefit of the damages cap.

What has happened here? Conflicts analysis works, in theory, by examining the contacts that an action has with different jurisdictions. Standard factors for car accident cases, according to Currie, are the location of the accident, the domicile of the parties, and the location of the forum.<sup>226</sup> Leave aside for the moment the location of the forum. *Al v. George*, from the perspective of the Alabama court, has the following arrangement of contacts: local plaintiff, foreign defendant, local accident. The result is that local rights prevail. *Lou v. Al* has the opposite arrangement of contacts: foreign plaintiff, local defendant, foreign accident. The two suits are what I will call "mirror-image" cases. If there is any reason, based on these three contacts, why local rights as to the available damages should prevail in the *Al v. George* suit, it can be mustered in favor of the corresponding foreign rights in *Lou v. Al*. If the conflicts rule is neutral between local and foreign rights, each should prevail in one case.<sup>227</sup> But of course under interest analysis, foreign rights prevail in neither. The location of the forum is dispositive; the forum applies local law because it is local law. Foreign rights are dis-

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226. See CURRIE, *supra* note 76, at 141.

227. A common law judge evaluating precedents with no knowledge of interest analysis might well think that a decision in favor of local rights in *Al v. George* compelled a decision favoring foreign rights in *Lou v. Al*. If there is such a thing as the nature of law, it might be encapsulated in Cardozo's adage: "It will not do to decide the same question one way between one set of litigants and the opposite way between another. . . . If a case was decided against me yesterday when I was defendant, I shall look for the same judgment today if I am plaintiff." BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 33-34 (1921). From the classic common law perspective, interest analysis hardly appears a *legal* theory at all.

avored in true conflicts not because of some arrangement of contacts that can be applied in mirror-image cases, but simply because they are foreign. Without the principle of rejecting foreign rights because of their origin, interest analysis is flatly incoherent; the rules it prescribes are self-contradictory.

Currie suggested that in true conflicts, "[a] court need never hold the interest of the foreign state inferior; it can simply apply its own law as such."<sup>228</sup> This may be true from the choice-of-law perspective: the court has not attempted to weigh interests, and so, a fortiori, it has not found the foreign interest inferior. But what the mirror-image *Al v. George* and *Lou v. Al* cases show, from the conflicts perspective, is that the court has indeed held foreign interests inferior — not in the sense that it has found the foreign state to be less interested, but in the sense that it has taken foreign interests less seriously than Alabama interests. If Alabama can make an argument that Alabama rights should prevail in *Al v. George* for any reason other than that they are local rights, Louisiana can make the same argument for Louisiana rights in *Lou v. Al*. If Alabama is deaf to those arguments in *Lou v. Al*, when it found them convincing in *Al v. George*, it has not given rights created by Louisiana law the same respect it gives Alabama rights.

Are these forms of discrimination constitutional? State-federal conflicts are so easy because the federal government is superior to the states. Interest analysis derives its plausibility from the claim that the coequal status of the states makes things different. No state can force another to apply its law; hence an interested state may always apply its own law to a case in its courts. This makes some sense from the choice-of-law perspective, using a personal-jurisdiction-style approach. But the conflicts perspective shows that assertions of legislative jurisdiction involve the rejection of foreign rights, and that interest analysis makes these assertions in a discriminatory fashion.

The basic problem with interest analysis is that it does not direct states to treat each other as equals. It prescribes, quite candidly, that foreign law should be rejected in conflicts simply because it is foreign, that scope analysis should withhold rights from out-of-staters simply because they are not locals. The coequal status of states is not an explanation of this approach — it is an indictment. If the principle of state equality has any force at all, it prohibits

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228. CURRIE, *supra* note 22, at 181-82.



interest analysis.<sup>229</sup> The next Part argues that even the weakest reading of the relevant constitutional provisions leads to this conclusion, laying the groundwork for Part VI, which shows the constitutional consequences for conflicts more generally.

## V. CONFLICTS AND THE CONSTITUTION

Two constitutional provisions will have relevance to this discussion: the Full Faith and Credit Clause, and the Privileges and Immunities Clause.<sup>230</sup> I will offer here what I think is a very modest reading of these Clauses, and then show that even the weak reading has quite dramatic consequences for conflicts theory. Before the textual exegesis, however, a bit of historical analysis is in order. The Supreme Court has done almost nothing with the Privileges and Immunities Clause in the conflicts arena,<sup>231</sup> so there is no history in need of recapitulation. There is a long series of Full Faith and Credit decisions, and these are worth revisiting.

### A. Introduction

If the current conceptual approach to conflicts has any virtue, it is that it spares the courts from confronting a difficult constitutional issue: the extent to which the Constitution requires federal interference with state prioritization of interests. Deciding what sorts of contacts with a state are important enough to justify a claim of legislative jurisdiction is quintessentially a matter of local concern; this is a matter of deciding how important are the various state policies implicated by different contacts. But these assertions come at the expense of sister-state legislative jurisdiction, and that is quintessentially a matter of federal concern. If the "choice-of-law" question is conceived of in terms of interstate recognition of rights — and I hope to have shown the correctness of that conception — it becomes immediately apparent that the Constitution has obvious relevance. The problem is how to accommodate both local and federal aspects of the issue.<sup>232</sup> This is hard, and I think the Supreme Court's abandonment of the conflicts field follows from a recogni-

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229. See, e.g., Ely, *supra* note 73; Laycock, *supra* note 73.

230. U.S. CONST. art. IV, §§ 1-2. Additionally, I will make some fleeting references to Due Process. The Commerce Clause is also important, but not for present purposes.

231. See the sparse discussion in SCOLES & HAY, *supra* note 7, at 104-07.

232. See Robert H. Jackson, *Full Faith and Credit: The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 28 (1945) ("How to determine when [federal considerations] require the law of the forum to give way to the law of another state seems to me an unsettled question. . . . The ultimate answer, it seems to me, will have to be based on considerations of state relations to each other and to the federal system.").

tion of the difficulty and a choice to err on the side of federalism rather than nationalism.

Many scholars have suggested that the Constitution has a good deal to say about conflicts of law.<sup>233</sup> This is hardly surprising. The great aim of the Constitution is to knit the discrete sovereignties of the states into a federal union, and this purpose obviously requires rules governing the treatment of the laws, and the citizens, of sister states. If the states related to each other as foreign sovereigns, these would be political questions, to be answered perhaps by treaties, perhaps by principles of comity. But states do not relate to each other in that way.<sup>234</sup> They cannot make treaties among themselves.<sup>235</sup> Questions that were political have been made legal — which is to say, constitutional. As Laycock puts it, "How Texas courts treat the law of a sister state is a matter of law, not comity, and the choice is no longer voluntary. For this purpose Texas is not a sovereign state; it surrendered this portion of its sovereignty when it joined the Union."<sup>236</sup>

What is surprising, then, is not the suggestion that the Constitution should supervise state conflicts rules but rather the extent to which the Supreme Court has ignored the suggestion. Closer analysis reveals an explanation, though: changed understandings of conflicts have created serious federalism challenges to constitutional supervision, and the current Court is receptive to federalism concerns.<sup>237</sup> The Court did try to develop a doctrine of constitutional conflicts law, at least under the Full Faith and Credit Clause; its early conflicts cases suggested that the vested rights theory had constitutional force.<sup>238</sup> This made sense, from Beale's perspective — laws, being territorial, did not conflict. The only

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233. Most notably Douglas Laycock, *see Laycock, supra* note 73, on whose historical arguments this section relies quite heavily. *See also* Ely, *supra* note 73; Jackson, *supra* note 232; Katzenbach, *supra* note 11; James R. Pielemeier, *Why We Should Worry About Full Faith and Credit to Laws*, 60 S. CAL. L. REV. 1299 (1987).

234. *See, e.g.*, *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 439 (1943) (stating that the Full Faith and Credit Clause "altered the status of the several states as independent foreign sovereignties, each free to ignore rights and obligations created under the laws or established by the judicial proceedings of the others, by making each an integral part of a single nation").

235. *See* U.S. CONST. art. I, § 10.

236. Laycock, *supra* note 73, at 259; *see also* Jackson, *supra* note 232, at 30.

237. *See, e.g.*, *Printz v. United States*, 521 U.S. 898, 918-22 (1997); *Sun Oil Co. v. Wortman* 486 U.S. 717, 727-28 (1988) ("If we abandon the currently applied, traditional notions of [legitimate state legislative jurisdiction] we would embark upon the enterprise of constitutionalizing choice-of-law rules, with no compass to guide us beyond our own perceptions of what seems desirable.")

238. *See, e.g.*, *Allgeyer v. Louisiana*, 165 U.S. 578, 587-90 (1897); *Chicago & Alton R.R. v. Wiggins Ferry Co.*, 119 U.S. 615, 622 (1877); *Green v. Van Buskirk*, 72 U.S. (5 Wall.) 307, 313-14 (1866); *see also* Pielemeier, *supra* note 233, at 1303-04.

question was whether foreign rights would be recognized, and Full Faith and Credit prescribed that they would. The erosion of the territorial conception revealed the possibility of conflict between laws, however, and the Court accordingly began to discuss conflicts in terms of evaluating the competing interests of the states.<sup>239</sup> Application of Full Faith and Credit became more difficult, but the Court still supposed that the Clause resolved conflicts in favor of the state with superior interests.<sup>240</sup>

But to tell a state that its interests are inferior is a serious infringement on its power to determine the relative importance of particular policies. Surely it is for each state to decide which interests are more important to it. The federal judiciary would understandably hesitate before entering so deeply into the internal workings of state government, and the Full Faith and Credit Clause gives no guidance as to what makes an interest superior.<sup>241</sup> Consequently, the Court quite swiftly abandoned the idea that Full Faith and Credit determined unique solutions and fell back to a safe distance from which to oversee state conflicts rules: a baseline test for legitimate application of forum law.

[T]he full faith and credit clause does not require one state to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state, even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events.<sup>242</sup>

That at least hewed to a territorial line, invoking the state's interest in regulating "persons and events within it." But territorialism was on the wane, and the Court soon retreated farther, ruling

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239. See, e.g., *Alaska Packers Assn. v. Industrial Accident Commn.*, 294 U.S. 532, 547-58 (1935).

240. See *Alaska Packers*, 294 U.S. at 547-58. I think that at this point the Court was not far wrong. The *Alaska Packers* Court seemed to suppose that the Full Faith and Credit Clause contained the "rational" rules determining which state's interest was superior. That was a mistake; the setting of priorities is indeed a matter for the states. But this does not mean that the Clause has nothing to say. It requires that a state base its assertion of legislative jurisdiction on a claim that its interests are superior; this is the only way to afford foreign law the appropriate respect while still determining that local rights prevail. It further requires that the interests not be superior merely because another state's interests are weighed less heavily. See *infra* section VI.B.1.

241. Justice Jackson noted, "Nowhere has the Court attempted, although faith and credit opinions have been written by some of its boldest-thinking and clearest-speaking Justices, to define standards by which 'superior state interests' in the subject matter of conflicting statutes are to be weighed." Jackson, *supra* note 232, at 16. The reluctance to impose particular substantive standards, I will suggest, was entirely correct. Full Faith and Credit does not set out standards by which a court may determine which state's interest is greater; it simply demands that states respect each other's laws. What I try to show here is how the principle of respect for sister-state law translates into restrictions on state conflicts rules.

242. *Pacific Employers Ins. Co. v. Industrial Accident Commn.*, 306 U.S. 493, 502 (1939).

that Full Faith and Credit did not require displacement of the forum state's law if the state had a "substantial connection" to the action.<sup>243</sup> The retreat has by now become a rout. In *Allstate Insurance Co. v. Hague*,<sup>244</sup> the Court announced that the only restriction the Constitution placed on state conflicts rules was the requirement that the choice of law be "neither arbitrary nor fundamentally unfair."<sup>245</sup> Hague was a Wisconsin domiciliary who died when the motorcycle on which he was a passenger was struck by a car. The accident occurred in Wisconsin, and the drivers of both vehicles were Wisconsin domiciliaries. Neither driver carried valid insurance, but Hague held an insurance policy, issued in Wisconsin, that offered up to \$15,000 for loss incurred in accidents with uninsured motorists. He owned three cars, and the policy covered each. Wisconsin law would have limited his recovery to \$15,000; Minnesota law, however, allowed the coverage on each car to be "stacked," raising the limit to \$45,000. Hague's widow moved to Minnesota after the accident (for what the Court called "bona fide" reasons<sup>246</sup>) and brought suit there seeking the more favorable terms of Minnesota law, which the Minnesota courts gave her. The Supreme Court stated that "if a State has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional."<sup>247</sup> It nonetheless affirmed, finding that the widow's new domicile, and the fact that the decedent had worked in Minnesota (and commuted to work there), created an interest sufficient to justify application of Minnesota law.<sup>248</sup>

The "neither arbitrary nor fundamentally unfair" language of *Allstate* is the language of due process, and as a construction of the Due Process Clause, it makes perfect sense. But the Due Process Clause is about the rights of individuals, and conflicts cases raise other issues. Parties may resist application of a particular law on the grounds that it is unfair, but more often their argument is that they may not be subjected to the liabilities of one law because another law operates to shield them. This is no longer simply a question of individual rights or due process, but one of the respect due

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243. See *Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469, 476 (1947).

244. 449 U.S. 302 (1981).

245. *Allstate*, 449 U.S. at 320.

246. See *Allstate*, 449 U.S. at 319 n.28.

247. *Allstate*, 449 U.S. at 310-11.

248. *Allstate* requires that a state have "a significant contact or significant aggregation of contacts." *Allstate*, 449 U.S. at 313. This does mean something; the Court has ruled that a state may not apply its law to suits to which it has no connection. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-22 (1985).

to sister-state law; that is, it is a question of Full Faith and Credit. Yet *Allstate* holds that the answer is always the same.<sup>249</sup>

It is disappointing — though, I have suggested, not incomprehensible — that the Court has merged the limitations imposed by Due Process and those of Full Faith and Credit, because the two Clauses could not be more different. Apart from the fact that Due Process governs relations between states and individuals, while Full Faith and Credit governs interstate relations, there is an important conceptual difference. Due process analysis sets a minimum threshold; beyond that threshold, there are no restrictions. Consequently, a due process analysis often leads to the conclusion that a number of different states' laws may apply. (This is, of course, the personal-jurisdiction-style analysis whose presence in the conflicts realm I have been deploring.) Full Faith and Credit, by contrast, demands that each state accord the greatest degree of respect — *full* faith and credit — to the laws of sister states. This may be a baseline requirement in some sense, but the baseline is set as high as it possibly could be.<sup>250</sup> To suppose that such a forceful command results in the same threshold test as Due Process — in particular, the toothless *Allstate* test — is to suppose that the Constitution cares very little about the resolution of conflicts between laws.

That supposition is of course false. Discrimination in choice of law can easily become discrimination against foreigners — this is precisely what Currie's interest analysis shows — and discrimination against sister-state citizens is one of the most obvious threats to the Union. The Framers were quite clearly aware of this. For evidence we need look no further than the Federalist Papers, where Alexander Hamilton invoked the "horrid picture of the dissensions and private wars" that wracked Germany before the creation of an impartial court to decide questions between members of different

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249. See *Allstate*, 449 U.S. at 308 n.10. This portion of the opinion was only a plurality, see 449 U.S. at 320-22 (Stevens, J., concurring) (distinguishing between the clauses), but the Court has shown no subsequent inclination to distinguish between Full Faith and Credit and Due Process analyses.

250. See Laycock, *supra* note 73, at 296. Laycock is essentially correct to suggest that since "full faith and credit" is what state courts give their own laws, the Clause demands equality of treatment. See 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1304 (1833) (stating that the Framers' intent was to give foreign laws "full faith and credit . . . so that they cannot be denied, any more than in the state, where they originated").

sovereignties.<sup>251</sup> Indeed the Constitution is replete with provisions intended to restrain geographical favoritism.<sup>252</sup>

Although the most textually obvious candidate is the Privileges and Immunities Clause, which Hamilton "esteemed the basis of the Union,"<sup>253</sup> Full Faith and Credit is no insignificant part of this design. The Framers most likely supposed that the Full Faith and Credit Clause prescribed unique answers to choice-of-law questions, regardless of the forum in which suit was brought, and thus it was *not* the source of a personal-jurisdiction-style analysis, which produces several acceptable, nonunique answers. They thought this not because they had a stronger reading of Full Faith and Credit than we do now, but because they drafted it against the backdrop of a particular understanding of conflicts of law.<sup>254</sup>

While the precise contours of this understanding are probably impossible to recover, and different Framers quite likely had different understandings,<sup>255</sup> they seem to have shared some variant of the classic territorially oriented theory.<sup>256</sup> Story's authoritative treatise, first published in 1834, comments in its "Introductory Remarks" that "[i]t is plain that the laws of one country can have no intrinsic force, propria vigore, except within the territorial limits and juris-

251. See THE FEDERALIST NO. 80, at 477 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

252. The Full Faith and Credit and Privileges and Immunities Clauses are the obvious examples. Federal diversity jurisdiction is also targeted at interstate discrimination. See, e.g., *id.*; Baxter, *supra* note 92; Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928); Laycock, *supra* note 73, at 278-83; Pielemeier, *supra* note 233, at 1316-22.

253. THE FEDERALIST, *supra* note 251, at 478; see also *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1868) ("[N]o provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this."). Why the Supreme Court's fairly robust Privileges and Immunities Clause jurisprudence, see, e.g., *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985); *Austin v. New Hampshire*, 420 U.S. 656 (1975), has exerted so little influence on its conflicts jurisprudence is a mystery. In *Allstate*, for example, a Privileges and Immunities argument could have been made that Minnesota courts would surely not have decided the case the same way if the widow had been a Wisconsin domiciliary, and hence the courts were awarding to locals benefits withheld from foreigners. See Ely, *supra* note 73, at 185-89 (noting tension between *Allstate* and *Austin*). It may be that the rhetoric of choice obscures things here too, by avoiding talk of the rights on which Privileges and Immunities case law focuses.

254. See Laycock, *supra* note 73, at n.276.

255. See Jackson, *supra* note 232, at 6.

256. See Laycock, *supra* note 73, at 289-90. Future Chief Justice John Marshall apparently gave a quite clear statement of the vested rights contract theory in the Virginia ratifying convention. See *id.* at 306-07. In 1797, the Supreme Court had quoted Ulrich Huber's (the Court referring to him as Huberus) territorialist maxims. See *Emory v. Grenough*, 3 U.S. (3 Dall.) 369, 370 n.\* (1797). It was applying a territorial theory to decide torts cases as early as 1842, with no suggestion that it was creating a new approach or rejecting an earlier understanding. See *Smith v. Condry*, 42 U.S. (1 How.) 28, 33 (1842).

diction of that country.”<sup>257</sup> He repeats the principle as “[t]he first and most general maxim” of international jurisprudence.<sup>258</sup> Nor was Story innovating in this regard; he derived his general theory in large part from the Frisian jurist Ulrich Huber, who published in the late seventeenth century.<sup>259</sup> Story claimed that Huber’s territorial principles had “been sanctioned both in England and America by a judicial approbation, as direct and universal as can fairly be desired for the purpose of giving sanction to it as authority, or as reasoning.”<sup>260</sup>

Under a territorial approach, as explained above, there is no question of laws conflicting. Only the territorially appropriate law creates a right. The question, from the Framers’ perspective, would simply have been whether rights created by the law of one state would be recognized by the courts of another. To answer *that* question, one could hardly draft a more emphatic provision than the Full Faith and Credit Clause. Rights acquired in one state must be respected everywhere, regardless of whether other states disagree with the substantive law creating those rights.<sup>261</sup>

That, then, is the most plausible original understanding: conflicts cases have unique resolutions because the only question is whether sister-state rights shall be recognized or rejected, and the Full Faith and Credit Clause requires the former. Indeed, the Supreme Court’s early ventures into conflicts jurisprudence consisted exactly of the constitutionalization of the vested rights theory.<sup>262</sup> Things have changed since the Framers’ days, however, and the changes have weakened some of their devices for national unity. Under the Framers’ understanding, parties in federal court by reason of diversity jurisdiction would have been guaranteed an unelected, life-tenured federal judge, presumably less prone to parochialism than an elected state judge. This guarantee has survived. Those parties would also have been guaranteed the general federal common law, however, applied by a decisionmaker not bound by the decisions of state courts, a decisionmaker who would “never

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257. STORY, *supra* note 30, ¶ 7, at 8.

258. *Id.* ¶ 18, at 21.

259. See SCOLES & HAY, *supra* note 7, § 2.2, at 9, § 2.4, at 12.

260. STORY, *supra* note 30, ¶ 38, at 36. For a listing of largely territorialist state court cases roughly contemporaneous with the drafting of the Constitution, see Laycock, *supra* note 73, at 307 n.340.

261. See *Fauntleroy v. Lum*, 210 U.S. 230, 237-38 (1908) (Holmes, J.). The rights that vested under the territorially appropriate law were not too dissimilar from the rights created by judgments. See 1 BEALE, *supra* note 6, § 8A.10. The significant point here is that there were no opposing rights.

262. See *supra* note 238.

immolate truth, justice, and the law because a State tribunal has erected the altar and decreed the sacrifice."<sup>263</sup> With the general federal common law died one of the antidiscrimination tools of diversity jurisdiction.<sup>264</sup>

Time has similarly enervated Full Faith and Credit. The Clause was not drafted in an era that saw the possibility of interstate conflicts of rights. If the question is only whether rights acquired under the law of one state shall be respected, when no other rights oppose them, the Clause provides a clear affirmative answer; but once there is the possibility of conflicting rights, or doubt about which law is the law producing the rights, things get harder. What could Full Faith and Credit mean in this context? The Supreme Court has suggested that a literal reading would mean that in conflicts cases, forum law must always yield — that “the statute of each state must be enforced in the courts of the other, but cannot be in its own”<sup>265</sup> — an obviously absurd result. Consequently, where cases feature competing rights, the Court has said essentially that forum law may always prevail.<sup>266</sup>

Douglas Laycock characterizes this approach as embodying the belief that “the phrase cannot be taken literally, and therefore it need not be taken seriously at all.”<sup>267</sup> This is fairly accurate on Laycock’s part, and total nonsense on the Court’s. Full Faith and Credit must be taken seriously, and it can be taken literally. We no longer have the backdrop of territorial rules of scope, but Full Faith and Credit can do a lot of work without that jurisprudential background. Demonstrating the power of even a weak reading of the Clause requires that I give that reading, and it is time now to begin the textual exegesis.

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263. *Gelpcke v. City of Dubuque*, 68 U.S. (1 Wall.) 175, 206-07 (1863).

264. See *Pielemeier*, *supra* note 233, at 1316-19. On diversity as antidiscrimination, see generally *Friendly*, *supra* note 252. Litigants might also have gotten federal conflicts rules, a hope slain by *Klaxon v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941). I do not believe that federal conflicts rules are necessary, provided that we pay attention to constitutional restrictions on state conflicts rules. It is troubling that under *Klaxon* the federal courts act as ventriloquists’ dummies, reproducing the very parochialism and bias their diversity jurisdiction exists to counter. The Second Circuit’s experience with New York law is especially notable and unfortunate in this regard. See, e.g., *Rosenthal v. Warren*, 475 F.2d 438 (2d Cir. 1973); *Pearson v. Northeast Airlines, Inc.*, 309 F.2d 553 (2d Cir. 1962) (en banc). It is the substantive bias of state choice-of-law rules that is the real problem, though, and if attention to the Constitution will eradicate it, there is no harm in having federal courts follow state conflicts law.

265. *Alaska Packers Assn. v. Industrial Accident Commn.*, 294 U.S. 532, 547 (1935).

266. See *infra* text accompanying notes 276-80.

267. Laycock, *supra* note 73, at 295.



B. *The Two Clauses*

The Full Faith and Credit Clause, as discussed above, dictates that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."<sup>268</sup> The Privileges and Immunities Clause provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."<sup>269</sup>

These are clearly both nationalizing Clauses, intended to bind the several states into a union.<sup>270</sup> They are also both clearly antidiscrimination Clauses. Full Faith and Credit governs discrimination against foreign law, Privileges and Immunities discrimination against foreign people. To put the point slightly differently, Full Faith and Credit determines when parties must be accorded the rights granted by *foreign* law; Privileges and Immunities when they must be accorded rights granted by *forum* law. The Clauses demand equality of treatment, but what is the cash value of this equality?<sup>271</sup> I do not want my argument to rely on dubious or overstrong interpretations of the Clauses. The reading I offer is thus a minimalist one — the weakest I can come up with.

My reading is the following. The Full Faith and Credit Clause means that a state may not refuse to recognize rights created by the

268. U.S. CONST. art. IV, § 1.

269. U.S. CONST. art. IV., § 2.

270. See, e.g., *Hughes v. Fetter*, 341 U.S. 609, 612 n.9 (1951) ("[The Full Faith and Credit Clause] altered the status of the several states as independent foreign sovereignties, each free to ignore rights and obligations created under the laws or established by the judicial proceedings of the others, by making each an integral part of a single nation." (quoting *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 439 (1943))); *Toomer v. Witsell*, 334 U.S. 385, 395 (1948) ("The primary purpose of [the Privileges and Immunities Clause] . . . was to help fuse into one Nation a collection of independent, sovereign States.").

271. Different notions of equality compete in conflicts theory. One directs that people acting in the same jurisdiction be treated the same regardless of where they are from (equality across domicile, power arranged territorially), the other that people from the same state be treated the same regardless of where they act (equality across territory, power arranged personally). See Mark D. Gergen, *Equality and the Conflict of Laws*, 73 IOWA L. REV. 893, 902 (1988). Gergen suggests there is no clear reason to prefer a territorial arrangement of state power to a personal one, so that scholars should simply accept "that any approach or policy will treat people unequally for reasons that may seem arbitrary to some people," *id.* at 902, but admits that those urging a territorial ordering have "a [constitutionally] stronger argument," *id.* at 906. The Constitution indeed seems to have a territorial orientation: at least, the Privileges and Immunities Clause entirely rejects the idea of ordering power on a personal basis.

Peter Westen has suggested that equality is an "empty" idea that should be eliminated from legal discourse. See Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982). Westen claims that those appeals to equality require some underlying notion of a relevant difference, and that equality arguments can be paraphrased as arguments about the relevance of the difference. The move is reminiscent of the realist attacks on the concept of rights. I have doubts about whether the paraphrases do avoid reliance on equality norms, but in any case I do not think that legal theory would benefit from eliminating the concept.

*Bank*, that justification must be something more than that the rights are foreign.<sup>281</sup> That is all I claim. The antidiscrimination reading is thus at least implicit in the cases, even where rejection takes the form of "applying local law" instead of rejecting the cause of action.

The more recent *Allstate* decision suggests that a state may reject foreign rights in favor of its own on the basis of extraordinarily slender justifications, which clearly do not embody a consistent policy.<sup>282</sup> Basically this amounts to the principle that one state may always reject another's law if it disagrees sufficiently to have enacted a different law. That is an absurd reading of Full Faith and Credit; if it commands respect for sister-state law merely when the states agree, it does nothing at all.<sup>283</sup> *Allstate* is in tension with the *Hughes* line of cases, and also with the Court's Privileges and Immunities jurisprudence.<sup>284</sup> More bluntly, it is wrong.<sup>285</sup> Why has the antidiscrimination principle of Full Faith and Credit emerged strongly with respect to judgments and jurisdictional limitations, but remained only implicit with respect to conflicting local law? If we take the jurisprudence at face value, the answer seems to be that policy disagreements trump Full Faith and Credit; but this is a wildly implausible reading, given the Clause's history and aspirations — policy disagreements are obviously one of its chief concerns.<sup>286</sup> If it were the case that conflicting local law trumped another state's law, the Court has never explained why it would not

for the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it."). The absence of similar territorial reasoning in *Hall* (which, oddly enough, quotes the above sentence, see *Hall*, 440 U.S. at 423-24) provoked a three-Justice dissent. See *Hall*, 440 U.S. at 428 (Blackmun, J., dissenting) (contrasting majority opinion to territorial reasoning of lower court).

281. See *supra* note 273.

282. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313-20 (1981) (upholding application of Minnesota law based on decedent's working in Minnesota, widow's after-acquired Minnesota domicile, and Allstate's "presence" in Minnesota).

283. Cf. *Kramer*, *supra* note 215.

284. The tension with Privileges and Immunities arises because it seems unlikely that Minnesota would have applied its law to benefit a Wisconsin domiciliary in similar straits. Indeed, if the domiciliary status of one party is the only reason a state has for applying its law, Due Process will forbid it from extending similar rights to out-of-staters, as *Phillips Petroleum* holds. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 815-22 (1985). But the Court's Privileges and Immunities cases suggest that out-of-staters may not be denied the rights granted locals merely on the basis of their foreign domicile. See *supra* note 273.

285. It is wrong because, were the contacts reversed, Minnesota would surely not have held that Wisconsin rights prevailed with respect to an accident between Minnesotans occurring in Minnesota, where the plaintiff moved to Wisconsin after the accident. Consequently, Minnesota must have rejected the Wisconsin rights because they were foreign and thereby violated Full Faith and Credit. See *infra* section VI.B.1.

286. See *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 521 (1953) (Jackson, J., dissenting) ("The whole purpose and the only need for requiring full faith and credit to foreign law is that it does differ from that of the forum.").

equally allow rejection of sister-state judgments. A more realistic explanation is that the Court has simply been unable to come up with a reading that allows it to handle conflicts between rights.<sup>287</sup>

The jurisdictional line of cases<sup>288</sup> did not raise this issue. When a state closes its courts to a foreign cause of action, it is simply rejecting a foreign right. It is not (superficially) resolving a conflict in favor of a local right, and therefore condemning the door-closing practice does not mandate subordination of local rights. Similarly, interstate enforcement of judgments poses no question of conflicting rights because our approach to judgments still resembles that of Joseph Beale. The law of the state of rendition determines the effect of a judgment,<sup>289</sup> and when a plaintiff sues to enforce a judgment in another state, he is asking simply that rights created by the law of the state of rendition be respected. There will seldom be even a *prima facie* right that a defendant can invoke against the enforcement of the judgment.

The situation with rights to recover, rights which have not been reduced to judgment, used to be much the same: the plaintiff invoked the rights created by the territorially appropriate law, and the defendant had available no contrary rights. But with the death of vested rights, the picture changed dramatically. Instead of Beale's no-conflict world, courts confronted cases in which the plaintiff urged a right created by one law while the defendant appealed to a defense created by another. (Another way of putting this is that it became unclear which state's law was the source of the plaintiff's rights.<sup>290</sup>) Where rights conflict, or laws contend for application, the meaning of Full Faith and Credit is much less clear, and the temptation for courts is to hide behind a personal-jurisdiction-style analysis that suggests the issue is one of choice, rather than of conflict. I will later explain how a straightforward application to conflicts may fulfil the aims of the Clause.<sup>291</sup> What should be already clear is that it cannot be ignored. It *does* require that

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287. More charitably, the Court's retreat may reflect the realization that constructing a hierarchy of interests is the legitimate prerogative of the states. But this does not mean that Full Faith and Credit has no role to play. Its goal is to "guard the new political and economic union against the disintegrating influence of provincialism in jurisprudence, but without aggrandizement of federal power at the expense of the states." Jackson, *supra* note 232, at 17. The question is how to balance the federal and local interests, and leaving everything up to the states is not the answer.

288. See *supra* note 273.

289. See, e.g., *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 375-59, 386-87 (1996).

290. This is the more popular description. As discussed above, see *supra* section III.C, I think it is more useful to talk in terms of conflicting rights.

291. See *infra* section VI.B.

states give full faith and credit to the laws — both statutory and common — of sister states.<sup>292</sup>

## 2. *Privileges and Immunities*

Uncertainty also exists with respect to the scope of “privileges and immunities.” The counterpart to the (foolishly) literal reading of the Full Faith and Credit Clause is the supposition that the Privileges and Immunities Clause requires out-of-staters to be granted *all* the rights of locals, including the right to vote and pay in-state tuition for public schools. The Supreme Court, however, has not similarly emasculated the Clause in the face of such an absurdly expansive reading, but has suggested instead that it applies only to “fundamental” rights.<sup>293</sup> Some privileges granted to locals — such as the elk-hunting license at issue in *Baldwin* — are not fundamental. Nor is the Clause absolute in its proscriptions. States may treat out-of-staters differently if they have a “substantial” reason that is “substantially advanced” by the discriminatory treatment.<sup>294</sup>

This restriction, by itself, is not a full explanation. The right to vote is surely fundamental, but no court has suggested that it is one of the relevant privileges and immunities. I think a satisfactory answer is that the idea of discrete states presupposes the distinction between members of the polity and outsiders. If all federal citizens could vote in all state elections, we would no longer have politically distinct states. This sort of discrimination is required for the Privileges and Immunities Clause to have meaning; it cannot be a violation of the Clause. Relatedly, Ely suggests that if outsiders could vote, they would be able to protect their interests, and there would be no need for the Clause.<sup>295</sup>

The more serious question is how privileges and immunities relate to conflicts rules. Laycock casts this in terms of “choice-of-law rules that prefer local litigants” and avoids the “fundamental rights” limitation by noting that equal treatment in court is surely a fundamental right.<sup>296</sup> This is a tempting argument, but it fails because it operates at too high a level of generality. All of the discriminations against outsiders that the Supreme Court has

292. See Jackson, *supra* note 232, at 12; Laycock, *supra* note 73, at 290-95.

293. See *Baldwin v. Fish & Game Comm.*, 436 U.S. 371, 387-88 (1978).

294. See *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 284 (1985). A mere desire to benefit locals does not count as a substantial interest.

295. See Ely, *supra* note 73, at 190.

296. See Laycock, *supra* note 73, at 265-66. Currie similarly talks about “[t]he right of access to courts, generally stated.” See CURRIE, *supra* note 161, at 467 n.70.

approved as not implicating fundamental rights do involve the question of equal treatment in the courts, and they all involve choice-of-law rules that prefer locals. That is, when the out-of-stater goes to court to get his elk-hunting permit, he is asking for a right that local law gives to locals. When the court denies his request, it is withholding from him rights granted to locals; it is (in a sense) refusing to apply local law to his claim. This is the paradigmatic Privileges and Immunities discrimination, analytically identical to a determination that out-of-staters have no right to recover for in-state batteries. If we are to give meaning to the "fundamental rights" restriction, we have to go case-by-case.

There is a sense, however, in which Laycock is right. Earlier I distinguished between rules of scope, which determine the extent of state-created rights, and conflicts rules, which prescribe which rights shall prevail in a conflict. The Privileges and Immunities Clause (unlike Full Faith and Credit, which applies only to conflicts rules) governs both sorts of rules. With respect to rules of scope, it demands that states extend to out-of-staters all the rights that they extend to locals — or rather, all fundamental rights, unless there is a substantial nondiscriminatory justification. With respect to conflicts rules, it demands that out-of-staters asserting rights not be treated differently from locals asserting the same rights simply because they are out-of-staters.<sup>297</sup> That is, if the state's conflicts rule provides that a local right will prevail in a particular case when asserted by a local, that right must prevail when asserted in the same case by an out-of-stater, unless there is some nondiscriminatory reason why it should not. Equality of treatment under conflicts rules is clearly fundamental, and Laycock is correct to say so.

If equality with respect to conflicts rules is to be meaningful, however, there must be equality with respect to rules of scope. If a state can limit the scope of a right to locals, then a nondiscriminatory conflicts rule will do nothing to remedy the discrimination. The question then is whether states, by restricting the scope of nonfundamental rights, may affect the outcome of the classic conflicts cases. It seems unlikely. These cases are usually ones in which a local would be able to avoid liability as a defendant, or recover damages as a plaintiff, under local law; and for some reason

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297. This is, in a sense, just another way of saying that equal treatment in the courts is a fundamental right. I think it is somewhat clearer, though, to distinguish between rules of scope and conflicts rules.

these rights seem to be regarded as fundamental.<sup>298</sup> Perhaps there is something about the adversarial nature of civil litigation that elevates the interests involved, such that the rights an individual possesses against other individuals are more likely to be deemed fundamental than his rights to governmental largesse. Or perhaps the interests protected against infringement by other individuals are typically more important than the interest in a hunting license. Neither of these rationales is entirely clear, but I have seen no serious suggestions that the rights at issue in conflicts cases will frequently not be fundamental for Privileges and Immunities purposes.<sup>299</sup>

The minimalist reading I advocate can thus be applied to the classic conflicts cases. The Supreme Court, which accepts this reading,<sup>300</sup> seems to think that it has no serious consequences. The next section will show, however, that such consequences exist: this reading is in irreconcilable tension with *Allstate*, with interest analysis, and with the personal-jurisdiction-style approach to conflicts more generally.

## VI. TOWARD A CONSTITUTIONAL JURISPRUDENCE OF CONFLICTS

This Part aims to show that even a weak reading of the Constitution imposes real limits on state conflicts rules and rules of scope.<sup>301</sup> The method will be to start with Currie's conception of governmental interests and then to show how the Constitution reconfigures his approach. I start with Currie's vision not because it seems accurate, or even plausible, but because it exemplifies the excesses the Constitution reins in. Brilmayer is undoubtedly right that it is dangerous to impute to legislatures policies they seem explicitly to disavow. States may refrain from pressing their legisla-

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298. See Ely, *supra* note 73, at 182-83 ("Baldwin or no Baldwin, it is not likely to be suggested that [decisions about liability] implicate rights so unimportant that they can be dismissed as beyond the coverage of the Privileges and Immunities Clause.").

299. The right of access to courts is acknowledged as fundamental. See *McKnett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230, 233 (1934). The refusal to grant the benefits of local law is not precisely a denial of access, but surely the right of access is meaningless if, having once gotten into court, the out-of-stater then faces discrimination as to substantive rights.

300. See *supra* note 273.

301. As mentioned earlier, I think that "choice-of-law rules" are misleadingly named. What they actually do is describe when foreign-created rights will be respected. The appropriate way to invoke a foreign-created right is not to sue under forum law and have the forum court decide which law applies to the claim; it is to sue under foreign law. If the forum court then decides that local law "applies," it has decided either that the law the plaintiff pleads grants him no right (a scope decision) or that the foreign right yields to whatever local defense the defendant invokes (a conflicts decision).

tive jurisdiction to the limit; they may also be more solicitous of sister-state domiciliaries than classic interest analysis supposes. Currie, of course, recognized both of these facts.<sup>302</sup> His aim was to show what states *could* do, and what it was appropriate for judges to do in the absence of legislative guidance.

That is also my aim, though my conclusions are quite different. The import of this Part is that states cannot do much of what Currie thought they could. In particular, the Constitution prevents them from following the discriminatory policies of interest analysis. One way to express this conclusion would be to say that state policies are not discriminatory. Because federal interests are local interests everywhere,<sup>303</sup> the antidiscrimination policies of the Privileges and Immunities and Full Faith and Credit Clauses are the true policies of the states, whatever their legislatures may in fact desire.<sup>304</sup>

It will be clearer, however, to talk in terms of state interests according to the Currie model and to consider the Constitution as an external constraint. I will also largely ignore statute-specific rules of scope. It is important to ask if a particular right is intended to be granted to those in the particular situation of the party before the court, but at the level of generality at which this section works, that inquiry can be sensibly performed only in terms of state interests.

One more introductory point remains. The reason I find the Constitution so effective in constraining choice-of-law rules is that I approach "choice of law" from the perspective of conflicts. That is, I see a "choice-of-law" question as a question of which right will prevail. State conflicts rules articulate a hierarchy of rights by establishing factors that determine which right prevails. The Constitution limits the acceptable factors. In particular, Full Faith and Credit prevents consideration of the fact that a particular right is a local one, and Privileges and Immunities similarly prevents the fact that a party is (or is not) a forum domiciliary from having weight. Beyond these two restrictions, states may construct what hierarchies they will. As we shall see, however, the restrictions suffice.

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302. See CURRIE, *supra* note 22, at 186.

303. See *Mondou v. N.Y., New Haven & Hartford R.R. Co.*, 223 U.S. 1, 55-57 (1912).

304. See John K. Beach, *Uniform Interstate Enforcement of Vested Rights*, 27 YALE L.J. 656, 665 (1917) ("Surely the Constitution expresses the real and controlling 'policy' of the states in this regard."). In a sense, the Constitution thus provides the objective state interests whose absence Brillmayer believes dooms Currie's theory.

### A. *Rules of Scope and the Constitution: Two Myths*

Currie's analysis is supposed to show that some cases create no real problems, that they pose no issue of choice of law — namely, false conflicts and unprovided-for cases. In the last analysis, my aspiration is much the same. Like Currie, I do not think that conflicts theory has much to say about true conflicts — situations in which both states claim priority for the rights created by their law. As long as the rule that prioritizes local rights is constitutionally sound, there is no reason why the forum should not apply it. My point is rather that this will very seldom happen. I do not mean that there will be few cases in which rights conflict — I actually find more conflicts than does Currie — but it will be a rare case in which states disagree on which right should prevail. Explaining why disagreement will be rare requires an analysis of the limitations the Constitution places on state conflicts rules, but that is the task of the next section. This section seeks to illustrate the application of the Constitution to the permissible scope of state laws. The issues are distinct: scope questions are about whether a given law creates a right or not, conflicts questions are about when one right prevails over another. This section will show that what interest analysis terms false conflicts and unprovided-for cases are actually true conflicts.<sup>305</sup>

#### 1. *The Myth of the Unprovided-for Case*

The title of this subsection is the same as the title of an article by Larry Kramer.<sup>306</sup> It was that article that started me thinking about conflicts in the way developed here, and this section unsurprisingly shows his influence. My analysis does, however, differ in some important respects, most notably my understanding of the effect of the Privileges and Immunities Clause.

Recall that Currie found an unprovided-for case when “[n]either state cares what happens.”<sup>307</sup> This situation obtains, generally, when the law of the defendant's domicile permits recovery, the law of the plaintiff's domicile bars it, and the tort occurs in the nonrecovery (plaintiff's) state.<sup>308</sup> In such a case, the plaintiff's state

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305. It is doubtless not obvious how this result will be helpful. The discovery of false conflicts is generally considered the great achievement of interest analysis; rejecting this insight does not seem like an advance. I will argue, however, that an abundance of conflicts is not a bad thing. See *infra* section VI.B.

306. See Kramer, *Myth*, *supra* note 81.

307. CURRIE, *supra* note 76, at 152.

308. Lea Brilmayer suggests that only domiciliary factors were generally relevant to Currie. see BRILMAYER, *supra* note 8, § 2.1.2, at 65-66, and hence that an unprovided-for case



has no interest in generating a recovery for the plaintiff; its domestic law does not do so. Nor does the defendant's state have an interest in granting recovery for an out-of-stater, against its own domiciliary, for a tort that occurred outside its borders. If state interests are thought of as interests in the application of state law, it seems that the lack of an interested state creates a troubling lacuna: no state wants its law applied. Interest analysis thus seems to suggest that no law applies to the case, and this is a prospect from which conventional legal thinking recoils.

Two basic insights drive Kramer's revisionary approach. First, he conceives of interest analysis as simply a method of determining when positive law confers rights on the parties.<sup>309</sup> That is, he sees the detection of interests as a matter of rules of scope.<sup>310</sup> The determination of interest must thus be made with respect to each claim of right.<sup>311</sup> For example, a decision that California tort law gives the plaintiff a right to recover does not necessarily mean that defenses created by California law should be available to the defendant. To say that California law "applies" in this sense is not to say that the transaction is *governed* by California law. The case is not decided as though it were a purely Californian case, as though

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arises whenever the plaintiff's home law bars recovery and the defendant's permits it, *see id.* § 2.1.2, at 63. This is somewhat of an oversimplification, as she later acknowledges. *see id.* § 2.1.2, at 67, and only true with respect to Currie's analysis of married women's contracts, *see CURRIE, supra* note 102, at 108. If a tort occurs in the pro-recovery state, Currie found an interest: the state "may incur responsibility to the person injured in the state." *CURRIE, supra* note 76, at 148; *see also id.* at 157 (constructing table of permutations, finding different interests based on territorial factors); *id.* at 149 ("California's interest in the injured plaintiff is based solely on the fact that he was injured here, but that has been regarded as a substantial basis."); *id.* at 150-51 ("[T]he fact that the injury occurred in California suggests — though it does not necessarily follow — that California may become very deeply concerned."). In his analysis of married women's contracts, the starting point for Brilmayer's discussion, Currie in fact found no unprovided-for cases. *See CURRIE, supra* note 102, at 95 (evaluating effect of application of law of the place of contracting on state interests, and finding an interest in each permutation).

This results from his rather complex articulation of the interests at stake. It is not unfair to say that Currie tended to find interests that produced congenial results. Brilmayer suggests that different, equally plausible interests may be constructed, *see BRILMAYER, supra* note 8, § 2.1.2, at 61-62, and this is quite true. To generalize interest analysis sufficiently that it becomes determinate, rather than retaining enough flexibility to produce whatever result the judge wishes to reach, it is probably necessary to distort Currie a bit. Tackling Currie on his own terms is like having a fistfight with a fog. Attributing to him a focus on domiciliary factors is one way to do so. Kramer produces a slightly more charitable generalization, supposing that states generally have interests in regulating conduct either occurring within their borders or affecting their domiciliaries. *See Kramer, Myth, supra* note 81, at 1065.

309. *See Kramer, Myth, supra* note 81, at 1064.

310. It may be that at this point my reading of Kramer is too strongly colored by my own perspective; in later work he casts the question in terms of which law applies. *See supra* note 154 and accompanying text.

311. *See Kramer, Myth, supra* note 81, at 1051-55. This is of course the procedure followed in ordinary cases.

only California law (and the entirety of California law) determines the rights of the parties. This is the same lesson I urged that we take from the coexistence of state and federal rights; it is also the reason I claim that interest analysis does not in fact select the "applicable law."<sup>312</sup>

Kramer's second, and related, insight is that a determination that no state is interested means that no state's law grants any rights.<sup>313</sup> The plaintiff loses; he has failed to state a claim on which relief may be granted.

What do these insights mean for "unprovided-for" cases? Such cases occur only when the plaintiff's home law does not permit recovery in a purely domestic case. There are two ways in which recovery might be restricted. First, on the facts of the plaintiff's case, the law may create a defense to the cause of action. Kramer believes that this sort of case is not truly unprovided-for because the plaintiff's state has no interest in extending the defense to a non-domiciliary defendant. Therefore, the result in such cases will be that the plaintiff recovers under his home state's law even though he could not recover against a codomiciliary.

Kramer has two examples from this category. Having surely taxed the reader's patience already, I will consider only one, a variant of *Grant v. McAuliffe*.<sup>314</sup> Both Arizona and California have wrongful death actions, but Arizona abates its action upon the death of the tortfeasor. The unprovided-for case arises when an Arizona plaintiff sues the estate of a California tortfeasor for an accident that occurred in Arizona. The Arizona defense would ordinarily apply, but Arizona has no interest in extending it to a Californian. Thus, Kramer finds, the plaintiff can recover under Arizona law.

But this is shockingly discriminatory, and Kramer subsequently recants. The Privileges and Immunities Clause, he says, will not allow states to decompose their "no recovery" rule into rights and defenses and deny the defenses to out-of-staters. If the plaintiff's home state does not permit recovery against its own domiciliaries, it cannot tinker with its law to disadvantage out-of-staters. So in the *Grant* variant, the plaintiff loses.

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312. See *supra* section IV.B. One thing Kramer's article thus shows is how far astray the notion of choosing an applicable law led Currie. Oddly, Kramer at times seems prone to the same mistake. See *supra* text accompanying note 154.

313. See Kramer, *Myth*, *supra* note 81, at 1062-63.

314. 264 P.2d 944 (Cal. 1953). *Grant* is the occasion for another of Currie's extended analyses of possible permutations of contacts. See CURRIE, *supra* note 76.

The second way in which the plaintiff's home law might "not permit recovery" is by simply not conferring a right to recover at all (rather than creating a right but subordinating it to a defense).<sup>315</sup> Here, Kramer finds, the "unprovided-for" aspect of the case simply means that the plaintiff has no right.<sup>316</sup> Kramer's example of this sort of case is *Erwin v. Thomas*,<sup>317</sup> in which a Washington resident was injured by an Oregon resident in Washington. The victim's wife sued to recover for loss of consortium, an action recognized by Oregon but not by Washington law. Oregon law gives no right because it is not interested in allowing recovery, and Washington law gives no right because it sees no injury. Thus, once again, the plaintiff loses. In sum, unprovided-for cases are simply ones in which the plaintiff cannot state a claim under his own law.

All this is dead on, as far as it goes — the law of the plaintiff's state will not help him in an unprovided-for case. But what about the defendant's home law? The defendant's home law, remember, permits recovery. Interest analysis says that it confers no right, because the defendant's home state has no interest in allowing recovery based solely on the fact that the defendant is a local.<sup>318</sup> But perhaps Privileges and Immunities has something to say here as well, and in fact, Kramer thinks that it does. In his analysis of *Erwin*, he initially concludes that the plaintiff loses: neither state's law gives her a right to recover. When Privileges and Immunities enters the picture, however, Kramer finds that Oregon cannot justify withholding the benefits of its law from a nonresident plaintiff when it would let an Oregonian recover.<sup>319</sup> Consequently, the plaintiff can recover under Oregon law — at least, in an Oregon court.

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315. Distinguishing between these two classes of cases may be difficult. It is not impossible, however, and is sometimes easy. If a state does not permit suit for loss of consortium, its law clearly confers no right. If it does have a wrongful death action but abates it on the death of the tortfeasor, its law confers a right but subordinates it to the defense. (These examples are drawn from the facts of *Grant* and *Erwin v. Thomas*, 506 P.2d 494 (Or. 1973), which Kramer considers in *Myth*, *supra* note 81, at 1048-56 (*Grant*), 1060-63 (*Erwin*).

316. See Kramer, *Myth*, *supra* note 81, at 1062-63.

317. 506 P.2d 494 (Or. 1973).

318. The tort, in these examples, takes place in the plaintiff's state. See, e.g., *Erwin*, 506 P.2d at 495.

319. See Kramer, *Myth*, *supra* note 81, at 1073. This may not be the correct reading of the Clause; it is at least arguable that it applies only to treatment of out-of-staters with respect to in-state occurrences. See *Toomer v. Witsell*, 334 U.S. 385, 395 (1948) ("It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy."). Whether the Clause is triggered when a State A citizen "ventures into State B" to litigate an out-of-state transaction is not entirely clear.

If this is so, why should the result be different in the *Grant* variation Kramer considers? Why does Privileges and Immunities not likewise compel California to extend the benefit of its law to the Arizona plaintiff, entitling him to recover under California law? It presumably would were the plaintiff a Californian<sup>320</sup> — in that case, both parties would be from California and the case would be a “false conflict” because Arizona would have no interest.<sup>321</sup> Thus the withholding of the right to recover under California law does not seem significantly different from the discrimination forbidden to Oregon.

Kramer’s reasoning here is hard for me to discern. It seems that the location of the forum makes the difference. Currie’s unprovided-for variant of *Grant* has the suit occurring in California, but Kramer’s Privileges and Immunities analysis considers an Arizona court.<sup>322</sup> He further suggests that courts may deny their *own* residents the benefits of sister-state law without violating the Clause. Thus while an Oregon court cannot deny a Washingtonian the benefits of Oregon law, a Washington court could. Similarly, an Arizona court can deny an Arizonan the benefits of California law.

This reasoning is not entirely satisfactory. The Privileges and Immunities Clause is partly about the permissible actions of state courts, but it is also about the permissible content of state laws. It means, in particular, that as a matter of positive law, California must extend to Arizonans the rights it extends to its own domiciliaries.<sup>323</sup> Thus when the Arizona court refuses to allow the plaintiff to rely on California law, it rejects a California right. After we use the Privileges and Immunities Clause to reconfigure the scope of the state laws, we find that *both* states are interested, in the sense that both attempt to confer rights.

That leads to the main point of this section. The determination that the *Erwin* plaintiff has stated a claim under Oregon law is just a matter of scope analysis. The question remains whether the de-

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320. Whether it would or not is the crucial question for Privileges and Immunities, and I will consider it in more detail later. See *infra* part VI.B.1. At this point, we may simply note that if it followed the prescriptions of interest analysis, it would. As a matter of historical fact, of course, California did apply its law, see *Grant v. McAuliffe*, 264 P.2d 944, 949 (Cal. 1953), but I am considering how interest analysis operates.

321. The presence of an Arizona interest will not prove essential to my analysis. With a law directed to primary conduct, Arizona presumably has an interest in deterring dangerous activity within its borders. The abatement of a tort suit upon the death of the tortfeasor has only marginal effect on primary conduct, however, so the claim that Arizona has no interest in applying that rule to two Californians is at least plausible.

322. See Kramer, *Myth*, *supra* note 81, at 1073.

323. Subject, of course, to the qualifications noted above. See *supra* section V.B.2.

defendant has a defense available. Of course he does — Washington law recognizes no cause of action, and thus privileges the conduct complained of. Washington obviously extends this right to locals acting in Washington; following Kramer's analysis, Privileges and Immunities requires it to extend equally to Oregonians acting there. So while the plaintiff has a claim under Oregon law, recovery is not a foregone conclusion — the defendant has a defense under Washington law. That is as far as rules of scope take us.

This should be a startling conclusion. It may still be that Kramer gets the results right — though eyebrows will raise at the suggestion that what should happen in “unprovided-for” cases is that the plaintiff should win if and only if he sues in the defendant's home court, a result troublingly similar to the overstrong reading of Full Faith and Credit. My point here is simply that these cases are not easy to resolve, even after Kramer's reworking; the outcome is not as clear as his optimistic assertions.<sup>324</sup> He is right that they are not, in fact, unprovided-for, but he does not go all the way: they are actually true conflicts.<sup>325</sup>

## 2. *The Myth of the False Conflict*

The preceding section concluded that the Constitution turns unprovided-for cases into true conflicts. The conclusion of this section, with respect to false conflicts, will be the same.

Take as a first example the actual facts of *Grant v. McAuliffe*: a collision in Arizona between two California domiciliaries. In this case, Currie said, “Arizona had no conceivable interest in the application of Arizona law to the case.”<sup>326</sup> This is true enough, according to Currie's construction of interests. But again, the Privileges and Immunities Clause will change things. What happens when the California defendant (that is, his estate) invokes the Arizona abatement rule? The way to perform this analysis, as intimated above, is to ask whether Arizona would assert an interest if the party asking for the benefit of her law were a domiciliary. The answer is yes, according to Currie's analysis; with a California plaintiff and an Arizona defendant, the case is a true conflict, where both states are

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324. See Kramer, *Myth*, *supra* note 81, at 1047-48.

325. Perhaps these should be called “reverse true conflicts” since they feature the unusual situation in which each state is asserting an interest in *disadvantaging* its domiciliary. (This is the reason Kramer believes that the plaintiff wins by suing in the defendant's home court.)

326. CURRIE, *supra* note 76, at 161.

interested. If Arizona grants this right to its own domiciliaries, must it not offer it on equal terms to out-of-staters?

Kramer suggests not; he argues that in such a case Arizona may defer to California's interests by withholding the benefits of Arizona law. Such deference, he claims, will reduce interstate friction, and thus better serve the aims of the Privileges and Immunities Clause.<sup>327</sup> But interstate friction is not clearly the sole target of the Clause. By its words, after all, it grants rights to individuals, not to their states, and the Supreme Court has never suggested that states may waive the rights of their citizens to the privileges and immunities of other states' laws. If the Clause aims to promote national unity, conceptually as well as instrumentally, it seems likely that the creation of a class of outsiders with fewer rights against each other than against local citizens offends the principle of equality of individuals within states.

Admittedly, the facts of *Grant v. McAuliffe* lend themselves to the proposition that rights created by the law of the common domicile should have priority, primarily because the law at issue has so little effect on primary conduct. The idea that a Californian can invoke such an Arizona rule against another Californian is odd; it is not clear why Arizona would want to make the law available to Californians *inter se*, nor why the Constitution should require it to. And I do not mean to suggest that the Constitution compels the application of Arizona law. After all, the California plaintiff can surely point to a California law that gives him a right to recover, so the result would be at most a true conflict. Arizona may be able constitutionally to adopt a conflicts rule deferring to California's regulation of its domiciliaries, and if it can do that, it can probably also simply withhold rights with such a marginal relation to primary conduct. I suspect, though, that the Constitution prevents Arizona from declaring as a general matter that Californians, *inter se*, do not have the rights of Arizonans.

Suppose that instead the law focuses on primary conduct; suppose Arizona has a cause of action that California law lacks — say, for intentional infliction of emotional distress. There is something plausibly wrong with a legal regime under which a Californian in Arizona does not enjoy the protections that Arizonans do, so long as the tortfeasor is also a Californian. Finally, suppose that the law is a speed limit — clearly directed to primary conduct. In an accident between two Californians, it seems intolerably odd that one

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327. See Kramer, *Myth*, *supra* note 81, at 1069-70.

would not be able to defend against an allegation of negligence with the claim that he had complied with the Arizona speed limit, regardless of what California's is.

These examples do not show that situs rights should always defeat those created by the law of the common domicile — it makes sense only in some cases — but rather that *dépeçage* may be most sensible. California rights prevail with respect to some issues (such as the abatement of the cause of action), and Arizona rights with respect to others (such as the applicable speed limit). This is common in state-federal conflicts, and we have seen no reason why multistate conflicts should treat it as anomalous.

The larger point thus is not that all false conflicts are necessarily true conflicts, but that some must be. Deference to the policies of the state of common domicile may be a sufficient nondiscriminatory reason to withhold local rights not affecting primary conduct — though I think this will be quite a small set. But Currie's conception of the category of false conflicts goes further, because he believes that states generally have no interest in granting rights to recover, or defenses against liability, to out-of-staters.<sup>328</sup> This is the discrimination I claim Privileges and Immunities blocks. "False conflicts" that are false simply because the situs state has no interest in compensating or defending out-of-staters, where it does have such interests with respect to locals, are made true conflicts by the Constitution.

### B. *Conflicts Rules and the Constitution*

Thus far I have suggested that, taking the Constitution seriously and thinking in terms of conflicting rights, unprovided-for cases and false conflicts are often true conflicts. This is not an auspicious start; it undoes most of the advances of interest analysis. This section will take some steps forward by arguing that the prevalence of true conflicts is nothing to worry about. Conflicts arise because rules of scope tend to be broad enough that more than one state will often create rights with respect to a particular transaction. Broad rules of scope are not the problem, however; we have seen that the Constitution works primarily to enlarge, not to constrict, the scope of state-created rights. The problem lies rather in the discriminatory manner in which conflicts are resolved. If states are

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328. Generalizing about Currie's approach is difficult, and this characterization may not be entirely fair. Currie did, after all, suggest that a state may have an interest in allowing recovery to out-of-staters so that they can pay their in-state hospital bills. See CURRIE, *supra* note 76, at 145 n.64.

prevented from discriminating, they will usually agree on which rights should prevail; where they do not, they act within their authority by resolving conflicts according to their own rules.

Whatever theory is invoked, courts resolving these conflicts do hierarchize rights: they recognize foreign rights or refuse to do so. Because these are legal decisions, there must be a legal rationale — a rule specifying which rights prevail and which must yield, what I have called a conflicts rule. The range of permissible conflicts rules is not infinite, however: the Constitution imposes constraints.

### 1. *Conflicts Rules and Law: Full Faith and Credit*

Full Faith and Credit requires that the conflicts rule a state adopts not disfavor foreign rights simply because they are foreign. Whatever the conflicts rule may be, it may not provide that local rights defeat foreign rights simply by reason of their origin. The reason must instead be neutral, in that it cannot be conditioned on the origin of the rights. (I will describe this as the requirement that the state must assert a greater interest in the suit; the characterization is useful but not essential.)

Return to the example of luckless driver Al. Al collides with George in Alabama and with Lou in Louisiana. In both cases, Al prefers Alabama law; Alabama, if it is interested in the financial welfare of its domiciliaries, and certainly if it adheres to interest analysis, might thus want to draw both cases within its legislative jurisdiction. But it cannot.

*Al v. George* and *Lou v. Al* are what I have called mirror-image cases, essentially identical (both are car accidents, and the law at issue in both cases determines the damages available), with the exception that the relevant contacts have been switched.<sup>329</sup> From the perspective of Alabama, *Al v. George* has a local plaintiff, a foreign defendant, and a local accident. *Lou v. Al* has a foreign plaintiff, a local defendant, and a foreign accident. Any reason that can be given in favor of Alabama rights in *Al v. George* can be given for Louisiana rights in *Lou v. Al*, and therefore no conflicts rule that is

329. See *supra* text accompanying note 226. I use here the contacts that Currie sets out as potentially relevant, though I omit the location of the forum. See CURRIE, *supra* note 76, at 141. It should be emphasized that these are not the only contacts a conflicts rule can consider — states have the freedom to orient their rules around whatever contacts they desire. Depending on the contacts deemed relevant, *Al v. George* and *Lou v. Al* might not be mirror images as I have constructed them. For example, it might be relevant whether the parties know each other and were traveling to the same destination in separate cars. It should be nonetheless clear that mirror-image cases can be constructed, using whatever contacts are taken as relevant.



neutral in the required sense can provide that Alabama rights prevail in both cases. Alabama can adopt a conflicts rule privileging Alabama rights in one case; that amounts to the assertion that its interest in that case is greater. But this assertion immediately implies that its interest is inferior in the other case, because the other case is a mirror image.<sup>330</sup>

Thus Full Faith and Credit will have a real effect on the development of state conflicts rules. If states abide by the principle of relinquishing the mirror images of cases in which they hold that their rights prevail, the system will develop appropriately, either by statute or by common law. But state compliance need not be willing. If Alabama decides that its rights prevail in *Al v. George* and then reaches the same conclusion in *Lou v. Al*, Lou's Full Faith and Credit argument has already been made for him. He can demonstrate "on some rational basis" (to use the short-lived *Alaska Packers* formulation) that Alabama's interest is inferior, for Alabama has said as much. Even if no mirror-image cases exist yet, states are unlikely to cheat, because an insincere assertion of greater interest will come back to haunt them when the mirror-image case arises.<sup>331</sup>

This use of Full Faith and Credit does not require the federal judiciary to interfere with a state's establishment of priorities.<sup>332</sup> If Alabama's conflicts rule provides that Alabama rights prevail in *Al v. George*, a federal court directing that Louisiana rights prevail in *Lou v. Al* has not imposed its conception of interests on Alabama or even deemed Alabama's interest inferior. It has simply listened to Alabama's analysis of what makes an interest superior and taken the state at its word. If a state asserts legislative jurisdiction over a case and its mirror image, it has violated the Full Faith and Credit Clause. What's sauce for the goose must be sauce for the gander.

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330. Cf. Jackson, *supra* note 232, at 25-26 ("It will not do to decide the same question one way between one set of litigants and the opposite way between another. . . . If a case was decided against me yesterday when I was defendant, I shall look for the same judgment today if I am plaintiff.") (quoting CARDOZO, *supra* note 227, at 33 (alteration in original) (quoting WILLIAM GOLDSMITH MILLER, *THE DATA OF JURISPRUDENCE* 335 (1903) (internal quotation marks omitted))).

331. With this particular example, Alabama would probably opt for a rule privileging its rights in *Al v. George* and subordinating them in *Lou v. Al*, primarily because the accident in *Al v. George* occurred in Alabama. For the same reason, Louisiana's conflicts rules are likely to privilege its rights in *Lou v. Al*. A general preference for territorial sovereignty will lead to interstate agreement about whose rights should prevail. This is nice, but not essential.

332. I speak of the federal judiciary because state courts have played a role in creating discriminatory conflicts rules. Of course, the constitutional limits I identify bind state courts as well.

## 2. *Conflicts Rules and Domicile: Privileges and Immunities*

The Privileges and Immunities Clause, I have said, operates at two levels. As a restriction on rules of scope, it requires states to extend to out-of-staters the same rights they do to locals. As a restriction on conflicts rules, it requires states to grant those rights the same force. These conditions may seem modest, but they have substantial effect.

Return to Laycock's example of hapless friends Mary and Del. They are involved in two accidents together; in each accident a different friend is driving. Assume further that the accidents both occur in the same state and are substantively identical.<sup>333</sup> Del sues Mary in Delaware, and Mary counterclaims; Delaware has a guest statute, and Maryland does not. If Delaware is interested simply in helping its domiciliaries, it will want to use the guest statute to bar Mary's claim but not Del's. This is precisely what interest analysis directs. But it violates the Privileges and Immunities Clause.

There are two ways in which Delaware can regulate the effect of its guest statute: rules of scope, and conflicts rules. Neither offers a way to distinguish between the two claims. If the scope of the guest statute extends to Del, it must also to Mary, because the only difference between the two claims is the domicile of the parties. For the same reason, if the guest statute in Del's hands defeats the right to recover, it must also do so in Mary's hands.

This example may suggest a linkage between rules of scope and conflicts rules, and it bears repeating that they are distinct. Consider again *Erwin v. Thomas*. An Oregon domiciliary injures a Washington husband in Washington, and his spouse sues for loss of consortium, an action existing under Oregon law but not (for wives) under Washington law. Oregon may not want to grant recovery to the Washington plaintiff, and I will show that it need not, contra Kramer,<sup>334</sup> but it will probably have to employ a conflicts rule to achieve this end.

With regard to rules of scope, the Privileges and Immunities Clause will probably require Oregon to extend the loss-of-consortium cause of action to the Washington plaintiff because it would likely grant the right to a similarly situated local. If no other law interferes, a state will often give its law extraterritorial force for

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333. Laycock does not specify these conditions, see Laycock, *supra* note 73, at 276, but they are essential to my analysis.

334. See Kramer, *Myth*, *supra* note 81, at 1073; see also *supra* text accompanying note 319.

transactions between two of its domiciliaries.<sup>335</sup> Consequently, the Privileges and Immunities Clause will require the state to grant rights to similarly situated nondomiciliaries. This is how the Clause creates the true conflict. But granting the right and prioritizing it over a competing right are two different things.<sup>336</sup> The defendant can appeal to Washington law for a defense — Washington does not recognize the cause of action — and to allow this defense to defeat the Oregon right, the Oregon court need only apply the conflicts rule that in tort cases, rights (and defenses) created by the law of the place of the wrong have priority over other rights.<sup>337</sup> The Privileges and Immunities Clause, as a restriction on conflicts rules, does not bar this rule, for the rule does not disfavor rights because the party invoking them is a foreign domiciliary.

As a last example, let us return to the example of *Grant v. McAuliffe*, a collision between two California domiciliaries occurring in Arizona. Interest analysis identifies this as a false conflict, but we have seen that it is actually a true one, in that Arizona cannot, as a general matter, withhold the benefits of its local law. The scope and conflict requirements of the Privileges and Immunities Clause imply that, if Arizona provides that its rights will defeat foreign rights in a suit over a local tort involving one of its domiciliaries, it must also provide that its rights defeat foreign rights in a similar suit where neither party is a domiciliary. Otherwise, its conflicts rule favors rights asserted by a local over rights asserted by a similarly situated out-of-stater. The result seems to be that, in false conflicts, the Constitution requires that out-of-staters be able to invoke local law. This makes sense in some circumstances; for example, it seems natural that a Californian must be able to defend against an allegation of negligence by showing that he complied with the rules of the road applicable to Arizonans.

In comparison, the idea that Arizona must provide that its abatement rule controls a suit between two Californians is harder to

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335. Cf. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 355-56 (1909) (Holmes, J.) (pointing out that national states — i.e., countries — often seek to apply their own law, even to acts within other jurisdictions).

336. Again, conflicts rules are not rules of scope. The Privileges and Immunities Clause operates as both a rule of scope and a constraint on permissible conflicts rules. As a rule of scope, it requires state laws to extend rights to nondomiciliaries on the same terms as it extends them to locals. As a conflicts rule constraint, it prevents states from applying rules that honor those rights helpful to local domiciliaries.

337. For this to work, it must be the case that Washington grants the defendant a right. A rational attempt to promote state interests would lead it to do so, since otherwise it loses the ability to control transactions taking place within its borders. That is, if it grants no right to the Oregon domiciliary, it cannot grant rights to its own domiciliaries in similar cases without violating the Privileges and Immunities Clause.

part it is just a matter of demanding they apply their laws as written — the conflicts rule says the rights yield, and yield they must. And in part it is a matter of Full Faith and Credit. A conflicts rule providing that local rights yield unless foreign rights also yield impermissibly discriminates against foreign law.

## VII. CONCLUSION

The approach I have developed allows us to draw some general conclusions about what conflicts rules will look like. The Privileges and Immunities Clause destroys the domiciliary-centered conception of governmental interests.<sup>342</sup> If a state grants rights to its domiciliaries, it must grant them to nondomiciliaries in the same cases. Its conflicts rules must similarly provide that rights that prevail in the hands of domiciliaries will also prevail in the hands of nondomiciliaries. The Privileges and Immunities Clause thus prevents the crudely selective exercise of legislative jurisdiction to favor domiciliaries.

The Full Faith and Credit Clause has a similar, though more subtle effect. A state may surely regulate transactions occurring within its borders and involving its domiciliaries; that is, it may adopt conflicts rules providing that in such cases, local rights prevail. But if it tries to draw within its regulatory field other cases involving its domiciliaries, the mirror-image requirements of Full Faith and Credit will start to sap its territorial authority. For every extraterritorial case it claims, it must yield the mirror image, which will necessarily be a case arising within its borders.

It thus seems likely that territorial factors will play a large role in conflicts rules,<sup>343</sup> but this does not mean a return to the bad old days of Joseph Beale. Beale's system produced arbitrary results not because of its territorialist orientation but because of its rigid devo-

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342. See, e.g., Ely, *supra* note 73, at 180; Laycock, *supra* note 73, at 251 (“[A] state’s interests in enriching local citizens . . . simply should not count.”). The significance of a domiciliary connection, I think, is not so much that it gives states a reason to extend rights as that it gives them a justification for imposing penalties. See Brilmayer, *supra* note 71, at 1297-1303. If a state is truly concerned about what its domiciliaries do outside its borders, it can probably impose criminal sanctions. See *supra* note 339.

343. This should not be surprising; the Framers were working within the Anglo-American tradition that saw law as a territorial entity. See *supra* text accompanying notes 28, 255-60. Beale notes the two conflicting traditions of “personal” and “territorial” law and pronounces that “[t]he conception of the common law has always been the conception of a territorial law.” 1 BEALE, *supra* note 6, § 5.2, at 52. Even today, federal laws are presumptively territorial in their scope. See *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248-59 (1991).

tion to the last act doctrine.<sup>344</sup> More sophisticated versions of the territorial approach are possible.<sup>345</sup>

Nor must territorialism be the whole story. Comparative impairment is a permissible approach, either by itself or as a supplement to territorialist rules; so too is a rule that the law that validates a contract prevails.<sup>346</sup> There is substantial flexibility, and it is impossible to predict what rules states would ultimately select. Shared conceptions of interest (for example, territorial sovereignty), however, would probably lead to substantive convergence, thereby producing the beneficial effect of a reduction in forum shopping. The constitutional restrictions I have examined essentially require states to be consistent in their conflicts rules, and therefore prevent states from favoring their own laws and domiciliaries. States may structure the rules so as to promote their own interests, but only by deciding which factors are most important. This is clearly a decision within the legitimate authority of the state — it is a matter of internal policy.<sup>347</sup> Having asserted the importance of these factors, though, they must yield control over cases in which those factors point to another state. Consequently, states will probably be sincere in their hierarchization of rights: they will lay claim to those cases that are most important to them, and cede control of cases they believe are more important to other states.<sup>348</sup> There is no way for a state to extend illegitimately the reach of its laws. The system

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344. See Laycock, *supra* note 73, at 322.

345. Laycock suggests a territorial approach that looks to the location of the relationship between the parties. See *id.* at 323-27. This is an interesting idea, although it seems odd that if one Californian commits a tort against another in Texas, the parties' rights will differ depending on whether they know each other or not.

346. The basic constitutional concern of conflicts jurisprudence is discrimination against foreign domiciliaries or, as a lesser and probably derivative matter, against foreign law. The model I sketch here does not do much to address problems of discrimination in favor of plaintiffs generally, which may occur if litigation brings benefits to the forum. A state probably could then adopt the rule that the law favoring the plaintiff prevails. The constitutional concern is that this would lead to privileging pro-plaintiff substantive law, since plaintiffs pick where to sue. Similar concerns arise with a preference for the generally adopted rule.

347. Brilmayer puts it this way:

Particularly where the Court is assessing state interests, it should not impose an ideal definition of interest but only ask whether a reasonable state might think it has an interest under these circumstances. State preferences are likely to differ, in part because of difference in value choices and in part because of divergent empirical assumptions. That is what state lawmaking is all about.

BRILMAYER, *supra* note 8, at 165. I agree with the caveat that the Court should ask whether a nondiscriminatory state might think it has a *greater* interest.

348. This surrender of cases in which the conflicts calculus points to another state is precisely what interest analysis refuses to do, and that is why I believe it is unconstitutional.

cannot be gamed because states are, in a sense, playing against themselves: each assertion of power implies a retraction.<sup>349</sup>

The federal judiciary's role in this system would be to oversee state conflicts rules and invalidate them when they violate one of the constitutional constraints. Federal courts would not dictate the substance of conflicts rules or tell states which factors are to be deemed more important.<sup>350</sup> They would ensure only that when a state asserts that a particular arrangement of factors gives it the greater interest in a case, it acts consistently and concedes that a mirror-image array of factors gives another state a greater interest. This could be done simply by surveying other state conflicts decisions. The common mistake of the Court and conflicts scholars has been to focus on individual cases, in which results can almost always be justified, rather than on patterns of state decisionmaking, which may reveal discriminatory conflicts rules. The suggested approach allows states to set their own priorities, but then holds them to their words. This seems the appropriate role for federal courts implementing antidiscrimination norms: ensuring that when one state rejects the claims of another, it does so because it sincerely believes that its interest in regulation is greater, not because it counts its interests more heavily than those of sister states.

This approach has applications beyond the field of conflicts of law, and is, in fact, almost identical to the approach Guido Calabresi and Allison Moore have proffered as an important, though neglected, form of judicial review.<sup>351</sup> According to this approach, the defense of fundamental rights is a role appropriately given to an independent judiciary, but the identification of such rights — rights society deems important, not necessarily rights de-

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349. The retraction does not mean that the state's rights will never be enforced. It means only that they will yield to sister-state rights, and if there are no opposing rights, there is nothing to which to yield. It is for this reason that a state's law may govern interactions between its domiciliaries in places with no local law. See, e.g., *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 355-56 (1909) (Holmes, J.). The difference between the absence of a right and its subordination explains why broad scopes of rights help in keeping states honest. If rights generally had narrow scope, states could try to game the system by structuring their conflicts rules so that cases in which their rights yielded tended to be cases in which no contrary rights existed. That would give them cheap wins in such cases, since their rights would be enforced without the sacrifice of the claim to authority over mirror-image cases.

350. On this point I disagree with Laycock, who believes that "[w]hether sister-state law applies is a federal question, and each state is obliged to give the same answer to that federal question." See Laycock, *supra* note 73, at 301.

351. See Guido Calabresi, *The Supreme Court, 1990 Term — Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 91-103 (1991); Allison Moore, *Loving's Legacy: The Other Antidiscrimination Principles*, 34 HARV. C.R.-C.L. L. REV. 163, 173-74, 178-82 (1999).

rived from the Constitution — is a task better suited to the democratically elected legislature.<sup>352</sup>

Calabresi's approach is an elegant way of taking advantage of these two institutional competencies. He suggests that states be permitted to make choices between fundamental values, with courts reviewing essentially the sincerity of the choice. To subordinate one important value in the name of another is a legitimate democratic decision; it is illegitimate only when the disfavored value is weighed lightly because of who is asserting it.<sup>353</sup> To determine this, Calabresi suggests, the court must first ascertain whether the burden of a challenged law falls upon a class whose interests the legislature may hold more lightly than their own. If so, the court must then examine the way the state resolves other conflicts between the competing values, to see if the challenged regulation reflects a hierarchy of values consistently instantiated in the law. If it does — if the value subordinated by the particular law at issue also loses when the burden of its defeat falls on the people well represented in the legislature — it reflects a permissible choice between values. If not, it suggests that discrimination is at work.<sup>354</sup>

The parallels should be clear. Sister state laws and domiciliaries are always likely candidates for discrimination, for they have no electoral voice. Federal courts should thus look to other examples of state conflicts decisionmaking to see if the factors asserted to make local law prevail in one case succeed when they support foreign law or foreign domiciliaries. Constitutional constraints do not usurp states' abilities to decide which contacts are most important — the danger analogous to judicial determination of which rights are fundamental — but they do require that states' claims to authority over particular cases be based on a consistent hierarchy of contacts and not on discrimination against foreign law or citizens.

Preventing this discrimination is all that the Constitution does. A domestic conflicts theory may in fact need more, but this is the most important thing, and probably the only realistic goal for theory, rather than federal legislation. If states comply with their constitutional obligations, laying claim only to those cases to which they sincerely believe they have a superior claim, there is no theoretical basis on which to fault them. There may be irresolvable disagreements between states even on this approach, and these are the

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352. See Calabresi, *supra* note 351, at 91.

353. See *id.* at 91-93.

354. See *id.*

real true conflicts. Federal legislation may resolve them — it may set out the substantive rights that always prevail, or it may prescribe conflicts rules by which states must abide.<sup>355</sup> The conflicts model reveals what federal judges should do in the absence of federal legislation.

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355. Congress's power to legislate under Article I is of course limited, *see* *City of Boerne v. Flores*, 117 S. Ct. 2157, 2162 (1997); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-1, at 297 (2d ed. 1988), and it might be hard to displace local tort laws. Congress can also legislate pursuant to the Full Faith and Credit Clause, which permits it to specify conflicts rules. U.S. CONST. art. IV, § 1; *see* TRIBE, *supra*, § 5-2, at 298.