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Choice of Law and the Forgiving Constitution[†]

GENE R. SHREVE*

INTRODUCTION

This Article confronts a paradox. Choice of law¹ seems to have everything yet almost nothing to do with the United States Constitution. The Full Faith and Credit, Due Process, Equal Protection, Privileges and Immunities, and Commerce Clauses all can easily be read to protect nonforum state interests, or the interest of nonforum litigants, that are disrupted by parochial state conflicts decisions. Yet the Supreme Court rarely intervenes under the Constitution to protect these interests. For choice of law, ours is a forgiving Constitution.

The forgiving Constitution permits what is here termed “conflicts localism”: state and federal diversity cases favoring local substantive law when the forum state’s relation to the controversy is clearly less than that of the place providing conflicting law. We see that conflicts localism unfairly damages nonforum litigants, exhibits disrespect to nonforum governments, and undermines principles of order and uniformity in choice of law. This Article explains that the pernicious effects of conflicts localism are sufficiently widespread to warrant a search for some kind of cure, and why, despite many different avenues to law reform that are available in theory, nothing in fact stands in the way of conflicts localism except the Constitution.

Deeper examination of the matter reenforces this conclusion. It is striking to observe how themes appearing in the four strains of contemporary conflicts theory—substantivism, multilateralism, unilateralism, and party expectations—recur clearly in various parts of the Constitution. This Article demonstrates that, because policy inspirations for constitutional doctrine regulating conflicts are so close to those for conflicts doctrine itself, and because the Supremacy Clause grants the Supreme Court clear entry to enforce those policies as constitutional doctrine, the authority of the Court to monitor or rewrite conflicts law is unlimited. We see that the refusal of the Supreme Court to use that authority to improve the quality of conflicts justice can be defended, if at all, only as an exercise of enlightened forbearance.

Does the Supreme Court belong on the sidelines? Perhaps, the Article suggests. This answer derives from the paradox itself. The Supreme Court may have been wise to forgo

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1. The terms “choice of law,” “conflict of laws,” and “conflicts law” appear interchangeably in this Article. They describe law attempting

to provide an intelligible and principled basis for choosing a substantive rule (perhaps tort or contract) over the competing rule of another place. Rules compete when their application would lead to conflicting results and when the relation of each place to the controversy is such that it is plausible for the rule of either place to govern. Conflicts law must legitimate the choice. It must explain why rejection of one law in favor of another is right.

Gene R. Shreve, *Conflicts Law—State or Federal?*, 68 *IND. L.J.* 907, 907 (1993) (footnote omitted).

a strong reaction to conflicts localism precisely because its constitutional authority over choice of law is unbounded. Constitutional justifications for Supreme Court intervention so fully partake of the mainstream values of choice of law that, should the Court begin to give serious weight to the former, it would find no logical stopping point short of constitutionalizing the entire subject. The Article confirms this idea through examination of different constitutional rules for addressing conflicts localism. It then concludes that it may be impossible for extensive constitutional and nonconstitutional components to coexist in a stable regime of American conflicts law.

I. THE PARADOX

A. *Conflicts Localism*

In 1978, the Minnesota Supreme Court decided *Blamey v. Brown*² and *Hague v. Allstate Insurance Co.*,³ two conflicts cases that would eventually come to the attention of the United States Supreme Court. The state court seemed in each case to go out of its way to award a local litigant the benefits of Minnesota law.

In *Blamey*, the Minnesota Supreme Court denied a Wisconsin tavern proprietor protection from dram shop liability available under Wisconsin law, although his conduct occurred in Wisconsin. Conceding that the proprietor might have failed to obtain liquor liability insurance upon the reasonable expectation that Wisconsin law would determine tort exposure from his tavern business, the Minnesota Supreme Court chose instead Minnesota dram shop law casting the defendant in liability. Its reasons for doing so were that the plaintiff in need of compensation was a Minnesotan, and that it regarded Minnesota law as more enlightened than Wisconsin law.

The Minnesota Supreme Court championed its own law again in *Hague*. Plaintiff wished to aggregate (stack) coverage on three vehicles insured by her husband at the time he died in a traffic accident. Wisconsin law did not permit stacking, however, Minnesota law did.⁴ Plaintiff therefore stood to recover three times as much under the insurance policy if Minnesota law, rather than Wisconsin law, applied. The court refused to apply Wisconsin law, notwithstanding the facts that the plaintiff and her husband lived in Wisconsin at the time of the accident, that the policy was contracted for and issued to plaintiff's husband in Wisconsin, that all of the insured vehicles were garaged in Wisconsin, and that the fatal accident occurred there.⁵ The principal reasons why the court chose Minnesota law instead were reminiscent of those it offered for choosing Minnesota law in *Blamey*.⁶ The court stressed that the plaintiff had become a Minnesotan

2. 270 N.W.2d 884 (Minn. 1978), cert. denied, 444 U.S. 1070 (1980).

3. 289 N.W.2d 43 (Minn. 1978), aff'd, 449 U.S. 302 (1981). The United States Supreme Court's decision in *Hague* sparked a great deal of commentary. See Friedrich K. Juenger, *Supreme Court Intervention in Jurisdiction and Choice of Law: A Dismal Prospect*, 14 U.C. DAVIS L. REV. 907 (1981); P. John Kozyris, *Reflections on Allstate—The Lessening of Due Process in Choice of Law*, 14 U.C. DAVIS L. REV. 889 (1981); Courtland H. Peterson, *Proposals of Marriage Between Jurisdiction and Choice of Law*, 14 U.C. DAVIS L. REV. 869 (1981); Gene R. Shreve, *In Search of Choice-of-Law Reviewing Standard—Reflections on Allstate Insurance Co. v. Hague*, 66 MINN. L. REV. 327 (1982); Symposium, *Choice-of-Law Theory After Allstate Insurance Co. v. Hague*, 10 HOFSTRA L. REV. 1 (1981) [hereinafter HOFSTRA SYMPOSIUM].

4. 289 N.W.2d at 46.

5. *Id.*

6. *Id.*

prior to filing her case, and that Minnesota's stacking law was more just than Wisconsin's antistacking law.⁷

The unmistakable local bias of *Blamey*⁸ and *Hague*⁹ is discernible in other choice-of-law decisions in American courts. Observers have noted this conflicts localism and the possibilities of injustice and confusion that attend it.¹⁰ Moreover, local bias in choice of law has not been limited to state cases. Federal diversity courts are obliged under the *Erie* doctrine to follow the conflicts decisions of the states where they are sitting.¹¹ *Erie* thus denies federal judges authority to distance themselves from the most biased of state conflicts decisions.

Federal diversity judges actually seem to share much of the enthusiasm of their state colleagues for vindicating local state interests. Thus, in the well-known case of *Rosenthal v. Warren*,¹² a federal diversity court was inspired by the conflicts localism of New York state decisions to press the interests of a New York plaintiff in a case having little connection with New York.¹³ Moreover, interaction of the *Erie* doctrine and the federal transfer-of-venue law creates risks for choice of inappropriate state law that exist only in federal court.¹⁴

7. *Id.*

8. Professor John Kozyris described *Blamey* as an "egregious" instance of "Minnesota state court overreaching." Kozyris, *supra* note 3, at 905.

9. Professor Linda Silberman described *Hague* as "state parochialism in the choice-of-law process." Linda Silberman, *Can the State of Minnesota Bind the Nation?: Federal Choice-of-Law Constraints After Allstate Insurance Co. v. Hague*, 10 HOFSTRA L. REV. 103, 103 (1981). The case was to Professor Aaron Twerski "unrestrained state chauvinism." Aaron D. Twerski, *On Territoriality and Sovereignty: System Shock and Constitutional Choice of Law*, 10 HOFSTRA L. REV. 149, 151 (1981).

10. See, e.g., Gregory S. Alexander, *The Concept of Function and the Basis of Regulatory Interests Under Functional Choice of Law Theory: The Significance of Benefit and the Insignificance of Intention*, 65 VA. L. REV. 1063, 1063-64 (1979); Michael E. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1 (1991); Friedrich K. Juenger, *Conflict of Laws*, in INTRODUCTION TO THE LAW OF THE UNITED STATES 411, 428-29 (David S. Clark & Tugrul Ansay eds., 1992); James R. Pielemeier, *Why We Should Worry About Full Faith and Credit to Laws*, 60 S. CAL. L. REV. 1299 (1987); William A. Reppy, Jr., *Eclecticism in Choice of Law: Hybrid Method or Mishmash?*, 34 MERCER L. REV. 645 (1983); Stewart E. Sterk, *The Marginal Relevance of Choice of Law Theory*, 142 U. PA. L. REV. 949 (1994); cf. Dirk H. Bliesener, *Fairness and Choice of Law: A Critique of the Political Rights-Based Approach to the Conflict of Laws*, 42 AM. J. COMP. L. 687, 687 (1994) ("[O]ne is not particularly hard put to run into a choice-of-law case which seems rather unfairly decided.").

11. The requirement that federal diversity judges follow state conflicts law comes from two cases: *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938) and *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941).

Klaxon ended brief uncertainty about whether federal conflicts doctrine was still available to federal courts sitting in diversity or was part of the federal general common law that *Erie* invalidated. Ruling it to be the latter, . . . *Klaxon* held that the plaintiff should not be permitted to use federal diversity jurisdiction to obtain a more favorable conflicts law.

GENE R. SHREVE & PETER RAVEN-HANSEN, UNDERSTANDING CIVIL PROCEDURE § 41[B] (2d ed. 1994).

12. 475 F.2d 438 (2d Cir.), *cert. denied*, 414 U.S. 856 (1973).

13. *Rosenthal* was a wrongful death case in which the plaintiff's decedent had elected to go to a Massachusetts hospital for surgery and died there. Massachusetts wrongful death law would have limited the liability of the Massachusetts defendants, the hospital and the surgeon. The Second Circuit instead subjected the defendants to unlimited liability for wrongful death created under New York law. Apart from the New York citizenship of the plaintiff and the plaintiff's decedent, all connections in the case were with Massachusetts. The court's choice of New York law has been widely criticized. See, e.g., EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS 98-99 (2d ed. 1992); Frederic L. Kirgis, Jr., *The Roles of Due Process and Full Faith and Credit in Choice of Law*, 62 CORNELL L. REV. 94, 135-36 (1976); James A. Martin, *Constitutional Limitations on Choice of Law*, 61 CORNELL L. REV. 185, 225-27 (1976); Willis L.M. Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587, 1605-06 (1978); cf. RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 340 (3d ed. 1986) (identifying *Rosenthal* as one of several decisions "that raise the question of whether the plaintiff's state has sufficient nexus with the defendant or with the defendant's course of conduct to make it fair and reasonable to hold the defendant liable under the plaintiff-favoring rule of the plaintiff's state").

14. Since federal diversity jurisdiction merely replicates state court jurisdiction for cases meeting the requirements of 28 U.S.C. § 1332 (1988), it may seem difficult at first to imagine how diversity jurisdiction could create possibilities for conflicts localism greater than those existing for the parties had they chosen to litigate the same case in state court. Yet this possibility exists because the Supreme Court reads the federal transfer-of-venue statute, 28 U.S.C. § 1404(a) (1988),

How much of a cause for concern is conflicts localism? The answer to this question depends upon what we believe the choice-of-law process in American courts should accomplish. If we believe that results in conflicts cases should be rational, predictable, and fair; if we believe that the sovereign interests accounting for forum and nonforum law alike should be respected whenever possible; and if we believe that all jurisdictions within our system of state and federal courts should strive for uniformity in choice of law in order to promote harmony between jurisdictions and discourage forum shopping; then it is possible to understand the destructive effects of conflicts localism.¹⁵

B. The Paradox of a Forgiving Constitution

The consequences of conflicts localism are, or at least could be, matters of concern under our Constitution.¹⁶ Aggressive but plausible readings of numerous clauses could bring the Constitution to bear. Consider some examples. The Due Process Clause¹⁷ could protect litigants' reasonable expectations in choice of law.¹⁸ The Full Faith and Credit Clause¹⁹ could prevent unwarranted refusals to apply sister-state law.²⁰ The separate or combined effects of the Privileges and Immunities,²¹ Equal Protection,²² and Commerce²³ Clauses could be to secure nonresident litigants from discriminatory applications of

and the *Erie/Klaxon* doctrine to require application of the state conflicts law of the transferor (original) forum instead of that of the transferee forum. *Van Dusen v. Barrack*, 376 U.S. 612 (1964). This is true even when the plaintiff seeks transfer rather than the defendant. *Ferens v. John Deere Co.*, 494 U.S. 516 (1990). Diversity plaintiffs may shop for favorable state conflicts law, as *Ferens* did, by filing in one federal district, then quickly securing a § 1404(a) transfer to a federal district located in a different state.

The same stratagem is unavailable for plaintiffs who file in state rather than federal diversity courts. A state court lacks authority to transfer one of its cases onto the docket of a sister-state court. Instead, the equivalent to transfer of venue for two state courts is for the initial case to be voluntarily dismissed or dismissed on forum non conveniens grounds, and for the plaintiff then to start afresh in the court of the second state. The latter state court naturally applies its own conflicts law, producing a result opposite to that for federal diversity litigation under the *Ferens* rule. Writing for four dissenting Justices in *Ferens*, Justice Scalia doubted "that Congress meant to provide the *plaintiff* with a vehicle by which to appropriate the law of a distant and inconvenient forum in which he does not intend to litigate, and to carry that prize back to the State in which he wishes to try the case." *Ferens*, 494 U.S. at 535 (Scalia, J., dissenting) (emphasis in original). For a more extended explanation of these matters, see SHREVE & RAVEN-HANSEN, *supra* note 11, § 41[C].

15. These expectations provide many of the policies for conflicts theory.

Policies guiding modern theory embrace the same core concerns that exerted an unacknowledged influence under old theory, which always should have mattered—that we should consider the purpose and intended reach of rules vying for application; try to avoid choices that unfairly surprise a litigant; and be sensitive to the needs of interstate federalism and international cooperation.

Shreve, *supra* note 1, at 912.

16. For discussion of the effect of the constitutions of other countries on their conflicts law, see Peter E. Herzog, *Constitutional Limits on Choice of Law*, 234 R.C.A.D.I. 239, 294-325 (1992).

17. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

18. Commentary on possibilities for due-process-based conflicts regulation is extensive. See, e.g., SCOLES & HAY, *supra* note 13, at 93-103; WEINTRAUB, *supra* note 13, at 512-40; Kirgis, *supra* note 13; Kozyris, *supra* note 3; Robert A. Leflar, *Constitutional Limits on Free Choice of Law*, 28 LAW & CONTEMP. PROBS. 706 (1963); Reese, *supra* note 13; Shreve, *supra* note 3.

19. U.S. CONST. art. IV, § 1.

20. Again, the literature is extensive. See, e.g., Paul A. Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210 (1946); Peter Hay, *Full Faith and Credit and Federalism in Choice of Law*, 34 MERCER L. REV. 709 (1983); Robert H. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1 (1945); Martin, *supra* note 13, at 186-201; Pielemeier, *supra* note 10.

21. U.S. CONST. art. IV, § 2.

22. U.S. CONST. amend. XIV, § 1.

23. U.S. CONST. art. I, § 8.

forum state law, thereby promoting uniformity in choice of law and discouraging forum shopping.²⁴

Yet almost all of the Constitution's potential for averting the bad effects of conflicts localism is unrealized under current law. The Due Process and Full Faith and Credit Clauses exert no more than a slight influence on conflicts decisions.²⁵ The Supreme Court appears to have given no role at all in conflicts to the Privileges and Immunities,²⁶ Equal Protection,²⁷ and Commerce Clauses.²⁸ It is symptomatic of this state of affairs that, while the frustrated nonresident defendants in *Rosenthal*, *Hague*, and *Blamey* all petitioned the United States Supreme Court for review, the Court granted certiorari only in *Hague*—and there it affirmed the Minnesota Supreme Court's choice of its own law.²⁹

The problem is not new. Fifty years ago, Justice Robert Jackson wrote: "I think it difficult to point to any field in which the Court has more completely demonstrated or more candidly confessed the lack of guiding standards of a legal character than in trying to determine what choice of law is required by the Constitution."³⁰ Much later, Professors Arthur von Mehren and Donald Trautman wrote that the Supreme Court's affirmation in *Hague* was "fair warning to the profession that the Court continues to have little to contribute to the subject of constitutional control of choice of law."³¹ Recently, Professor Friedrich Juenger delivered the verdict that "all attempts to induce the U.S. Supreme Court to impose limits on state court experimentation" in choice of law "have come to naught."³²

We have now reached a series of conclusions upon which the paradox of choice of law and the forgoing Constitution rests: (1) State and lower federal courts can and do render

24. See Brainerd Currie & Herma H. Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Equal Protection*, 28 U. CHI. L. REV. 1 (1960); Brainerd Currie & Herma H. Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, 69 YALE L.J. 1323 (1960); John H. Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173 (1981); Gottsman, *supra* note 10; Harold D. Horowitz, *The Commerce Clause as a Limitation on State Choice of Law Doctrine*, 84 HARV. L. REV. 806 (1971); P. John Kozyris, *Some Observations on State Regulation of Multistate Takeovers—Controlling Choice of Law Through the Commerce Clause*, 14 DEL. J. CORP. L. 499 (1989); Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249 (1992); Peter D. Isakoff, Note, *Unconstitutional Discrimination in Choice of Law*, 77 COLUM. L. REV. 272 (1977).

25. This is a recurring realization in literature on choice of law and the Constitution. BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963); Bruce Posnak, *Choice of Law Rules v. Analysis: A More Workable Marriage than the (Second) Restatement; A Very Well Curried Leflar Over Reese Approach*, 40 MERCER L. REV. 869 (1989); Robert A. Sedler, *Constitutional Limitations on Choice of Law: The Perspective of Constitutional Generalism*, 10 HOFSTRA L. REV. 59 (1981); David E. Seidelson, 1 (*Wortman*) + 1 (*Ferens*) = 6 (*Years*): *That Can't Be Right—Can It? Statutes of Limitations and Supreme Court Inconsistency*, 57 BROOK. L. REV. 787 (1991); Gene R. Shreve, *Interest Analysis as Constitutional Law*, 48 OHIO ST. L.J. 51 (1987); Louise Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. CHI. L. REV. 440 (1982). For further discussion of the current minimal standard, see *infra* note 139.

26. "The Privileges and Immunities Clause has seen little use outside the area of state restrictions on access to natural resources and other state benefits (and it has never been employed by the Supreme Court in a choice-of-law case)." WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, *UNDERSTANDING CONFLICT OF LAWS* § 96[b] (2d ed. 1993); see also Herzog, *supra* note 16, at 288-89.

27. "[T]he Equal Protection Clause has never been the basis of a Supreme Court choice-of-law decision . . ." RICHMAN & REYNOLDS, *supra* note 26, § 96; see also Herzog, *supra* note 16, at 285-86.

28. "Although the Commerce Clause has significant potential implications for choice of law, the Supreme Court has never used it to decide a case in that area." RICHMAN & REYNOLDS, *supra* note 26, § 96; see also Herzog, *supra* note 16, at 289.

29. *Rosenthal v. Warren*, 475 F.2d 438 (2d Cir.), *cert. denied*, 414 U.S. 856 (1973); *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43 (Minn. 1978), *aff'd*, 449 U.S. 302 (1981); *Blamey v. Brown*, 270 N.W.2d 884 (Minn. 1978), *cert. denied*, 444 U.S. 1070 (1980).

30. Jackson, *supra* note 20, at 16.

31. Arthur T. von Mehren & Donald T. Trautman, *Constitutional Control of Choice of Law: Some Reflections on Hague*, 10 HOFSTRA L. REV. 35, 35 (1981).

32. Juenger, *supra* note 10, at 427.

conflicts decisions biased against nonforum litigants and nonforum law; (2) These decisions unfairly damage nonforum litigants, exhibit disrespect to nonforum governments, and undermine principles of order and uniformity in choice of law; (3) The authority of the Supreme Court to avert these consequences seems clear under several clauses of the Constitution; (4) Yet the Supreme Court has denied the Constitution (and thus itself) a significant role in choice of law.

II. HOW NECESSARY IS CONSTITUTIONAL REFORM?

These conclusions might seem to warrant immediate and more precise inquiry concerning the capacity of the Constitution to regulate choice of law. If our best understanding of the problem turns out to be that conflicts localism violates the Constitution, then, one could argue, the Supreme Court cannot refrain from announcing and acting upon that fact.

Professor Douglas Laycock seems to advocate this view, urging prompt creation of a legal regime where "[c]hoice-of-law methods that prefer local litigants, local law, or better law are unconstitutional."³³ Yet, even were we to assume that Laycock's approach or some other³⁴ is preferable in theory to current law, that alone would provide an incomplete case against the Supreme Court inaction. Given the claim of so many other matters for the Court's attention, it is not enough merely to demonstrate that a different constitutional theory for conflicts would be more attractive than current law. There must also be a strong practical need for Supreme Court intervention.

To determine whether conflicts is a topic worth the Supreme Court's time, we must ask two questions. First, is conflicts localism (with its pernicious effects of injustice and uncertainty)³⁵ sufficiently widespread to warrant a search for some kind of cure? Second, assuming conflicts localism does present a serious problem, is a solution other than reformation of constitutional reviewing standards readily at hand? The following discussion indicates that the answers to these successive questions are yes and no.

It is possible to argue that cases like *Blamey*, *Hague*, and *Rosenthal* inform more about the notoriety than the extent of conflicts localism.³⁶ Certainly, decisions can be found where judges refrained from favoring local litigants with forum law, even when a plausible ground for doing so existed.³⁷ Are decisions evincing principled self-denial as

33. See Laycock, *supra* note 24, at 336.

34. For a variety of ideas about increased constitutional control of choice of law, see James Martin, *Personal Jurisdiction and Choice of Law*, 78 MICH. L. REV. 872 (1980); Willis L.M. Reese, *The "Hague" Case: An Opportunity Lost*, 10 HOFSTRA L. REV. 195 (1981); Gary J. Simson, *State Autonomy in Choice of Law: A Suggested Approach*, 52 S. CAL. L. REV. 61 (1978); Twerski, *supra* note 9.

35. This Article uses conflicts localism in a narrow sense, to describe a group of cases (*Blamey*, *Hague*, and *Rosenthal* among them) where the forum chooses its own law, although the forum's relation to the controversy is clearly less than that of the place providing the conflicting law. In a different, broader sense, conflicts localism might be said to occur whenever the local residence of a litigant, or the local origin of chosen law, or both, figure in the result.

36. Professor Willis Reese, a critic of conflicts localism, see Reese, *supra* note 13, nonetheless questioned the extent of the problem.

American choice of law is not as unruly and chaotic as is generally supposed. On the basis of the actual court decisions, it appears that there is a fair measure of predictability and uniformity of result in all areas, except torts, contracts in situations where the contract does not contain a choice-of-law clause, and conveyances of interests in movables as between the parties to the conveyance.

Willis L.M. Reese, *American Choice of Law*, 30 AM. J. COMP. L. 135, 146 (1982).

37. Louise Weinberg, *Against Comity*, 80 GEO. L.J. 53, 59 (1991). For a description of several such cases, see Russell J. Weintraub, *A Defense of Interest Analysis in the Conflict of Laws and the Use of that Analysis in Products Liability*, 46 OHIO ST. L.J. 493, 499-501 (1985). The Minnesota Supreme Court (that decided *Blamey* and *Hague*) recently engaged in its own act of self-denial. *Jepson v. General Casualty Co.*, 513 N.W.2d 467 (Minn. 1994). For an analysis of

indicative of conflicts decisionmaking in the United States as the notorious cases? Apparently not. Empirical studies suggest a high incidence of chosen law favoring the home-state litigant, especially when that litigant is the plaintiff.³⁸ It may be impossible to confirm beyond question that local bias is widespread in choice of law. Yet it takes considerable force of will to doubt that fact, and to believe instead that local judges would consistently read nonforum law as broadly and sympathetically as they would their own local law.³⁹

The conclusion that conflicts localism warrants a cure does not, however, bring us at once to the Constitution. Nonconstitutional solutions are possible through state common law, state statutes, federal common law, federal statutes, or self-executing treaties of the United States.

Through the combined effect of our separation-of-powers tradition and the Supremacy Clause of the Constitution,⁴⁰ the most authoritative nonconstitutional sources for regulating choice of law are in theory federal statutes⁴¹ and self-executing treaties.⁴² Yet very few conflicts cases are affected by law at this level,⁴³ and, while the impact on choice of law of federal statutes⁴⁴ and treaties⁴⁵ may increase in the future, there is no reason to believe that the picture will soon change dramatically.

Jepson, see James R. Pielemeier, *Some Hope for Choice of Law in Minnesota*, 18 *HAMLIN L. REV.* 8 (1994).

38. Patrick J. Borchers, *The Choice of Law Revolution: An Empirical Study*, 49 *WASH. & LEE L. REV.* 357, 382 (1992) (“[L]ifelong observers of American choice-of-law decisions may be able to detect that most recent cases can be explained by a desire to apply pro-recovery, forum rules”); cf. Michael E. Solomine, *An Economic and Empirical Analysis of Choice of Law*, 24 *GA. L. REV.* 49, 56 (1989) (noting the tendency under modern conflicts decisions that “a forum state resolves a true conflict by using its own law, which inevitably favors the forum-shopping plaintiff”). Conflicts localism also seems to be a problem in countries that share with the United States a decentralized, federal form of government. Peter Nygh, *Choice-of-Law Rules and Forum Shopping in Australia*, 46 *S.C. L. REV.* 899, 912 (1995); John Swan, *Federalism and the Conflict of Laws: The Curious Position of the Supreme Court of Canada*, 46 *S.C. L. REV.* 923, 931 (1995).

39. The idea that local judges are apt to give a broader reading to local law similarly explains why state judges are more likely than federal judges to prefer state over federal law. For discussion of that phenomenon, see Gene R. Shreve, *Pragmatism Without Politics—A Half Measure of Authority for Jurisdictional Common Law*, 1991 *B.Y.U. L. REV.* 767, 784-85.

40. U.S. CONST. art. VI.

41. The interstate or international character of conflicts cases places them clearly within the regulatory power of Congress. CURRIE, *supra* note 25, at 125; Gottesman, *supra* note 10, at 1; Ralph U. Whitten, *The Constitutional Limitations on State Choice of Law: Due Process*, 9 *HASTINGS CONST. L.Q.* 851, 917-18 (1982).

42. Self-executing treaties take effect without ratification by Congress. RONALD D. ROTUNDA & JOHN E. NOWAK, *CONSTITUTIONAL LAW: SUBSTANCE & PROCEDURE* § 6.6 (2d ed. 1992). “Whether a treaty is self-executing or non-self-executing depends on the intentions of the United States in signing and ratifying the treaty.” GARY B. BORN & DAVID WESTIN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 10-11 (2d ed. 1992).

43. The best known federal legislative example may be the conflicts rule in the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1988), discussed in James A. Shapiro, *Choice of Law Under the Federal Tort Claims Act: Richards and Renvoi Revisited*, 70 *N.C. L. REV.* 641 (1992).

An example of choice of law by treaty may be found in Article 9 of the Inter-American Convention on the Law Applicable to International Contracts, discussed in Friedrich K. Juenger, *American Conflicts Scholarship and the New Law Merchant*, 28 *VAND. J. TRANSNAT'L L.* 487 (1995), and in Harold S. Burman, *International Conflict of Laws, The 1994 Inter-American Convention on the Law Applicable to International Contracts, and Trends for the 1990s*, 28 *VAND. J. TRANSNAT'L L.* 367 (1995). However, it is possible for the United States to sign a commercial treaty while (through a reservation) refusing to accept the binding effect of a choice-of-law provision in the treaty. This occurred in connection with the 1980 United Nations Convention on Contracts for the International Sale of Goods. See JOSEPH LOOKOFSKY, *UNDERSTANDING THE CISG IN THE USA* 11 (1995).

44. There has been some interest in and out of Congress in statutory reform in choice of law for mass torts litigation. See AMERICAN LAW INSTITUTE, *COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS* § 6.01 (1994); James A.R. Nafziger, *Choice of Law in Air Disaster Cases: Complex Litigation Rules and the Common Law*, 54 *LA. L. REV.* 1001, 1012-13 (1994). So far, initiatives have fallen short. For a description of the obstacles faced in Congress, see Charles G. Geyh, *Complex-Litigation Reform and the Legislative Process*, 10 *REV. LITIG.* 401 (1991).

45. Professor Juenger sees a greater role in the future for choice of law by treaty. Juenger, *supra* note 43, at 495-96.

The lack of a congressional initiative leaves the way clear for the federal courts to reform state conflicts law by displacing it with a federal common law of conflicts. The Supreme Court could occupy part of the conflicts field with federal common law, either by overruling *Klaxon v. Stentor Electric Manufacturing Co.*,⁴⁶ its decision extending the *Erie* doctrine to conflicts questions,⁴⁷ or by nationalizing choice of law for a particular category of litigation.⁴⁸ Alternatively, the Supreme Court could nationalize the entire subject of conflict of laws.

Freeing federal diversity judges from the constraints of state conflicts law might avoid embarrassments like the *Rosenthal* case and the incongruities of federal choice of law following transfer of venue,⁴⁹ and it might return to nonresident suitors a measure of protection from local bias that diversity jurisdiction was created to secure.⁵⁰ At the same time, the proposition that federal diversity jurisdiction alone provides authority for a federal common law of conflicts is not free from doubt.⁵¹ Moreover, it would be difficult to overrule *Klaxon* without unraveling much of the *Erie* doctrine.⁵² For these reasons, and because the Supreme Court has not exhibited the slightest inclination to overrule *Klaxon*,⁵³ it is doubtful that the choice-of-law picture will change for federal diversity judges.

It is ironic that, in contrast to uncertainties attending the more modest objective of overruling *Klaxon*, the authority of the federal judiciary to make conflicts law binding throughout the country is secure through the Supremacy Clause.⁵⁴ Most agree that the federal courts may borrow the authority to regulate choice of law that lies dormant in Congress.⁵⁵ Thus, while overruling *Klaxon* would merely create a federal common law of conflicts applicable in federal diversity cases, the same doctrine made through use of

46. 313 U.S. 487 (1941).

47. See *supra* note 11 and accompanying text.

48. For example, the Supreme Court could formulate national choice-of-law rules for mass torts, a prospect entertained in Friedrich K. Juenger, *Mass Disasters and the Conflict of Laws*, 1989 U. ILL. L. REV. 105, 109; Thomas D. Rowe, Jr. & Kenneth D. Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 U. PA. L. REV. 7, 38-39 (1986).

49. See the discussion of the *Ferens* case, *supra* note 14. *Ferens* has been widely criticized. See, e.g., George D. Brown, *The Ideologies of Forum Shopping—Why Doesn't a Conservative Court Protect Defendants?*, 71 N.C. L. REV. 649, 655 (1993); John B. Oakley, *Recent Statutory Changes in the Law of Federal Jurisdiction and Venue: The Judicial Improvements Acts of 1988 and 1990*, 24 U.C. DAVIS L. REV. 735, 781 n.166 (1991); Ursula M. Henninger, Note, *The Plaintiff's Forum Shopping Gold Card: Choice of Law in Federal Courts After Transfer of Venue Under Section 1404(a)*, 26 WAKE FOREST L. REV. 809 (1991).

50. On the purpose of diversity jurisdiction to diminish the significance of citizenship in the outcome of cases, see HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* (1973); Patrick J. Borchers, *Conference on Jurisdiction, Justice, and Choice of Law for the Twenty-First Century—Case One: Choice of Forum Clauses*, 29 NEW ENG. L. REV. 517, 533 (1995) (mock appellate opinion); David L. Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317 (1977). As a result, "[c]onflicts rules are just the sort of subject for which uniform treatment across all federal courts makes sense." Borchers, *supra*, at 533.

51. See David E. Seidelson, *Section 6.01 of the ALI's Complex Litigation Project: Function Follows Form*, 54 LA. L. REV. 1111, 1112 n.2 (1994); Gene R. Shreve, *Reform Aspirations of the Complex Litigation Project*, 54 LA. L. REV. 1141, 1149-50 (1994).

52. The core principle of the *Erie* doctrine is that a litigant may not use federal diversity jurisdiction to obtain a different result than would have been possible in the state courts of the forum. SHREVE & RAVEN-HANSEN, *supra* note 11, § 39, at 167. *Klaxon* prevents the choice of substantive law different than that which would have been chosen in a state case, therefore, it secures the *Erie* principle in conflicts settings.

53. *Klaxon* was reaffirmed in *Day & Zimmermann v. Challoner*, 423 U.S. 3 (1975).

54. See Harold W. Horowitz, *The Commerce Clause as a Limitation on State Choice-of-Law Doctrine*, 84 HARV. L. REV. 806 (1971); Silberman, *supra* note 9, at 131; Donald T. Trautman, *The Relation Between American Choice of Law and Federal Common Law*, 41 LAW & CONTEMP. PROBS. 105 (1977).

55. See, e.g., sources cited *supra* note 54. The sources of authority for a federal common law of conflicts are listed in Shreve, *supra* note 3, at 338 n.55.

dormant congressional power would be enforceable through the Supremacy Clause in all federal and state conflicts cases.

Serious questions remain, however, concerning the wisdom or likelihood of a national common law of conflicts. Federal judges are usually reluctant to make common law.⁵⁶ That reluctance extends to the subject of choice of law, and it is easy to understand why. Conflicts is a historically difficult and controversial legal subject;⁵⁷ hence, the prospect of announcing, refining, and administering federal conflicts law does not attract most federal judges. They are not inclined to wrest conflicts lawmaking authority from state judges even for a limited and pressing subject like mass tort litigation.⁵⁸ The federal judiciary is even more disinclined to nationalize conflicts law entirely. Thus, while the Justices have not spelled out their reasons for the view, there may be unanimous agreement on the Supreme Court that conflicts should not become a domain of federal law.⁵⁹

56. On this general condition and its causes, see Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947); Jackson, *supra* note 20, at 1; cf. Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 885 (1986) (describing federal common law as typically the exception rather than the rule). Supreme Court development of federal common law has been guarded to say the least. The Supreme Court itself has stated that occasions for federal common law are "few and restricted." *E.g.*, *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981).

57. See BENJAMIN N. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 67 (1928) (regarding conflicts to be "one of the most baffling subjects of legal science"); FRIEDRICH K. JUENGER, *CHOICE OF LAW AND MULTISTATE JUSTICE* 1 (1993) ("Alas, in spite of all the valiant intellectual efforts lavished on it, and the voluminous literature that has built up over the ages, the law of conflicts remains mired in mystery and confusion."); Max Rheinstein, Book Note, *How to Review a Festschrift*, 11 AM. J. COMP. L. 632, 655 (1962) (finding conflicts the "most difficult and most confused of all branches of the law") (reviewing David F. Cavers, *Re-Restating the Conflict of Laws: The Chapter on Contracts*, in *XXTH CENTURY COMPARATIVE AND CONFLICTS LAW* 349-64 (A.W. Sythoff-Leyden ed., 1961)).

On reasons for the particular difficulty of conflicts, see Gene R. Shreve, *Teaching Conflicts, Improving the Odds*, 90 MICH. L. REV. 1672 (1992); Arthur T. von Mehren, *Choice of Law and the Problem of Justice*, 41 LAW & CONTEMP. PROBS. 27 (1977). In short:

Those who work in the field of choice of law are, at times, discouraged by the apparently intractable nature of the problems with which they must grapple. Intricate and subtle analyses are undertaken; ambiguities and uncertainties are painfully resolved; [u]ltimately, a result is reached, yet the solution is too frequently neither entirely satisfying nor fully convincing.

von Mehren, *supra*, at 31. *But see* Larry Kramer, *More Notes on Methods and Objectives in the Conflict of Laws*, 24 CORNELL INT'L L.J. 245, 247 (1991) (questioning whether conflicts issues are distinctly different from or more difficult than other issues in civil procedure); Sterk, *supra* note 10, at 951-52 (questioning the importance of conflicts theory).

58. On the absence of a federal common law of conflicts in mass tort litigation, see Juenger, *supra* note 48; Rowe & Sibley, *supra* note 48; Shreve, *supra* note 1, at 917; cf. *In re "Agent Orange" Product Liability Litigation*, 635 F.2d 987 (2d Cir. 1980) (refusing to make common law to determine liability for mass toxic exposure of personnel in Vietnam because, while concerns of national policy existed in the case, the court did not feel itself best suited to determine how those policies should be balanced).

59. Should the Supreme Court convert all conflicts law into federal common law, it would soon encounter a serious problem. "If the Supreme Court imposed a neutral . . . choice-of-law methodology . . . it would face the dilemma of either undertaking a debilitating amount of superintendence through judicial review of state decisions or presiding over only the illusion of neutrality in the choice-of-law process." Shreve, *supra* note 3, at 344.

This realization may account for the hostile reception the Justices have given to the idea of nationalizing conflicts law. Writing for the plurality in *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 307 (1981), Justice Brennan refused to indicate "whether we would make the same choice-of-law decision if sitting as the Minnesota Supreme Court." Justice Stevens added in his concurrence: "It is not this Court's function to establish and impose upon state courts a federal choice-of-law rule." *Id.* at 332 (Stevens, J., concurring). In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), the Court stated: "We make no effort to determine for ourselves which law must apply to the various transactions involved in this lawsuit, and we reaffirm our observation in *Allstate* that in many situations a state court may be free to apply one of several choices of law." *Id.* at 823; cf. *Sun Oil Co. v. Wortman*, 486 U.S. 717, 729 (1988) ("It is not the function of this Court . . . to make departures from established choice-of-law precedent and practice constitutionally mandatory.").

In the absence of federal conflicts law, state legislatures have authority to remedy conflicts localism.⁶⁰ Yet they are not a group likely to be offended by local bias in choice of law. In fact, with a few exceptions, state legislatures seem disinterested in the subject of conflict of laws.⁶¹

At the bottom of the chain of legal institutions capable of making conflicts law rests the state judiciary. Their power and obligation to make conflicts law exists by default.⁶² However, state judges appear likely for the foreseeable future to be the only lawmakers regularly on the scene, hence the only realistic source of nonconstitutional reform in choice of law. That is cold comfort to the opponents of conflicts localism. There is no reason to believe that state courts, who bear the greatest responsibility for conflicts localism, will suddenly be moved to eliminate it.

The problem may be averted without increased choice-of-law review under the Constitution if legal developments outside the conflicts field incidentally eliminate opportunities for conflicts localism. There are two possibilities. First, the Supreme Court could significantly increase due process constraints on the personal jurisdiction of state and lower federal courts. Thus, if the Court required for personal jurisdiction a tighter relationship than exists currently between the forum and the controversy,⁶³ the cases that now most clearly evince forum bias in choice of law might never reach the merits.⁶⁴ Second, the creation of new federal substantive law would preempt the application of state law, and hence, opportunities for conflicts localism. Given the Supremacy Clause, local state law—or, for that matter, any state law conflicting with the federal law—would cease to be a legitimate choice-of-law option.⁶⁵

Neither of these possibilities, however, seems likely. The Supreme Court has evinced little interest of late in redrawing the boundaries of personal jurisdiction. The last important personal jurisdiction case actually supported state personal jurisdiction in a

60. They usually occupy positions above their state judiciaries through a separation-of-powers arrangement like that for Congress and the federal judiciary. REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 67 (1975); G. ALAN TARR & MARY C.A. PORTER, *STATE SUPREME COURTS IN STATE AND NATION* 52-53 (1988). Thus, “[a] court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.” RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(1) (1971) [hereinafter RESTATEMENT (SECOND)].

61. One commentator states:

Several European countries (for example Austria, Germany, and Switzerland) have codified most or all of their conflicts law. . . . In the United States, the most comprehensive statutory approach to choice of law is the Louisiana codification of 1992. . . . In most instances, however, statutory directions in the United States with reference to choice of law are much more limited.

WILLIS L. M. REESE ET AL., *CONFLICT OF LAWS—CASES AND MATERIALS* 36 (Supp. 1995). For a detailed examination of state statutory developments in choice of law that have occurred in this country, see the discussion and citations appearing in Shreve, *supra* note 1, at 910. Overall, the amount of state statutory law remains small. The ALI’s 1971 observation still stands: “A court will rarely find that a question of choice of law is explicitly covered by statute.” RESTATEMENT (SECOND), *supra* note 60, § 6 cmt. b.

62. “It scarcely adds to the lustre of conflicts law to realize that state courts contribute most of its content because they alone cannot avoid the task.” Shreve, *supra* note 1, at 911.

63. For discussion of the current requirements, see ROBERT C. CASAD, *JURISDICTION IN CIVIL ACTIONS* §§ 2.04-2.05 (2d ed. 1991); SHREVE & RAVEN-HANSEN, *supra* note 11, §§ 15-19, at 61-88; Symposium, *Fifty Years of International Shoe: The Past and Future of Personal Jurisdiction*, 28 U.C. DAVIS L. REV. 531 (1995).

64. Although, even with tighter regulation of personal jurisdiction, some problematic conflicts cases might still slip through that net. For examples, see Shreve, *supra* note 25, at 59-60. For discussion of the relation between personal jurisdiction and choice of law generally, see Symposium, *Jurisdiction and Choice of Law*, 59 U. COLO. L. REV. 1 (1988); HOFSTRA SYMPOSIUM, *supra* note 3.

65. For more on this phenomenon, and how it differs from the standard, or “horizontal” choice-of-law problem, see ARTHUR T. VON MEHREN & DONALD T. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS: CASES AND MATERIALS ON CONFLICT OF LAWS* 1038-41 (1965).

place with little connection to the controversy.⁶⁶ Similarly, the possibility of introducing federal substantive law in troubled choice-of-law areas seems unlikely to attract the interest of either Congress⁶⁷ or the federal courts.⁶⁸

We have seen, that while it is difficult to measure the precise extent of damage done by conflicts localism, the problem appears serious. And we have seen, while nonconstitutional possibilities for eliminating or reducing the problem exist in theory, they depend on lawmaking initiatives that legal institutions have not taken and, in their discretion, are unlikely to take. Nothing, then, stands in the way of conflicts localism except the Constitution.

III. CONFLICTS THEORY CONFRONTING THE CONSTITUTION

Should the Constitution stand in the way of conflicts localism? This Article offers no final answer to the question but will show that the matter is a good deal more complicated than Professor Laycock's prescription⁶⁹ would suggest. To thoroughly understand the opportunities and limitations in constitutional theory for regulating choice of law, one must first consider the character of conflicts law confronting the Constitution.

Conflicts law is usually common law,⁷⁰ therefore, one can expect to find in judicial opinions a good deal of conflicts theory and policy. As in any common law sphere,⁷¹ decisions creating or adjusting conflicts doctrine aspire to a measure of principled elaboration: careful balancing of social interests and concern for reasoned delineation and continuity in law.⁷² Policies enlisted in conflicts opinions to meet the demands of principled elaboration usually support one of three approaches. These are the substantive, multilateral, and unilateral approaches to choice of law.⁷³ In addition, courts and commentators periodically express concern that chosen law not unreasonably disturb the expectations of a party.

66. *Burnham v. Superior Court*, 495 U.S. 604 (1990). For discussion of this case, see Symposium, *The Future of Personal Jurisdiction: A Symposium on Burnham v. Superior Court*, 22 RUTGERS L.J. 559 (1991).

67. For example, federal substantive law is "[t]he obvious and simplest solution" to conflicts problems posed in mass torts cases. Donald T. Trautman, *Toward Federalizing Choice of Law*, 70 TEX. L. REV. 1715, 1731 (1992); see also Gottesman, *supra* note 10, at 14; Linda S. Mullenix, *Complex Litigation Reform and Article III Jurisdiction*, 59 FORDHAM L. REV. 169, 197 (1990). Yet the idea of Congress enacting such legislation is "utopian." Symeon C. Symeonides, *The A.L.I.'s Complex Litigation Project: Commencing the National Debate*, 54 LA. L. REV. 843, 855 (1994). The American Law Institute expressed the same sentiment, explaining why it decided not to recommend federal substantive law for mass tort litigation. "[T]he possibilities of reaching a political consensus on what the appropriate federal standard should be, as well as expecting Congress to intrude so directly into areas historically governed by state law, appear so slim that it becomes important to look for . . . a procedural solution." AMERICAN LAW INSTITUTE, *supra* note 44, § 6.

68. The negative reaction of the Second Circuit in the *Agent Orange* case, 635 F.2d 987 (2d Cir. 1980), explained *supra* note 58, is indicative.

69. See *supra* note 33 and accompanying text.

70. See *supra* note 61.

71. Judges lack the ad hoc authority of legislators. Instead, the judicial function requires a process of reasoned elaboration. See M.P. Golding, *Principled Decisionmaking and the Supreme Court*, 63 COLUM. L. REV. 35, 40 (1963); Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982, 999 (1978); cf. G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279, 285 (1973) ("[Judges are] required to make public the justifications for their decisions, thus inviting comment on their performance.").

72. See generally Edward H. Levi, *An Introduction to Legal Reasoning*, 15 U. CHI. L. REV. 501, 501-02 (1948); James R. Murray, *The Role of Analogy in Legal Reasoning*, 29 UCLA L. REV. 833 (1982); Vincent A. Wellman, *Practical Reasoning and Judicial Justification: Toward an Adequate Theory*, 57 U. COLO. L. REV. 45 (1985); Kenneth I. Winston, *On Treating Like Cases Alike*, 62 CAL. L. REV. 1 (1974).

73. See JUENGER, *supra* note 57, at 45-46 ("These three approaches have coexisted since the Middle Ages.").

A. The Substantive Approach

The single-minded policy of the substantive approach is that there is a preferable result for a particular type of case (e.g., plaintiffs should win product liability cases). Conflicts law should not obstruct this outcome. It should, if anything, facilitate it. The substantive approach can take one of two forms. One makes the choice-of-law issue disappear. This may happen because the sovereign making substantive law is so powerful that conflicting law from an inferior source must give way. The relation of federal to state substantive law is the most important example.⁷⁴ Or a group of coequal sovereigns may all adopt the same substantive rule as their local law.⁷⁵ The other substantive approach, necessary when coequal sovereigns have conflicting laws, is to authorize substantive preference within the choice-of-law scheme. An example used by a number of courts is the fifth and last of Professor Robert Lefflar's "Choice-influencing Considerations," termed "Application of the better rule of law."⁷⁶

Neither multilateralism nor unilateralism share with the substantive approach the concern over the innate justice of chosen law. Both are concerned instead with selection of the correct sovereign, or law source.⁷⁷ These two conflicts approaches have coexisted since medieval times. Our leading conflicts historian writes that this "is remarkable because unilateralism and multilateralism proceed from different assumptions, focus on different questions, and are bound to yield different conclusions."⁷⁸

B. Multilateralism

Multilateralism strives for uniform results in choice of law. To the multilateralist judge, the possible sources of chosen law are sovereigns, or jurisdictions, that make up a kind of legal community. Each type of case has its own conflicts rule, administrable throughout that legal community.⁷⁹ For example, the requirement that the tort law of the

74. See *supra* notes 40-45, 54-55 and accompanying text.

75. This is the object of uniform law movements sponsored by groups like the National Conference of Commissioners on Uniform State Laws and the American Law Institute.

76. Robert A. Lefflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 295-303 (1966). For a survey of other substantive approaches to choosing law, see Patrick J. Borchers, *Conflicts Pragmatism*, 56 ALB. L. REV. 883, 900-02 (1993).

77. Juenger, *supra* note 43, at 489. "[B]oth postulate that transactions that cross territorial boundaries must be governed by the laws laid down by a state or nation; neither countenances legal rules that are not rooted in some sovereign's command." *Id.* at 490.

78. Friedrich K. Juenger, *A Page of History*, 35 MERCER L. REV. 419, 427 (1983). For other comparisons between multilateralism and unilateralism in choice of law, see LEA BRILMAYER, *CONFLICT OF LAWS* 16-17 (2d ed. 1995); Bliesener, *supra* note 10, at 704-07; Herma H. Kay, *A Defense of Currie's Governmental Interest Analysis*, 215 R.C.A.D.I. 9, 92-94 (1989).

79. One can think of this approach as a choice of jurisdiction rather than choice-of-law approach. "[T]he selecting process can be—and is—viewed as providing the required choice of law." Arthur T. von Mehren, *Recent Trends in Choice of Law Methodology*, 60 CORNELL L. REV. 927, 931 (1975). The approach goes by a variety of names, including territorialism, see JUENGER, *supra* note 57, at 90-91, and jurisdiction-selecting rules, see David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 194 (1933). "The jurisdiction-selecting rule makes a state the object of choice; in theory it is only after the rule has selected the governing state by reference to the 'contact' prescribed in the rule that the court ascertains the content of the state's law." DAVID F. CAVERS, *THE CHOICE-OF-LAW PROCESS* 9 n.24 (1965) (emphasis in original).

Multilateralists were therefore concerned that rules be clear and simple enough to be uniformly administered throughout the community of jurisdictions. E.g., Joseph H. Beale, *What Law Governs the Validity of a Contract*, 23 HARV. L. REV. 1 (1909). This helps to explain the stern, simplistic, and categorical form multilateral conflict rules usually assumed. See, e.g., RESTATEMENT OF THE LAW OF CONFLICT OF LAWS (1934) [hereinafter ORIGINAL RESTATEMENT].

place of injury should govern is a multilateral rule.⁸⁰ Ideally, each member of this community of jurisdictions would use the common conflicts rule, and uniform choice-of-law results would exist in fact. If so, the high-minded suppositions of interjurisdictional order and comity⁸¹ attending the earliest conceptions of multilateralism in this country would be vindicated. To many multilateralists, however, that perfect or even substantial interjurisdictional cooperation is unnecessary to justify their approach. They have contended that multilateralism in any event advances policies of antidiscrimination.⁸² And many have used vested rights analysis to maintain that multilateralism leads to the only valid source of law.⁸³

Multilateralism dominated choice of law in this country during the 19th century and for the first half of the 20th century. Published in 1834, Joseph Story's strongly multilateralist *Commentaries on the Conflict of Laws* was quite influential in the United States and abroad.⁸⁴ No less committed to multilateralism, Professor Joseph Beale extended the movement through his scholarship⁸⁵ and through his leadership in the creation of the original *Restatement of the Law of Conflict of Laws*, published one hundred years after Story's treatise. Resistance materialized, however, to the uncompromising multilateralism of Story and Beale. It may be found in commentary beginning in the 1920's⁸⁶ and in judicial decisions somewhat later.⁸⁷

Shortly after mid-century, the choice-of-law revolution began in earnest.⁸⁸ Particularly in torts and contract cases, American jurisdictions began rejecting multilateralism in rapid succession. Today, the original *Restatement* enjoys widespread acceptance in only a few

80. When injury was the last event in time making up the cause of action, the rule could also be stated as the place of the wrong. *E.g.*, ORIGINAL RESTATEMENT, *supra* note 79, § 378 ("The law of the place of wrong determines whether a person has sustained a legal injury.")

81. Ernest G. Lorenzen, *Story's Commentaries on the Conflict of Laws—One Hundred Years After*, 48 HARV. L. REV. 15, 34-37 (1934). Some multilateralists had reservations early on. Beale's skepticism about the value of comity is expressed in JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS 1964-65 (1935); *cf.* Perry Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L.J. 1191 (1987) (discussing a multilateral approach disavowing comity).

82. Early multilateralists deplored the autonomy displayed by some courts who departed from territorial rules. *E.g.*, Beale, *supra* note 79, at 2. Early multilateralists may have had some sense of antidiscrimination as a value. *See* BRILMAYER, *supra* note 78, at 18 ("[M]ultilateralists . . . by and large believed that their methods helped judges successfully escape the gravitational pull of forum legal rules.")

Yet it is clear that antidiscrimination figures more prominently in the work of contemporary writers sympathetic to multilateralism. *See* Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392 (1980); John B. Corry, *Interest Analysis and Choice of Law: The Dubious Dominance of Domicile*, 1983 UTAH L. REV. 651; Ely, *supra* note 24; Kozyris, *supra* note 3; Twerski, *supra* note 9, at 162.

Modern multilateralists also exhibit greater willingness to see as victims of conflicts localism not only nonforum sovereigns but also nonforum litigants, by discussing the problem in ways that seem to consider both concerns, and by expressly identifying the concern of party fairness. *E.g.*, Twerski, *supra* note 9, at 170.

83. The vested rights jurisprudence of multilateralists left them with the conviction that their conflicts rules produced not merely the best result, but the only legitimate one. *See, e.g.*, BEALE, *supra* note 81, at 1967-69. Vested rights theories in choice of law are surveyed and reworked in Dane, *supra* note 81, at 1260-63.

84. On Story's conflicts writing and its influence, *see* JUENGER, *supra* note 57, at 88; ALAN WATSON, JOSEPH STORY AND THE COMITY OF ERRORS: A CASE STUDY IN CONFLICT OF LAWS (1992); Lorenzen, *supra* note 81; Kurt A. Nadelmann, *Joseph Story's Contribution to American Conflicts Law: A Comment*, 5 AM. J. LEGAL HIST. 230 (1961).

85. *See* BEALE, *supra* note 81; Beale, *supra* note 79. For a discussion of Beale and a comparison of his approach with that of Story, *see* von Mehren, *supra* note 79, at 929-30, 943-45.

86. *See* WALTER W. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAW (1942); Cavers, *supra* note 79; Elliot E. Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361 (1945); Ernest G. Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736 (1924); Hessel E. Yntema, *The Hornbook Method and the Conflict of Laws*, 37 YALE L.J. 468 (1928).

87. *E.g.*, W.H. Barber Co. v. Hughes, 63 N.E.2d 417 (Ind. 1945); Auten v. Auten, 124 N.E.2d 99 (N.Y. 1954).

88. For descriptions of this period, *see* David F. Cavers, *Contemporary Conflicts Law in American Perspective*, 131 R.C.A.D.I. 75 (1970); Harold L. Korn, *The Choice of Law Revolution: A Critique*, 83 COLUM. L. REV. 772 (1983).

jurisdictions.⁸⁹ Multilateralism may assume new forms in the future and regain some of its prior importance.⁹⁰ For the time being, however, courts are most receptive to multilateralism when the approach is softened⁹¹ and blended with unilateral, and at times substantive, policies.⁹²

C. Unilateralism

Unilateralism⁹³ shares with multilateralism the idea that choice of law should search for the appropriate sovereign (law source) rather than for the best law.⁹⁴ Yet unilateralism shares with the substantive approach a keen interest in the content of the laws vying for application. A unilateralist would see no contradiction here. She does not examine each of the conflicting laws to determine (as a substantivist would) which best promotes justice. Rather, she examines them to determine whether each, upon closer study, is truly applicable. A law is truly applicable to a unilateralist only if the case at hand is one of the cases that the law was designed to govern.⁹⁵ If so, then the sovereign creating that law may be said to be interested in having it applied.⁹⁶ Interest analysis is the linchpin for conflicts unilateralism in the United States.

Unilateralists are not particularly opposed to the idea of uniformity in choice of law. They simply do not share the multilateralist belief that uniformity is of central importance. Unilateralists would maintain that, in at least some cases, interest analysis leads to a different and better result than that provided by multilateralism. Consider an example. Following the facts of a famous case,⁹⁷ let us assume that passenger plaintiff and driver defendant, both residents of State A, travel together to State B, where defendant loses control of his car and negligently injures plaintiff. Assume further that the tort law

89. For a list of jurisdictions that continue to adhere to the original Restatement (and of the far greater number rejecting it), see Borchers, *supra* note 38, at 370-72.

90. Various possibilities for the revival of multilateralism are examined in BRILMAYER, *supra* note 78, at 181-202; Dane, *supra* note 81; Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277 (1990); Robert A. Sedler, *Interest Analysis, Party Expectations and Judicial Method in Conflicts Torts Cases: Reflections on Cooney v. Osgood Machinery*, 59 BROOK. L. REV. 1323 (1994).

91. The RESTATEMENT (SECOND), *supra* note 60, succeeded the original Restatement in 1971 and softened the multilateralism of the latter. For example, commands in the original Restatement to apply law of the place of the wrong (injury) in tort cases, ORIGINAL RESTATEMENT, *supra* note 79, § 381, were reduced to presumptions in the second Restatement. Thus according to the second Restatement, "In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless . . . some other state has a more significant relationship . . . in which event the local law of the other state will be applied." RESTATEMENT (SECOND), *supra* note 60, § 146.

92. The second Restatement administers its "significant relationship" test, *see* RESTATEMENT (SECOND), *supra* note 60, § 146, through a series of choice-of-law policies in § 6(2). These include the multilateralist subsections, § 6(2)(a) ("the needs of the interstate and international systems") and § 6(2)(f) ("certainty, predictability and uniformity of result"); unilateralist subsections, § 6(2)(b) ("the relevant policies of the forum") and § 6(2)(c) ("the relevant policies of other interested states"); and substantive subsections, § 6(2)(e) ("the basic policies underlying the particular field of law") and § 6(2)(g) ("ease in the determination and application of the law to be applied").

93. Unilateralism in choice of law has assumed a variety of forms over its long history. *See* P.M. NORTH & J.J. FAWCETT, *CHESHIRE AND NORTH'S PRIVATE INTERNATIONAL LAW* 15-26 (12th ed. 1992); Juenger, *supra* note 43, at 489-90; Hessel E. Yntema, *The Historic Bases of Private International Law*, 2 AM. J. COMP. L. 297 (1953). The explanation of unilateralism in this Article describes the movement as it developed in this country during the 20th century.

94. To both, "all rules of decisions are suited equally to govern multistate cases." JUENGER, *supra* note 57, at 156.

95. Unilateralism is "[t]he determination of the personal and territorial reach of the potentially applicable local rules of decision." *Id.* at 45. "[T]he reach of substantive rules . . . is the essence of unilateralism." *Id.* at 14.

96. *Cf. id.* at 159 ("Unilateralists . . . purport to obey sovereign commands by enforcing laws in accordance with the respective lawmakers' wishes . . .").

97. *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963). For discussion of the case, see Symposium, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212 (1963).

of the place of the plaintiff's and the defendant's residence makes defendant liable to plaintiff, but the law of the place of injury does not.

The multilateral conflicts rule directs the court in this and other personal injury cases to apply the rule of decision of the place of the injury, State B.⁹⁸ If, however, the purpose of State A's pro-recovery law was to compensate victims and the purpose of State B's anti-recovery law was to keep insurance rates down in State B, only State A will be interested in having its tort law applied. The policy of compensation accounting for the existence of State A's pro-recovery law would be implicated because plaintiff is a citizen of State A and could, in the absence of compensation, become a ward of State A. But the cost-conscious policy accounting for State B's anti-recovery law would not be implicated, because recovery by plaintiff would affect insurance rates of State A, rather than those of State B. Through interest analysis, the unilateralist judge chooses the law of State A, concluding that State A is the only sovereign genuinely interested in having its law applied.⁹⁹

Much of the credit for launching unilateralism in this country goes to Brainerd Currie, the principal creator of interest analysis.¹⁰⁰ Professor Currie distinguished cases where only one sovereign was interested in having its law applied (he termed them "false" conflicts) from those where both sovereigns were interested ("true" conflicts). Not all of Currie's unconventional ideas were successful. Some were either stillborn¹⁰¹ or frayed over time.¹⁰² His greatest accomplishment was to establish through his false conflict

98. See *supra* note 80 and accompanying text.

99. This was the result in *Babcock*. For an illuminating study of the use of interest analysis in that case, see William M. Richman, *Diagramming Conflicts: A Graphic Understanding of Interest Analysis*, 43 OHIO ST. L.J. 317, 318-20 (1982). But see *Alabama G.S.R. v. Carroll*, 11 So. 803 (Ala. 1892) (providing a famous example of a multilateral solution to the problem posed in *Babcock*).

100. See, e.g., Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171. Many of Professor Currie's most important works appear in CURRIE, *supra* note 25. His ideas are discussed at length in Symposium, *Interest Analysis in Conflicts of Laws: An Inquiry into Fundamentals with a Side Glance at Products Liability*, 46 OHIO ST. L.J. 457 (1985) [hereinafter OHIO STATE SYMPOSIUM].

Actually, the very first conflicts scholarship in this country was of a unilateralist bent, in the European statist tradition. SAMUEL LIVERMORE, *DISSERTATIONS ON THE QUESTIONS WHICH ARISE FROM THE CONTRARIETY OF THE POSITIVE LAWS OF DIFFERENT STATES AND NATIONS* (1828). Closer to Currie's own time, several authors anticipated something of his interest-analysis approach. See *supra* note 86. For all that, Currie's special place in conflicts scholarship is secure. See Ely, *supra* note 24, at 174 n.3 ("There were important precursors, . . . but Currie's was certainly a more complete system of interest analysis: his work is among the most formidable corpora in all of legal theory.").

101. Currie's contention that the truly interested forum should always apply its own law never won judicial acceptance as an express conflicts rule. See Ely, *supra* note 24, at 175 (concluding that the idea "has had almost no takers"); Gene R. Shreve, *Currie's Governmental Interest Analysis—Has It Become a Paper Tiger?*, 46 OHIO ST. L.J. 541, 542 (1985).

Professor Ely and some other critics believe that, even if interest analysts want to divorce themselves from Currie's forum-bias rule (and most do), it is impossible. Interest analysis, these critics maintain, is innately forum favoring. E.g., BRILMAYER, *supra* note 78, at 68; Bleisener, *supra* note 10, at 705 n.4; Ely, *supra* note 24, at 175.

Many share the opposing view, however, that interest analysis does work (in fact, works better) when it confers no special advantage to forum law or forum residents. The classic exposition of interest analysis as a neutral approach appears in William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 19-22 (1963). Belief in this possibility is reflected in the juxtaposition of forum and nonforum interest-probing criteria in RESTATEMENT (SECOND), *supra* note 60, § 6. The adoption of interest analysis by the Restatement (Second) reflects a serious commitment to the idea that neutral interest analysis is not an oxymoron. "[T]he Restatement is written from the viewpoint of a neutral forum which has no interest of its own to protect and is seeking only to apply the most appropriate law." Willis L.M. Reese, *Conflict of Laws and the Restatement (Second)*, 28 LAW & CONTEMP. PROBS. 679, 692 (1963). In its recent proposals for complex litigation, the American Law Institute reaffirmed its view on the utility of interest analysis in a neutral approach to choice of law, presenting criteria "for purposes of identifying each state having a policy that would be furthered by the application of its laws" and directing the means whereby "the court shall choose the applicable law from among the laws of the interested states." AMERICAN LAW INSTITUTE, *supra* note 44, § 6.01(e)-(d).

102. Evidence of the purpose for a rule of decision, the grist for interest analysis, may be inconclusive or nonexistent. See Lea Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, 46 OHIO ST. L.J. 459 (1985); Aaron D. Twerski, *Enlightened Territorialism and Professor Cavers—The Pennsylvania Method*, 9 DUQ. L. REV. 373 (1971). And Currie's approach was generally less effective for true conflicts cases and for "no interest" cases. See JUENGER, *supra*

principle a formidable argument for departing from multilateral choice of law.¹⁰³ Ten years ago, Professor John Kozyris wrote that "interest analysis . . . has dominated the conflicts agenda for the last quarter century and deconstructed traditional conflicts in most states."¹⁰⁴ At the same time, unilateralist policies of interest analysis are now most likely to appear interspersed with those of multilateralism and substantivism.¹⁰⁵

D. Party Expectations as to Chosen Law

Taken together, the three conflicts approaches just considered encompass most of the conflicts policies in use today.¹⁰⁶ Yet the following important principle may be difficult to locate within either a substantive, multilateralist, or unilateralist approach. A party may be protected from the choice of unfavorable law if the party reasonably and to his detriment relied on the application of favorable law. The policy justifying this—variously termed party expectations, avoidance of unfair surprise, or foreseeability—is well accepted in conflicts theory.¹⁰⁷

The availability of this policy is likely to turn on idiosyncracies of fact, such as whether a party actually relied on the application of favorable law, or whether that reliance was reasonable. While courts often discount the expectations factor in tort cases,¹⁰⁸ it can figure there.¹⁰⁹ The policy comes to bear more frequently in other areas, like contract cases,¹¹⁰ where the parties are more likely to have expectations about choice of law prior to the controversy.

The expectations policy does not seem within the substantive tradition in choice of law because it has little if anything to do with the innate quality of the law upon which a party reasonably relies. Uniformity sought by multilateralism, if actually achieved, might enhance foreseeability in choice of law and correspondingly reduce possibilities for unfair surprise.¹¹¹ However, the multilateralist predilection for stern and categorical conflicts rules¹¹² is ill suited to administer a policy as supple and case variable as

note 57, at 159 (arguing that "[u]nilateralists . . . are stymied if more than one sovereign 'wants' his law to control a given case, or [if] none cares"). For elaboration of difficulties posed for interest analysis in no-interest cases, see Aaron D. Twerski, Neumeier v. Kuehner: *Where are the Emperor's Clothes?*, 1 HOFSTRA L. REV. 104 (1973).

103. In one way or another, the great number of American jurisdictions that have abandoned the original Restatement in torts cases, see *supra* note 89 and accompanying text, have all drawn from Currie's false conflicts principle.

104. P. John Kozyris, *Foreword*, OHIO STATE SYMPOSIUM, *supra* note 100, at 457.

105. See the example provided by the RESTATEMENT (SECOND), *supra* note 60, § 6 (discussed *supra* note 92).

106. "[T]he venerable tenets of unilateralism, multilateralism, and the substantive law approach remain the basic ingredients of our mysterious science." JUENGER, *supra* note 57, at 151.

107. See, e.g., RESTATEMENT (SECOND), *supra* note 60, § 6 cmt. g ("Generally speaking, it would be unfair and improper to hold a person liable under the local law of one state when he had justifiably molded his conduct to conform to the requirements of another state."); Elliott E. Cheatham & Willis L.M. Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959, 969-72 (1952); Max Rheinstein, *The Place of Wrong: A Study in the Method of Case Law*, 19 TUL. L. REV. 4, 17-28 (1944).

108. It is unlikely that the alleged tort will come about through planning or arrangements by the parties. See Clark v. Clark, 222 A.2d 205, 209 (N.H. 1966) ("Predictability of legal results in advance of the event is largely irrelevant, since automobile accidents are not planned.").

109. Expectations issues in torts largely arise when the defendant argues that he relied reasonably on tort law favorable to him when deciding how to behave, or when deciding how much insurance to obtain. Rheinstein, *supra* note 107, at 27. An example would be the predicament of the defendant in the *Blamey* case. See *supra* part I.A. for discussion of *Blamey*.

110. RESTATEMENT (SECOND), *supra* note 60, § 6 cmt. g; RICHMAN & REYNOLDS, *supra* note 26, § 85; Rheinstein, *supra* note 107, at 21. The expectations factor in contract cases is subsumed, however, in the growing number of cases governed by choice-of-law clauses included in the contract. See RICHMAN & REYNOLDS, *supra* note 26, § 72.

111. See Cheatham & Reese, *supra* note 107, at 969-70.

112. See, e.g., ORIGINAL RESTATEMENT, *supra* note 79.

expectations. Unilateralism, while a method-centered and case-variable approach,¹¹³ shares classic multilateralism's focus on sovereigns as a source of law.¹¹⁴ To unilateralism, preoccupied with interest analysis,¹¹⁵ concern about expectations of the parties would be something of a distraction.¹¹⁶

In the end, whether a policy protecting reasonable expectations exists within one of the tripartite categories or separately may not be terribly important. We have already noted that substantive, multilateral, and unilateral approaches have fragmented, and policies attributable to each have become interspersed.¹¹⁷ The additional presence of an expectations policy¹¹⁸ simply bears out the eclectic trend in modern conflicts theory.¹¹⁹

IV. FIGHTING CONFLICTS LOCALISM WITH CONSTITUTIONAL LAW

The foregoing interlude on conflicts theory will prove useful as this Article returns to its main subject, because it will permit important insights about possibilities for constitutional reform. Attempts to understand the character and reach of constitutional policies supporting reform will be aided by the realization that these policies are vitally identical to those animating the substantive, multilateral, or unilateral approaches to choice of law, or to the concern that chosen law not unreasonably disturb party expectations.

A. The Limited Authority of the Supremacy Clause to Regulate Conflicts Localism

The Supremacy Clause¹²⁰ plays a supporting role in all responses to conflicts localism based on federal law. By establishing the authority of the United States Constitution over state courts,¹²¹ it facilitates constitutional regulation of choice of law. By establishing the authority of nonconstitutional federal law, it facilitates regulation of choice of law by federal statute,¹²² treaty,¹²³ or common law.¹²⁴

The Supremacy Clause is also capable of making a further contribution, one keeping with the substantive approach to choice of law. Recall that, at the least, the substantive

113. See Richman, *supra* note 99, at 333.

114. See *supra* note 77 and accompanying text.

115. See Currie, *supra* note 100, at 177-81.

116. Cf. Sterk, *supra* note 10, at 955 ("Currie's analysis largely ignored the interests of private parties.").

117. See *supra* notes 91-92, 105 and accompanying text.

118. Compare the substantive, multilateral, and unilateral conflicts policies of the RESTATEMENT (SECOND), *supra* note 60, § 6(2) (quoted *supra* note 92) with the policy of § 6(2)(d): "[T]he protection of justified expectations."

119. Various descriptions of the trend have appeared. See, e.g., Peter Hay & Robert B. Ellis, *Bridging the Gap Between Rules and Approaches in Tort Choice of Law in the United States: A Survey of Current Case Law*, 27 INT'L LAW. 369 (1993); Robert A. Leflar, *Choice of Law: A Well-Watered Plateau*, 41 LAW & CONTEMP. PROBS. 10 (1977); Reppy, *supra* note 10; Joseph W. Singer, *Real Conflicts*, 69 B.U.L. REV. 1, 26-33 (1989); Symeon C. Symeonides, *Revolution and Counter-Revolution in American Conflicts Law: Is There a Middle Ground?*, 46 OHIO ST. L.J. 549 (1985).

One effect of eclecticism is that there are not many purists in the conflicts community. Thus my designation in this Article of a particular commentator as a unilateralist or as a multilateralist suggests nothing more than the main shape of his or her arguments.

120. U.S. CONST. art. VI.

121. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-4, at 33 (2d ed. 1988).

122. See *supra* notes 41, 43-44.

123. See *supra* notes 42-43, 45.

124. See *supra* notes 54-55 and accompanying text.

approach guides choice of law in a way offering no support to conflicts localism.¹²⁵ At the most, it eradicates conflicts localism. The Supremacy Clause figures prominently in the second of these functions. It secures safe passage for all forms of federal substantive law when they encounter conflicting state law.¹²⁶

The Tenth Amendment poses some—albeit uncertain—restraint on the power of the federal government to force its law on states.¹²⁷ It is doubtful, however, that the obligation to choose federal rather than state rules of decision intrudes enough on state judicial administration to be problematic under the Tenth Amendment. The Supremacy Clause merely denies to state judges opportunities for conflicts localism that they would have if choosing instead between forum and sister-state law.¹²⁸

A connection between the substantive approach to choice of law and the Supremacy Clause exists, and noting it provides a certain symmetry with the more extensive discussion to follow about the connections the Constitution has with conflicts concerns of multilateralism, unilateralism, and party expectations. Yet the Supremacy Clause hardly resonates with conflicts policy. Instead, like that form of the substantive approach to which it is tied, the Supremacy Clause provides a means of obviating (rather than regulating) conflicts localism.

Moreover, while affinity between the substantive approach and the Supremacy Clause suggests an additional role for the latter in regulating conflicts localism, it is still a role dependent on nonconstitutional lawmaking initiatives. We cannot enlarge the meaning of the Supremacy Clause to fight conflicts localism since that clause alone secures no rights to sovereigns or to litigants in the choice-of-law process. The Supremacy Clause merely gives life to law that Congress, the executive branch, or the judiciary chooses to make in its discretion.

B. Conflicts Theory as Constitutional Law

Most of the policies associated with the other three conflicts approaches we examined can be enlisted in a constitutional offensive against conflicts localism. Perhaps only two policies, comity (a somewhat discarded policy of multilateralism¹²⁹) and the explicit and overriding preference for forum law (a fringe policy of unilateralism¹³⁰), need be left behind. The latter obviously will not work because it is friendly to conflicts localism. In contrast, the multilateralist policy of comity is offended by conflicts localism.¹³¹ It seems

125. See *supra* note 74-76 and accompanying text. Substantive theory can be corrupted to support conflicts localism. This appears to have happened in *Blamey v. Brown*, 270 N.W.2d 884, 891 (Minn. 1978), *cert. denied*, 444 U.S. 1070 (1980). Correctly understood, however, a substantive approach might lead to selection of either forum or nonforum law. See Leflar, *supra* note 76, at 298-300. "A court sufficiently aware of the relation between law and societal needs to recognize superiority of one rule over another will seldom be restrained in its choice by the fact that the outmoded rule happens still to prevail in its own state." *Id.* at 300.

126. See *supra* note 65 and accompanying text.

127. See ROTUNDA & NOWAK, *supra* note 42, § 4.10 (2d ed. Supp. 1995).

128. *Testa v. Katt*, 330 U.S. 386, 392-93 (1947).

129. See *supra* note 81.

130. See *supra* note 101.

131. It may even have figured in a few cases decided by the Supreme Court many years ago that appeared to entertain the multilateralism of the time as constitutional law. *E.g.*, *New York Life Ins. Co. v. Dodge*, 246 U.S. 357 (1918). Professor Robert Sedler sees ties between *Dodge* and the Court's more famous, substantive due process decision in *Lochner v. New York*, 198 U.S. 45 (1905). Robert A. Sedler, *Constitutional Limitations on Choice of Law: The Perspective of Constitutional Generalism*, 10 HOFSTRA L. REV. 59, 64-65 (1981). "[W]ith the passage of time it has become apparent that *Dodge* is obsolete." DAVID H. VERNON ET AL., *CONFLICT OF LAWS: CASES, MATERIALS AND PROBLEMS* 414 (1990).

difficult, however, to recalibrate comity as a constitutional policy. A vague term, comity suggests, if anything, a design and level of coordination beyond the boundaries of the Constitution, or perhaps the constitution of any single nation.¹³²

When we turn to the numerous conflicts policies that are capable of a second life under the Constitution, the policy that chosen law not disturb the reasonable expectations of a party seems a natural choice. Indeed, concern over unfair surprise of a party supported in part the only restrictive ruling on state choice of law the Supreme Court has made in recent years.¹³³

Similarly, it follows that any strains of multilateralist conflicts policy echoed in the Constitution provide a basis for constitutional regulation of conflicts localism. Localism is an anathema to multilateralism in theory and usually in fact.¹³⁴ Had the influence of multilateralism in this country not been weakened by inward decay¹³⁵ and by the unilateralist challenge of interest analysis,¹³⁶ conflicts localism would be far less of a problem.

Of the three, unilateralism might appear the least likely source of inspiration for regulating conflicts localism. Granted, unilateralism is little concerned with party fairness.¹³⁷ Yet once we purge from interest analysis the rule requiring courts to apply the law of a truly interested forum,¹³⁸ interest analysis can be an effective instrument for protecting nonforum sovereigns from discrimination. The Supreme Court actually toyed with this as a constitutional rule before eventually abandoning the idea.¹³⁹

132. See Herzog, *supra* note 16; C.G.J. Morse, *Choice of Law in Tort: A Comparative Survey*, 32 AM. J. COMP. L. 51 (1984).

133. Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985); see *infra* note 140 and accompanying text.

134. However, even multilateralists refused to follow a rule requiring nonforum law when the pull of conflicting local law was strong enough. For example, the ORIGINAL RESTATEMENT, *supra* note 79, § 612, provided: "No action can be maintained upon a cause of action created in another state the enforcement of which is contrary to the strong public policy of the forum." On the public policy exception generally, see John B. Corr, *Modern Choice of Law and Public Policy: The Emperor Has the Same Old Clothes*, 39 U. MIAMI L. REV. 647 (1985).

135. Thus, while the public policy exception to the original Restatement (described *supra* note 134) was to have "extremely limited" effect, ORIGINAL RESTATEMENT, *supra* note 79, § 612 cmt. c, courts made much greater use of it. On abuse of the public policy exception, see Ernest G. Lorenzen, *supra* note 86, at 736; Monrad G. Paulsen & Michael I. Sovern, "Public Policy" in *Conflict of Laws*, 56 COLUM. L. REV. 969 (1956). And courts undermined the prevailing multilateral approach by using escape devices in addition to public policy. See Walter Cook, "Substance" and "Procedure" in the *Conflict of Laws*, 42 YALE L.J. 333 (1933); Joseph Morse, *Characterization: Shadow or Substance*, 49 COLUM. L. REV. 1027 (1949).

136. See *supra* notes 99-100.

137. See *supra* notes 113-116 and accompanying text.

138. There is debate whether interest analysis is viable as a neutral choice-of-law approach. See *supra* note 101 (citing opposing views). However, the position that interest analysis can work for both forum and nonforum law in a neutral choice-of-law approach—a position taken twice by the American Law Institute, see *supra* note 101, and never really renounced by the Supreme Court, see *infra* note 140-41, is defensible, and it provides a useful working assumption for this Article.

139. The standard is most often associated with *Alaska Packers Ass'n v. Industrial Accident Commission*, 294 U.S. 532 (1935).

[O]nly if it appears that, in the conflict of interests which have found expression in the conflicting statutes, the interest of Alaska is superior to that of California, is there rational basis for denying to the courts of California the right to apply the laws of their own state. . . . The interest of Alaska is not shown superior to that of California.

Id. at 549-50. While the Supreme Court affirmed the California court's choice of local law, the Court's constitutional test suggested a significant measure of protection to nonforum sovereigns.

Four years later, the Supreme Court "jettisoned" the *Alaska Packers* standard in *Pacific Employers Insurance Co. v. Industrial Accident Commission*, 306 U.S. 493 (1939). There, the Court "concluded that the California court was free to apply the law of either of the two interested states, without weighing or balancing their respective interests." *VERNON ET AL.*, *supra* note 131, at 415 (emphasis in original). In many cases since, for example, *Richards v. United States*, 369 U.S. 1 (1961) and *Nevada v. Hall*, 440 U.S. 410 (1979), the Court has made clear that, while the Constitution may require the forum state to be interested when the forum applies its own law over the conflicting law of an interested sovereign, that is all.

C. Approaches to Constitutional Reform: Three Rules

To explore some of the connections possible between different conflicts approaches and parts of the Constitution, consider a variety of rules the Supreme Court could fashion to regulate choice of law: (1) a forum cannot apply law disturbing the reasonable expectations of a party; (2) a forum cannot apply its own law when to do so would discriminate against another sovereign; and (3) a forum cannot apply law favoring its own resident when to do so would discriminate against a nonresident.

These rules could be phrased differently. They may not exhaust all possibilities for constitutional regulation of choice of law. They are not cumulative, and I do not urge that the Supreme Court adopt any of them. They serve rather to illustrate from different angles the intimacy between choice-of-law theory and the Constitution, to indicate some of the differences between what constitutional law governing conflicts is and what it could be, and to aid our later consideration of whether the Supreme Court belongs on the sidelines.

1. Rule One: A Forum Cannot Apply Law Disturbing the Reasonable Expectations of a Party

The first rule draws from the conflicts policy of party expectations, recast as constitutional due process doctrine. Of the three, only the first rule is within hailing distance of current law. It has ties with the only two Supreme Court cases that restrain conflicts localism at all: *Phillips Petroleum Co. v. Shutts*¹⁴⁰ and the much older *Home Insurance Co. v. Dick*.¹⁴¹ *Dick* was a due process case. *Shutts* was decided under the current amalgam of due process and full faith and credit law.¹⁴²

The Supreme Court in *Shutts* based its conclusion that the Kansas courts' choice of local law violated the Constitution in part on a finding that choice of Kansas law disturbed the expectations of Phillips Petroleum, the party aggrieved by that choice.¹⁴³ In the much earlier *Dick* case, the Supreme Court struck down the Texas courts' attempt to apply local law upon a finding that the controversy had nothing to do with the State

Where more than one State has sufficiently substantial contact with the activity in question, the forum State, by analysis of the interests possessed by the States involved, could constitutionally apply to the decision of the case the law of one or another state having such an interest in the multistate activity.

Richards, 369 U.S. at 15.

Of course, the Supreme Court reviews state and federal diversity conflicts cases as a neutral court. The cases after *Alaska Packers* offer little if any support for the idea that the Supreme Court has grown to mistrust interest analysis as a neutral tool for conflicts review. Indeed, interest analysis continues to be a key ingredient in the modest constraint on choice of law found today in the Constitution. See *infra* note 140-41 and accompanying text.

140. 472 U.S. 797 (1985). The case is discussed at length in Terry S. Kogan, *Toward a Jurisprudence of Choice of Law: The Priority of Fairness over Comity*, 62 N.Y.U. L. REV. 651 (1987); James R. Pielemeier, *supra* note 10, at 1299; Shreve, *supra* note 25.

141. 281 U.S. 397 (1930). An excellent discussion of this case appears in WEINTRAUB, *supra* note 13, at 521-24.

142. Justice Stevens, dissenting in *Shutts*, would have viewed the case separately under the two clauses. *Shutts*, 472 U.S. at 824 (Stevens, J., dissenting). The contrary approach continues to be the law today. "[W]ith regard to the issue of whether an adequate nexus exists for application of local law, the due process and full faith and credit limits are identical." LEA BRILMAYER, *CONFLICT OF LAWS: CASES AND MATERIALS* 439 (4th ed. 1995).

143. As the *Shutts* court stated:

Given Kansas' lack of "interest" in claims unrelated to that State, and the substantive conflict with jurisdictions such as Texas, we conclude that application of Kansas law to every claim in this case is sufficiently arbitrary and unfair as to exceed constitutional limits. When considering fairness in this context, an important element is the expectation of the parties. . . . Kansas "may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them."

Shutts, 472 U.S. at 822 (quoting *Dick*, 281 U.S. at 410).

of Texas. While the *Dick* Court itself did not speak in terms of party expectations,¹⁴⁴ the *Shutts* Court gave it that reading.¹⁴⁵

Rule One would clarify and enlarge the scope of expectations protection currently available. The Supreme Court has explicitly used an expectations standard only once—in *Shutts*—to reverse a conflicts case.¹⁴⁶ And there the Court encumbered the expectations principle by linking it to a forum-interest test; that is, the Court limited protection of reasonable expectations to cases where the forum was uninterested in applying its own law.¹⁴⁷ Rule One uncouples concern for party expectations from interest analysis. Separation of the two is sound in theory,¹⁴⁸ and would give greater range to the expectations standard.¹⁴⁹

Greater constitutional life for an expectations constraint might have one interesting effect on conflicts law and another on due process jurisprudence. Rule One could alter conflicts law by causing the expectations policy in current eclectic theory to trump policies that might support choice of the other law.¹⁵⁰ Furthermore, Rule One might have the effect on due process jurisprudence of lessening the current dichotomy between slight regulation of choice of law and greater regulation of personal jurisdiction.¹⁵¹

2. Rule Two: A Forum Cannot Apply Its Own Law When To Do So Would Discriminate Against Another Sovereign

Rule Two draws selectively from both multilateralism and unilateralism. Its object, to protect nonforum sovereigns from conflicts localism, promotes modern-day multilateralism.¹⁵² To use territorialism (jurisdiction-selection)¹⁵³ as the instrument for enforcing Rule Two would render the rule simply and entirely multilateral.¹⁵⁴ But, to

144. According to Professor Weintraub, "*Dick* does not seem greatly emancipated from the rigid, territorial conceptualism" of earlier precedent. WEINTRAUB, *supra* note 13, at 522.

145. See generally *Shutts*, 472 U.S. 797.

146. *Hague v. Allstate Insurance Co.*, 289 N.W.2d 43 (Minn. 1978), *aff'd*, 449 U.S. 302 (1981) (see *supra* note 3 and accompanying text) may have provided the United States Supreme Court with another opportunity. Minnesota Supreme Court Justice Otis, dissenting in *Hague*, argued forcefully that Minnesota's choice of its own law worked unfair surprise on Allstate in violation of the Due Process Clause of the Constitution. *Hague*, 289 N.W.2d at 50-54 (Otis, J., dissenting). For discussion of the unpersuasive attempts of Justice Brennan for the plurality and Justice Stevens concurring in *Hague* to rationalize the expectations problem, see Shreve, *supra* note 3, at 347-48.

147. *Shutts*, 472 U.S. at 821-22.

148. Choice-of-law values secured by expectations and interest analysis are in fact entirely different. See Sterk, *supra* note 10, at 955; *supra* notes 99-100; *supra* text accompanying notes 113-16. That difference is reflected at the constitutional level by the distinctions between Rule One and Rules Two and Three.

149. Doubtless there are cases where the forum has sufficient connection to the controversy to be interested, but application of forum law would work an unfair surprise on the party aggrieved by it. See, e.g., *Blamey v. Brown*, 270 N.W.2d 884 (Minn. 1978), *cert. denied*, 444 U.S. 1070 (1980) (noting that forum interested in availing its resident of a pro-recovery law but that choice unfairly surprised defendant) (discussed *supra* notes 2, 4 and accompanying text); *Lilienthal v. Kaufman*, 395 P.2d 543 (Or. 1964) (same); Reese, *supra* note 13, at 1597 (discussing *Lilienthal* from this perspective).

150. See *supra* notes 118-19 and accompanying text.

151. "To believe that a defendant's contacts with the forum state should be stronger under the due process clause for jurisdictional purposes than for choice of law is to believe that an accused is more concerned with where he will be hanged than whether." Linda B. Silberman, *Shaffer v. Heitner: End of an Era*, 53 N.Y.U. L. REV. 33, 88 (1978); see also Kozyris, *supra* note 3, at 892 ("[H]ow to decide a case is more important than where to decide it.").

152. See *supra* note 82. Thus, Professor Aaron Twerski writes of the "assault on sovereignty . . . and corresponding shock to the expectations of the legal system" inflicted by conflicts localism. Twerski, *supra* note 9, at 162.

153. On the function of a territorialism, or jurisdiction-selection, in the multilateral approach, see *supra* note 79.

154. See Laycock, *supra* note 24 (exploring at length the idea of constitution-based territorialism); Twerski, *supra* note 9 (arguing for the same). Rule Two as a territorial rule would serve what Laycock terms "[t]he principle of equal states: States must treat sister states as equal in authority to themselves." Laycock, *supra* note 24, at 250.

demonstrate additional possibilities for constitutional regulation of choice of law, this discussion employs the unilateralist tool of interest analysis¹⁵⁵ to administer Rule Two.

The application and scope of Rule Two would therefore be comparable to the application and scope of the rule the Supreme Court entertained in *Alaska Packers*.¹⁵⁶ That is, it would bar applications of forum law when another sovereign is more interested in having its conflicting law applied.¹⁵⁷ Rule Two could rest on full faith and credit law¹⁵⁸ insofar as it protected sister states,¹⁵⁹ perhaps on the Due Process Clause as the full faith and credit surrogate protecting foreign states,¹⁶⁰ and generally on the Commerce Clause.¹⁶¹

Rule Two would work one small and one enormous change on current law. The small change would be to uncouple interest analysis from a reasonable expectations inquiry.¹⁶² The enormous change would be to nationalize choice of law.

Granted, the only choices of forum law that appear to be invalidated by Rule Two are instances of conflicts localism—those where the forum's interest is demonstrably less than that of the source of conflicting law. However, uncertainties often encountered in interest analysis are such that a plausible argument of greater nonforum interest could be made in a substantial majority of conflicts cases.¹⁶³ Most of these cases would survive the challenge of Rule Two, but only after the laborious process of fact and policy crunching required by interest analysis. Moreover, Rule Two would force interest analysis on state jurisdictions that did not employ it in their conflicts law, since all jurisdictions would

155. For a description of interest analysis and the manner in which it animates unilateral choice of law in this country, see *supra* notes 95-96 and accompanying text. On the utility of interest analysis in a neutral approach to choice of law, see Shreve, *supra* note 101.

156. *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532 (1935). For analysis of the *Alaska Packers* rule, see WEINTRAUB, *supra* note 13, at 230.

157. For a variation of Rule Two, see the constitutional rule offered in Martin, *supra* note 13:

The forum may apply its law to the substantive questions of a case whenever (a) the party resisting application of that law has acted in the forum or derived from the forum relatively direct benefits, or (b) there is some weaker connection between the defendant and the forum, and the forum's interests are relatively strong compared to interests of other states that would be disserved by the application of forum law.

Id. at 230. Either formulation of the rule rests on the assumption that the forum needs a good reason for frustrating the purpose of nonforum law, and will lack that reason if clearly less interested than the nonforum sovereign.

158. *Id.* at 229.

159. This would close some of the distance in current law between the strong combined effect of the Full Faith and Credit Clause and the full faith and credit statute, 28 U.S.C. § 1738 (1988), to coerce recognition of sister-state judgments and the marginal effect of the two on choice of law. Compare *Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691 (1982) (sister-state judgment must be enforced) with *Nevada v. Hall*, 440 U.S. 410 (1979) (sister-state tort law may be disregarded). For discussion of some of the reasons that have been offered for maintaining two such different standards under full faith and credit law, see Freund, *supra* note 20, at 1225-26. For further discussion of the relation between choice of law and the law of judgments, see Gene R. Shreve, *Judgments from a Choice of Law Perspective*, 40 AM. J. COMP. L. 985 (1992); Gene R. Shreve, *Preclusion and Federal Choice of Law*, 64 TEX. L. REV. 1209 (1986).

160. At least after *Dick*, it has been possible to argue that, while foreign states are beyond the language of the Full Faith and Credit Clause and statute, they can get the same protection by recalibrating full faith and credit arguments under the Due Process Clause. For an evaluation of this argument, see Martin, *supra* note 13, at 192-94. The appeal of the argument is that it provides symmetry of protection for sister states and foreign states. For purposes of discussion, I have listed this constitutional base as one supporting Rule Two, but I do have misgivings about it. It may be preferable to limit due process as a protection for parties, not sovereigns. See Hay, *supra* note 20, at 713 (noting that due process protections should be limited to situations of "overreaching" against "the individual or his cause of action").

161. Rule Two rests on what could be termed the dormant Commerce Clause, since the clause would operate in the absence of a federal statute. ROTUNDA & NOWAK, *supra* note 42, §§ 11.1, 11.11(b). While the Commerce Clause may serve as authority for protecting nonresident litigants from conflicts localism, RICHMAN & REYNOLDS, *supra* note 26, § 96, the broad reach of the clause to "national or multistate interests" associated with commerce in the United States, Horowitz, *supra* note 24, at 807, is sufficient to support Rule Two.

162. This uncoupling process is similar to that of Rule One, see *supra* notes 148-49 and accompanying text, but it begins at the other end (*i.e.*, interest analysis).

163. See *supra* note 102.

have to use interest analysis to vet the constitutionality of their conflicts decisions. It may not go too far to suggest that, like the similar position the Supreme Court briefly entertained in *Alaska Packers*, Rule Two would have “the effect of constitutionalizing virtually every diversity or other two-state case.”¹⁶⁴

The great difference between Rule Two and current law is evident from what each requires of a judge in analyzing nonforum law. Rule Two requires correct conclusions about the result (position) nonforum law requires on the merits, and whether the interests to be advanced by that position are implicated by the facts of the case. These become constitutional points clearly subject to redecision on United States Supreme Court review. In contrast, the Constitution does not currently require state and federal diversity courts to employ interest analysis, nor does it make those electing to use interest analysis accountable for errors. Moreover, the Constitution does not always require these courts to be correct in determining the effect of nonforum law on the merits.¹⁶⁵

3. Rule Three: A Forum Cannot Apply Law Favoring Its Own Resident When To Do So Would Discriminate Against a Nonresident

Just as Rule Two could be equipped with either territorialism or interest analysis as its instrument, so could Rule Three. A good argument can be made for administering Rule Three via interest analysis: A way of protecting nonresidents from discrimination would be to permit application of forum law adverse to them only if the forum is interested.¹⁶⁶ However, to take a closer look at territorialism as constitutional law, it will be the instrument of Rule Three instead. It will serve what Professor Laycock has termed “[t]he principle of equal citizens: States must treat the citizens of sister states equally with their own.”¹⁶⁷

As a territorial directive, Rule Three could be based on the three parts of the Constitution thought to address state discrimination against nonresidents: the Equal Protection Clause, the Commerce Clause, and the Privileges and Immunities Clause.¹⁶⁸

The changes which territorial Rule Three would work on current constitutional law are as sweeping as those made by an interest-based Rule Two. The premise of territorial (multilateral) constitutionalism is that state and federal diversity courts must be stopped at the threshold from engaging in interest analysis because interest analysis invariably

164. VERNON ET AL., *supra* note 131, at 415. For a more extensive description of this phenomenon and its consequences, see Weinberg, *supra* note 25, at 470-78.

165. Even as between sister states, mere error in construing nonforum law does not offend the Constitution. Error must be flagrant.

To constitute a violation of the Full Faith and Credit Clause or the Due Process Clause, it is not enough that a state court misconstrue the law of another State. Rather, our cases make plain that the misconstruction must contradict law of the other State that is clearly established and that has been brought to the court's attention.

Sun Oil Co. v. Wortman, 486 U.S. 717, 730-31 (1988).

166. See Shreve, *supra* note 25, at 72; Louise Weinberg, *The Place of Trial and the Law Applied: Overhauling Constitutional Theory*, 59 U. COLO. L. REV. 67, 69 (1988). Other writers demand a significant connection between the forum and the controversy in order to support application of forum law, but avoid use of interest analysis to work out their tests. *E.g.*, Kirgis, *supra* note 13, at 103; Kogan, *supra* note 140, at 657.

167. Laycock, *supra* note 24, at 250.

168. Note, however, that the Privileges and Immunities Clause does not protect corporations or nonresident aliens. ROTUNDA & NOWAK, *supra* note 42, § 12.7; Gary J. Simson, *Discrimination Against Nonresidents and the Privileges and Immunities Clause of Article IV*, 128 U. PA. L. REV. 379, 380 n.10 (1979).

results in conflicts localism.¹⁶⁹ Note the unavoidable sweep of constitutional law founded on this premise. While it is easy to isolate areas for conflicts reform through federal common law,¹⁷⁰ it is impossible to similarly fine tune constitutional control through Rule Three. Once the premise that interest analysis cannot disadvantage nonresidents becomes a constitutional principle in one setting (say, wrongful death litigation), it will have to apply in all conflicts settings (torts, contracts, etc.) that run the risk of favoritism of local law through interest analysis.

Territorialist Rule Three might require for its administration a series of jurisdiction-selecting subrules reminiscent of the original Restatement,¹⁷¹ one for each type of case where interest analysis might otherwise come into play.¹⁷² In one sense, maintenance of territorialist Rule Three might not be as labor intensive as interest-based Rule Two. Territorialism is not supposed to concern itself (as interest analysis does) with the content of the rules vying for application. A territorialist approach to constitutional regulation concerns itself only with sources of law. And it takes far less effort to conduct a rule-directed search for the appropriate law source—whatever the law of that place—than it does to determine, as we must in Rule Two, how many interested law sources exist and just how interested they might be.¹⁷³

V. DOES THE SUPREME COURT BELONG ON THE SIDELINES?

Most writing on choice of law and the Constitution has focused on the reformation of constitutional doctrine. The three rules, just considered, competing visions of constitutionalized conflicts law, provide a pretext for adding to that discussion. But we will not press on in that direction. Our progress to this point in this Article enables us to view the constitutional reform of conflicts law from the different and somewhat neglected angle of federal judicial administration.

An implicit assumption often found in discussions about constitutional reform in choice of law¹⁷⁴ is that questions whether, when, or how the Supreme Court could implement a particular constitutional reform are subordinate to questions about the shape or coherence of new doctrine. We can sympathize with this outlook. Federal or state institutions have the discretion to decline requests for nonconstitutional reform of

169. See Laycock, *supra* note 24, at 274-75.

170. The Supreme Court may use through common law the dormant power that Congress has to make federal conflicts law. The Supreme Court is as free as Congress would be to limit the conflicts law it makes to only a particular type of case. See *supra* note 48 (discussing the possibility of a federal common law of conflicts limited to mass torts).

171. ORIGINAL RESTATEMENT, *supra* note 79; see *supra* note 80.

172. Professor Laycock denies this. Laycock, *supra* note 24, at 322-23.

173. Compare the straightforward approach of territorialism, see *supra* note 79, with the relative uncertainties of interest analysis, see *supra* note 102. However, if state and lower federal courts are unwilling to accept the discipline of territorial constitutional regulation, problems of judicial administration might materialize comparable to those for an interest-based approach. Historic judicial resistance to territorialism as conflicts doctrine, see *supra* note 135, would likely reappear should territorialism attempt a comeback. "An attempt to return to territorial choice-of-law rules would undoubtedly invite, on a greatly accelerated basis, the avoidance techniques used in the past . . ." Russell J. Weintraub, *Methods for Resolving Conflict-of-Laws Problems in Mass Tort Litigation*, 1989 U. ILL. L. REV. 129, 133. Proponents might argue that obedience to territorial conflicts rules would increase if the rules existed as constitutional law. Yet the past record of state and lower federal courts in complying with Supreme Court precedents is less than reassuring. See generally James E. Robertson, *When the Supreme Court Commands Do the Lower Federal Courts Listen? The Impact of Rhodes v. Chapman on Correctional Litigation*, 7 HAMLIN L. REV. 79 (1984); Michael Wells, *The Unimportance of Precedent in the Law of Federal Courts*, 39 DEPAUL L. REV. 357 (1990); Note, *Constitutional Stare Decisis*, 103 HARV. L. REV. 1344 (1990); Note, *Lower Court Disavowal of Supreme Court Precedent*, 60 VA. L. REV. 494 (1974).

174. See *supra* notes 17-24.

conflicts localism.¹⁷⁵ But the Constitution is about rights and authority, and the rhetoric of constitutional argument for conflicts reform easily can easily become: Any version of the Constitution at odds with the version pressed is not merely inferior; it is illegitimate.¹⁷⁶ Yet it would be a mistake to read too much into the special status of constitutional law. Even if the Justices of the Supreme Court became convinced of the doctrinal superiority of an alternative reading of the Constitution over current law, it is possible to imagine two concerns of judicial administration that could delay the Court in acting on that conviction, or lead the Justices never to act.

The first concern is about the priority of matters competing for the attention of the Court. Here, however, the case for conflicts reform benefits from conclusions reached earlier in this Article. Conflicts localism and its attendant harms probably pose a serious problem in fact,¹⁷⁷ and it is a problem likely to continue without constitutional intervention.¹⁷⁸ It is very difficult, of course, to determine the relative priority of conflicts localism on a complete list of social, economic, and political problems inviting revision of constitutional doctrine. However, let us assume that the place of conflicts localism on such a list would be high enough to satisfy this first concern.

The second concern is over the capacity of the Supreme Court to oversee enforcement of constitutional reforms. It is far more troublesome and may in fact eliminate the possibility of extensive Supreme Court intervention in the foreseeable future. We accept as a basic principle, grounded if necessary in Article III of the United States Constitution, that the judicial branch is reluctant to make promises it cannot keep.¹⁷⁹ The Supreme Court would therefore be reluctant to declare new rights under the Constitution to be free from conflicts localism which, as a practical matter, it could not vindicate. Heretofore, my apprehensions¹⁸⁰ and those of a number of other writers¹⁸¹ that constitutional reform of choice of law might pose such difficulties, have tended to be epigrammatic. The study of the inseparability of choice of law and constitutional policies in this Article and the illustrations provided by Rules Two¹⁸² and Three¹⁸³ push deeper into the subject of

175. Avenues of nonconstitutional conflicts reform are surveyed *supra* part II.

176. See Laycock, *supra* note 24, at 336 ("The choice-of-law revolution has proceeded in disregard of the Constitution.").

177. See *supra* notes 38-39 and accompanying text.

178. See *supra* text accompanying notes 40-68.

179. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 115 (1962); Gene R. Shreve, *Federal Injunctions and the Public Interest*, 51 GEO. WASH. L. REV. 382, 401-05 (1983). Thus the Court has traditionally conserved and enhanced its power as a general matter by professing to lack power in particular cases.

180. Shreve, *supra* note 25, at 65 ("How . . . does the Supreme Court use for its constitutional reviewing doctrine the predominant norms of the choice-of-law process without slipping headlong into the process itself?").

181. Justice Robert Jackson found "uniformity in choice-of-law" imposed by the Constitution as "a prospect comforting to none." Jackson, *supra* note 20, at 26. He saw such difficulty from serious constitutional intervention into choice of law that he recognized as one option that "we will adopt no rule, permit a good deal of overlapping and confusion, but interfere now and then, without imparting to the bar any reason by which the one or the other course is guided or predicted." *Id.* at 27.

Professor Paul Freund mused "that problems of choice of law have not lent themselves to satisfactory solution as constitutional questions, and that in their nature they cannot be expected to." Freund, *supra* note 20, at 1235.

Professor Aaron Twerski wondered whether the Court's reluctance to curb conflicts localism existed "because it did not believe that any of the analytical tools available for resolving the problem were capable of curbing the excesses in the numerous choice-of-law approaches in vogue today without creating total havoc in the field." Twerski, *supra* note 9, at 151-52.

And Professors Arthur von Mehren and Donald Trautman noted that, despite the need for "significant federal control over choice of law . . . the great difficulties that contemporary choice-of-law methodology encounters in developing dispositive rules [makes] the conscientious administration of full-scale controls . . . a significant—perhaps an intolerable—burden on the Supreme Court." von Mehren & Trautman, *supra* note 31, at 38.

182. See *supra* notes 152-67 and accompanying text.

183. See *supra* notes 167-73 and accompanying text.

conflicts reform and judicial administration; yet they seem to confirm those earlier apprehensions.

True, Rule One probably could hurdle the difficulties of judicial administration that this Article has considered. This assumes that cases where even a plausible expectations argument is possible constitute a far smaller group than the conflicts cases touched by Rules Two and Three.¹⁸⁴

Rule One, however, does not do a great deal alone to fight conflicts localism. The larger picture therefore remains discouraging. Numerous past proposals for significant but carefully limited constitutional entry into choice of law,¹⁸⁵ including my own,¹⁸⁶ may be in fact unworkable because of difficulties of Supreme Court administration. The subject deserves a good deal more thought and discussion. The conclusion emerging from this Article may not be inescapable. It may be, however, that there is no stopping place for significant constitutional reform of conflicts law. It may be impossible for extensive constitutional and nonconstitutional components to coexist in a stable regime of American conflicts law.

184. Given the relatively low incidence of expectations issues in conflicts cases, *see supra* notes 108-10 and accompanying text, this seems like a reliable assumption.

185. *See, e.g.,* Hay, *supra* note 20; Kozyris, *supra* note 3; Reese, *supra* note 34.

186. Shreve, *supra* note 25, at 72.