Choice of Law and the Forgiving Constitution†

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INTRODUCTION

This Article confronts a paradox. Choice of law† 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 reinforces 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.

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 Blarney v. Brown and Hague v. Allstate Insurance Co., 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 Blarney, 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. 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. The principal reasons why the court chose Minnesota law instead were reminiscent of those it offered for choosing Minnesota law in Blarney. 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).
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\(^4\) 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.


\(^11\) 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. 847 (1941).

\(^12\) *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.

\(^13\) *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 Rules 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); Willia 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 Clause 17 could protect litigants' reasonable expectations in choice of law. 18 The Full Faith and Credit Clause 19 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 Commerce 23 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 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.


18. Commentary on possibilities for due-process-based conflicts regulation is extensive. See, e.g., SCOLLS & HAY, supra note 13, at 93-103; Wintroub, 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.


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. The Supreme Court appears to have given no role at all in conflicts to the Privileges and Immunities, Equal Protection, and Commerce Clauses. 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.

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.” Much later, Professors Arthur von Mehren and Donald T. Trautman wrote that the Supreme Court’s affirmance 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.” Recently, Professor Friedrich Juenger delivered the verdict that “all attempts to induce the Supreme Court to impose limits on state court experimentation” in choice of law “have come to naught.”

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

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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. “The 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.


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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." Yet, even were we to assume that Laycock's approach or some other 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) 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 Blarney, Hague, and Rosenthal inform more about the notoriety than the extent of conflicts localism. Certainly, decisions can be found where judges refrained from favoring local litigants with forum law, even when a plausible ground for doing so existed. Are decisions evincing principled self-denial as

33. See Laycock, supra note 24, at 336.
35. This Article uses conflicts localism in a narrow sense, to describe a group of cases (Blarney, 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.
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. 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.

The conflict 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, the most authoritative nonconstitutional sources for regulating choice of law are in theory federal statutes and self-executing treaties. Yet very few conflicts cases are affected by law at this level, and, while the impact on choice of law of federal statutes and treaties may increase in the future, there is no reason to believe that the picture will soon change dramatically.
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.," its decision extending the Erie doctrine to conflicts questions, or by nationalizing choice of law for a particular category of litigation. 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 Roseenthal case and the incongruities of federal choice of law following transfer of venue, and it might return to nonresident suitors a measure of protection from local bias that diversity jurisdiction was created to secure. 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. Moreover, it would be difficult to overrule Klaxon without unraveling much of the Erie doctrine. For these reasons, and because the Supreme Court has not exhibited the slightest inclination to overrule Klaxon, 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. Most agree that the federal courts may borrow the authority to regulate choice of law that lies dormant in Congress. 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.
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. SHEVE & 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.
55. See, e.g., sources cited supra note 54. The sources of authority for a federal common law of conflicts are listed in Sheve, 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. Sytchof-Leyden ed., 1961)).

58. 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).

59. On the absence of a federal common law conflicts in mass tort litigation, see Juenger, supra note 48; Rowe & Sibbey, supra note 48; Shreve, supra note 3, 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 825, of 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. 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.

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. 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, the cases that now most clearly evince forum bias in choice of law might never reach the merits.

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.

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

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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.


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.

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

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 prescription 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, therefore, one can expect to find in judicial opinions a good deal of conflicts theory and policy. As in any common law sphere, 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. 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. In addition, courts and commentators periodically express concern that chosen law not unreasonably disturb the expectations of a party.

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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.


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. Or a group of coequal sovereigns may all adopt the same substantive rule as their local law. 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 Leflar's "Choice-influencing Considerations," termed "Application of the better rule of law."

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. 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."

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. 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.
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.
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 jurisdictionalism, 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 § 6.24 (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 stem, 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.").


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. Corr, Interest Analysis and Choice of Law: The Dubious Dominance of Domicile, 1983 UTAH L. REV. 651; Ely, supra note 24; Kosyris, 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.


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

86. See WALTER W. COOK, THE LOGICAL AND LEGAL BASIS 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); Lorenzen, supra note 81; Kurt A. Nadelmann, Joseph Story's Contribution to American Conflicts Law: A Comment, 5 AM. J. LEGAL HIST. 230 (1961).


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

C. Unilateralism

Unilateralism shares with multilateralism the idea that choice of law should search for the appropriate sovereign (law source) rather than for the best law. 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. If so, then the sovereign creating that law may be said to be interested in having it applied. 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, 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.
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 "the determination of the personal and territorial reach of the potentially applicable local rules of decision." Id. at 45. "The 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 . . . ").
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. 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 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.

Much of the credit for launching unilateralism in this country goes to Brainerd Currie, the principal creator of interest analysis. 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 stillborn or frayed over time. His greatest accomplishment was to establish through his false conflict

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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 Gov’t 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.

Professor Ely, supra note 24, at 175 concludes 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 inextricably forum favoring. E.g., BRILMAKER, supra note 78, at 68; Bleiziffer, 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(c)-(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. Tverski, Enlightened Territorialism and Professor Currie—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. 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." At the same time, unilateralist policies of interest analysis are now most likely to appear interspersed with those of multilateralism and substantivism.

D. Party Expectations as to Chosen Law

Taken together, the three conflicts approaches just considered encompass most of the conflicts policies in use today. 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.

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, it can figure there. The policy comes to bear more frequently in other areas, like contract cases, 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. However, the multilateralist predilection for stern and categorical conflicts rules is ill suited to administer a policy as supple and case variable as

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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 265, 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.
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expectations. Unilateralism, while a method-centered and case-variable approach,\textsuperscript{113} shares classic multilateralism’s focus on sovereigns as a source of law.\textsuperscript{114} To unilateralism, preoccupied with interest analysis,\textsuperscript{115} concern about expectations of the parties would be something of a distraction.\textsuperscript{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.\textsuperscript{117} The additional presence of an expectations policy\textsuperscript{118} simply bears out the eclectic trend in modern conflicts theory.\textsuperscript{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 Clause\textsuperscript{120} 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,\textsuperscript{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,\textsuperscript{122} treaty,\textsuperscript{123} or common law.\textsuperscript{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

\textsuperscript{113} See Richman, supra note 99, at 333.
\textsuperscript{114} See supra note 77 and accompanying text.
\textsuperscript{115} See Currie, supra note 100, at 177-81.
\textsuperscript{116} Cf. Sterk, supra note 10, at 955 ("Currie’s analysis largely ignored the interests of private parties.").
\textsuperscript{117} See supra notes 91-92, 105 and accompanying text.
\textsuperscript{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."
\textsuperscript{120} 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.
\textsuperscript{121} U.S. CONST. art. VI.
\textsuperscript{122} See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-4, at 33 (2d ed. 1988).
\textsuperscript{123} See supra notes 41, 43-44.
\textsuperscript{124} See supra notes 54-55 and accompanying text.
approach guides choice of law in a way offering no support to conflicts localism. 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.

The Tenth Amendment poses some—albeit uncertain—restraint on the power of the federal government to force its law on states. 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.

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 lawmakers 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 multilateralism) and the explicit and overriding preference for forum law (a fringe policy of unilateralism), 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. It seems

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125. See supra note 74-76 and accompanying text. Substantive theory can be corrupted to support conflicts localism. This appears to have happened in Blaney 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.


129. See supra note 81.

130. See supra note 101.

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
suggests, if anything, a design and level of coordination beyond the boundaries of the
Constitution, or perhaps the constitution of any single nation.132

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,134 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

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. Cott, Modern Choice of Law and Public Policy: The
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; Monsad G. Paulsen & Michael
I. Sorensen, "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).

[Only] 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, 366 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 and the much older Home Insurance Co. v. Dick. Dick was a due process case. Shutts was decided under the current amalgam of due process and full faith and credit law.

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. 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.


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, 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.\(^{151}\)

\section{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 unilaterlalism. 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 Weintrau, "Dick does not seem greatly emancipated from the rigid, territorial conceptualism" of earlier precedent. \textit{Weintrau, supra} note 13, at 522.

\(^{145}\) \textit{See generally Shutts, 472 U.S. 797.}


\(^{147}\) Shutts, 472 U.S. at 821-22.

\(^{148}\) Choice-of-law values secured by expectations and interest analysis are in fact entirely different. \textit{See Sterk, supra} note 10, at 955; \textit{supra} notes 99-100; \textit{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. \textit{See, e.g.}, Blaney v. Brown, 270 N.W.2d 884 (Minn. 1978), cert. denved, 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 \textit{supra} notes 2, 4 and accompanying text); Lilienthal v. Kaufman, 395 P.2d 543 (Or. 1964) (same); Reese, \textit{supra} note 13, at 1597 (discussing \textit{Lilienthal} from this perspective).

\(^{150}\) \textit{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. Heiter: \textit{End of an Era}, 53 N.Y.U. L. REV. 33, 88 (1978); see also Koayris, \textit{supra} note 3, at 892 ("[h]ow to decide a case is more important than where to decide it.").

\(^{152}\) \textit{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, \textit{supra} note 9, at 162.

\(^{153}\) On the function of a territorialism, or jurisdiction-selection, in the multilateral approach, \textit{see supra} note 79.

\(^{154}\) \textit{See Laycock, supra} note 24 (exploring at length the idea of constitution-based territorialism); Twerski, \textit{supra} note 9 (arguing for the same). Rule Two as a territorial rule would serve what Laycock terms the principle of equal states: States must treat sister states as equal in authority to themselves. Laycock, \textit{supra} note 24, at 250.
demonstrate additional possibilities for constitutional regulation of choice of law, this discussion employs the unilateralist tool of interest analysis 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.* That is, it would bar applications of forum law when another sovereign is more interested in having its conflicting law applied. Rule Two could rest on full faith and credit law, perhaps on the Due Process Clause as the full faith and credit surrogate protecting foreign states, and generally on the Commerce Clause.

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. 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. 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

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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.


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 purposes of nonforum law, and will lack that reason if clearly less interested than the nonforum sovereign.

158. *Id.* at 229.


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, §§ 11.11, 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 redetermination 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 misconception 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., Kirsig, supra note 13, at 103; Kogan, supra note 140, at 657.

167. Laycock, supra note 24, at 250.

results in conflicts localism. 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, 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, one for each type of case where interest analysis might otherwise come into play. 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.

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 law 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 constitutional law. 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).

169. See Laycock, supra note 24, at 274-75.
170. See Laycock, supra note 24, at 274-75.
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 HAMLINE 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).
conflicts localism. But the Constitution is about rights and authority, and the rhetoric of constitutional argument for conflicts reform can easily become: Any version of the Constitution at odds with the version pressed is not merely inferior; it is illegitimate. 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, and it is a problem likely to continue without constitutional intervention. 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. 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 apprehensions and those of a number of other writers 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 Two and Three 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.\textsuperscript{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,\textsuperscript{185} including my own,\textsuperscript{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.

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

\textsuperscript{185} See, e.g., Hay, \textit{supra} note 20; Kozyris, \textit{supra} note 3; Reese, \textit{supra} note 34.

\textsuperscript{186} Shreve, \textit{supra} note 25, at 72.