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Choice-Of-Law as Non-Constitutional Federal Law

Mark D. Rosen

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Article

Choice-of-Law as Non-Constitutional Federal Law

Mark D. Rosen[†]

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[†] Professor, IIT-Chicago-Kent College of Law. Thanks to Perry Dane and Christopher Schmidt for helpful comments and discussions, to Kermit Roosevelt for helpful and fair-minded reactions, and to Greg Tsonis for excellent research assistance. I also received astute comments from Allan Erbsen and Michael Green, but too late (due to no fault of theirs) for me to incorporate my responses. This Article is dedicated to the memories of Joseph Story and Ernest Lorenzen, two of this country’s most profound thinkers in the field of choice-of-law. Copyright © 2015 by Mark D. Rosen.

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INTRODUCTION

Sixteen years ago, Ninth Circuit Judge and former Berkeley professor William Fletcher wrote “we have in the United States an essentially chaotic system in which a multitude of different choice of law systems are employed by different states.”¹ Empirically, his observation remains true. A recent survey identifies no fewer than seven distinct choice-of-law methodologies presently used by the states.² Further complicating matters, fifteen states use more than one methodology, de-

1. *Ins. Co. of N. Am. v. Fed. Express Corp.*, 189 F.3d 914, 927 (9th Cir. 1999) (Fletcher, J., concurring). For a similar observation made seventy-five years earlier, see *infra* note 204; see also Walter Wheeler Cook, *The Powers of Congress Under the Full Faith and Credit Clause*, 28 YALE L.J. 421, 422, 432–33 (1919) (speaking of choice-of-law as “legal anarchy” that yields “chaos and confusion, not to say injustice”).

2. Symeon C. Symeonides, *Choice of Law in the American Courts in 2012: Twenty-Sixth Annual Survey*, 61 AM. J. COMP. L. 217, 279 (2013).

ploying one for tort and another for contract questions.³ Recent empirical studies confirm that different choice-of-law methodologies produce different outcomes.⁴

But while the *fact* of a “multitude of different choice of law systems” is undeniable, its normativity requires careful consideration. After all, states also differ in their tort, contract, and family law, yet we do not typically bemoan as ‘chaotic’ those interstate differences. Quite to the contrary: we praise our federalism for allowing states to adopt divergent laws that best reflect their citizens’ distinctive values.⁵ Then why are different tort and family laws across states acceptable, but not choice-of-law?

Answering this question is not so easy—indeed, Supreme Court precedent suggests that cross-state variations in choice-of-law are just fine. The 1941 case of *Klaxon Co. v. Stentor Electric Manufacturing Co.*⁶ identified choice-of-law as state law, and ruled that federal courts sitting in diversity must use the conflicts rules applied by the state in which the federal court is located.⁷ *Klaxon* recognized this could create a “lack of uniformity . . . between federal courts in different states” since states utilize different choice-of-law rules.⁸ But any such nonuniformity, explained the Court, “is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors.”⁹ In other words, choice-of-law is no different from family law in respect of differences across states.

This Article argues that today’s disorder in choice-of-law is traceable to a largely overlooked conceptual mistake in *Klax-*

3. *Id.*

4. See Stuart E. Thiel, *Choice of Law and the Home-Court Advantage: Evidence*, 2 AM. L. & ECON. REV. 291, 310–13 (2000); see also Christopher A. Whytock, *Myth of Mess? International Choice of Law in Action*, 84 N.Y.U. L. REV. 719, 750, 771 (2009) (concluding that “choice-of-law doctrine does affect decisions” of federal courts in a dataset of international tort cases, and summarizing three different earlier studies by different investigators as having “found significant differences between the[] outcomes” between the First Restatement and modern methods in domestic choice-of-law cases).

5. See, e.g., Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 886–91 (2002).

6. 313 U.S. 487 (1941).

7. *Id.* at 496–97.

8. *Id.* at 496.

9. *Id.*

on¹⁰—the assumption that choice-of-law is state law—and that *Klaxon* must be overruled. Choice-of-law was not viewed as state law for most of our country’s history, but long was conceptualized as a subset of the “general commercial law” of private international law, which was neither state nor federal.¹¹ Cross-state uniformity was one of the general law’s signal characteristics, and expectations of uniformity extended to choice-of-law. After *Erie* declared “[t]here is no federal general common law,”¹² what had been understood to be general law had to be parceled out into one of the categories of law *Erie* recognized as legitimate.¹³ There were two main options—state and federal—and *Klaxon* put choice-of-law into the box of state law.

This Article provides four arguments as to why choice-of-law is best understood to be federal law, not state law. The first argument is an amalgam of history and functional analysis: in a post-*Erie* world in which all law must be attributed to a sovereign, choice-of-law must be federal because only federal law can satisfy what I call choice-of-law’s “Single System Requirement.” To explain, while choice-of-law presupposes variations across states in the substantive law to which it applies, choice-of-law cannot effectively serve its managerial function of predictably determining which state’s law applies if choice-of-law *itself* varies across states. This gives rise to the Single System Requirement: all polities whose differences in substantive law give rise to the need for choice-of-law must use the same choice-of-law rules. While general law satisfied the Single System Requirement before *Erie*, only federal law can fulfill the Single System Requirement after *Erie*.

The Article also advances three conceptual arguments for the conclusion that choice-of-law is inherently federal. First, at its core, choice-of-law sorts out conflicts between states’ overlapping regulatory powers, a federal role by its very nature. Second, choice-of-law plays a substantial role in determining the character of our federal union; choice-of-law plays a crucial role in determining to what extent states can, as a practical matter, have divergent substantive laws in fields that federal constitu-

10. For other scholars who have considered the possibility that choice-of-law is federal, see *infra* notes 14–19.

11. See *infra* Part I.A.2.

12. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

13. This is not to suggest that general law altogether disappeared after *Erie*. See generally Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 505 (2006) (describing modern general law).

tional and statutory law does not demand national uniformity. Third, choice-of-law plays a crucial role in maintaining the health of our interstate system. State law is unsuited to discharging these three tasks, whereas federal law is the most functionally appropriate and democratically legitimate resource for accomplishing them.

In addition to these four arguments, the Article also makes the positive doctrinal case for its claim that choice-of-law is federal law. The Full Faith and Credit Clause's "effects clause" grants Congress the power to enact choice-of-law rules for state courts, and the Diversity Clause (in conjunction with the Necessary and Proper Clause) authorizes Congress to create choice-of-law rules for federal courts.

Because choice-of-law must be federal law, *Klaxon's* dramatic break with the past—its holding that choice-of-law is state law that can vary across states—must be overruled. To be more precise, the Article argues that a post-*Klaxon* amendment to the Full Faith and Credit Act is best understood as having partially overturned *Klaxon*, and as currently providing a statutory basis for the development by state courts (and possibly federal courts too) of a single body of federal choice-of-law that is applicable in all courts. But *Klaxon* unquestionably impairs the effectiveness of a second federal statute, the Rules of Decision Act, which provides clearer authorization than the Full Faith and Credit Act for federal courts to create a body of choice-of-law—yet another reason *Klaxon* should be overruled.

As this Article explains, the Full Faith and Credit Act and the Rules of Decision Act are best understood as imposing obligations consistent with the Single System Requirement: the two statutes require that the same federal choice-of-law rules be operative in state and federal courts. The statutes do not detail what those choice-of-law rules would be, but—like the anti-trust laws—delegate courts the authority to flesh out choice-of-law rules on a case-by-case basis. Moreover, the understanding that choice-of-law is federal provides considerable guidance in formulating choice-of-law rules.

An important implication of this Article's argument is that federal courts are not alone in being responsible for developing the federal common law of choice-of-law. Rather, they have two partners: state courts and Congress. State courts have the power—indeed, a constitutional duty under the Supremacy Clause—to apply, and where necessary to develop, federal choice-of-law. This is so because when state courts hear inter-

state disputes requiring them to determine which state's law applies, they necessarily must rely upon—and in the process develop on a case-by-case basis—the federal Full Faith and Credit Act. And because Congress has ultimate authority over choice-of-law, it can always legislatively revise the choice-of-law rules that the courts have generated—even those of the Supreme Court.

Significantly, both federal and state courts would be developing and applying the *same* body of law; there is one federal choice-of-law, and it is operative in both federal and state courts across the entire country. The large number of courts involved in developing choice-of-law is a boon insofar as it holds out the prospect of a rapid airing of doctrinal alternatives. Entropic dangers would be checked by the federal appellate system that would review the choice-of-law holdings of both state and federal courts, and by Congress, which has the power to codify or modify courts' choice-of-law doctrines.

While this Article argues that choice-of-law doctrine went seriously amiss seventy-three years ago in *Klaxon*, the Article is neither a wholesale rejection of modern choice-of-law doctrine nor a call for returning to the “general law.” The Article identifies genuine insights of both the traditional and modern choice-of-law approaches. But the Article also locates traditional and modern understandings that must be discarded, as it provides a new conceptual scaffolding for the development of a uniform body of federal choice-of-law.

This Article follows in the path of a small but important body of scholarship that has contemplated the federalization of choice-of-law. Donald Trautman and Harold Horowitz argued in short articles in the 1960s and 1970s that choice-of-law should be treated as federal common law,¹⁴ as did Doug Laycock in an important article twenty years ago.¹⁵ In the 1990s, Michael Gottesman called upon Congress to enact a federal

14. See Harold W. Horowitz, *Toward a Federal Common Law of Choice of Law*, 14 UCLA L. REV. 1191 (1967); Donald T. Trautman, *The Relation Between American Choice of Law and Federal Common Law*, 41 LAW & CONTEMP. PROBS. 105 (1977); see also Donald T. Trautman, *Toward Federalizing Choice of Law*, 70 TEX. L. REV. 1715, 1718 (1992) [hereinafter Trautman, *Toward Federalizing*].

15. See Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 332–33 (1992). In addition to the critiques I provide here, see *infra* notes 263–65, other important parts of Professor Laycock's constitutional argument have been subject to substantial criticism. See Stephen E. Sachs, *Full Faith and Credit in the Early Congress*, 95 VA. L. REV. 1201, 1217–21 (2009).

choice-of-law statute,¹⁶ though decades earlier William Baxter had pointed to one federal statute, and Elliott Cheatham to another, that, each argued, federalized choice-of-law to some extent.¹⁷ Like Henry Hart sixty years ago,¹⁸ recent articles by Allan Erbsen and Kermit Roosevelt understand choice-of-law rules in federal courts sitting in diversity to be federal law, but treat choice-of-law rules in state courts as state law.¹⁹

This Article builds upon much, though also rejects some, of these scholars' arguments and conclusions. This Article's aforementioned four arguments fortify the sometimes conclusory assertions found in the abovementioned scholarship that choice-of-law is federal.²⁰ But the Article refutes the sug-

16. See Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1, 23 (1991).

17. See William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 40–41 (1963) (arguing that the Rules of Decision Act authorizes federal courts sitting in diversity to create federal choice-of-law rules); Elliott E. Cheatham, *A Federal Nation and Conflict of Laws*, 22 ROCKY MOUNTAIN L. REV. 109, 114 (1950) [hereinafter Cheatham, *A Federal Nation*] (suggesting that the 1948 amendments to the Full Faith and Credit Act might determine the choice-of-law rules applicable in state courts); Elliott E. Cheatham, *Federal Control of Conflict of Laws*, 6 VAND. L. REV. 581, 585–87 (1951) [hereinafter Cheatham, *Federal Control*]. Laycock made a fleeting reference as well. See Laycock, *supra* note 15, at 332.

18. See Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 513–14 (1954) (concluding that although state law appropriately governs choice-of-law in litigation among “citizens of the same state [in] the courts of their own state . . . [i]t does not follow that these questions should be similarly disposed of when they arise between citizens of different states,” and asking “[w]hy is it an offense to the ideals of federalism for federal courts to administer, between citizens of different states, a juster justice than state courts . . . ?”).

19. See Allan Erbsen, *Erie's Four Functions: Reframing Choice of Law in Federal Courts*, 89 NOTRE DAME L. REV. 579, 641–43 (2013) (“[I]t does not necessarily follow that federal courts should create a uniquely federal choice of law rule rather than adopting choice of law rules from state governments.”); Kermit Roosevelt III, *Choice of Law in Federal Courts: From Erie and Klaxon to CAFA and Shady Grove*, 106 NW. U. L. REV. 1, 22 n.109 (2012) (suggesting the federal choice-of-law rule might “incorporat[e] the preexisting state rule”). In an interesting article, William Baude argues that federal choice-of-law doctrine should be applicable when federal substantive statutes reference state law. See William Baude, *Beyond DOMA: Choice of State Law in Federal Statutes*, 64 STAN. L. REV. 1371 (2012). Baude's argument does not address the choice-of-law that is operative in state courts, or in federal courts sitting in diversity.

20. To restate them: (1) the Single System Requirement (that all polities whose differences in substantive law occasion the need for choice-of-law utilize the same choice-of-law rules), shows that choice-of-law pre-*Klaxon* was conceptualized in a way that satisfied the Single System Requirement, and explains why only federal law can satisfy it in a post-*Erie* world; and (2)

gestion that there is a federal choice-of-law for federal courts but a state law of choice-of-law for state courts;²¹ the assumption that choice-of-law was state law before *Erie*;²² the claim that the Constitution requires “territorial choice-of-law rules” because “[t]he allocation of authority among the states is territorial;”²³ and many other important points.²⁴

The Article is in four parts. Part I provides a comprehensive intellectual history of choice-of-law from this nation’s birth until just before *Erie* and *Klaxon*. While there were some shifts in how choice-of-law was conceptualized during this pre-modern era, choice-of-law during this time was understood in ways that presumed it was uniform across all states, thereby satisfying the Single System Requirement.²⁵

Part II shows what has transpired in choice-of-law following *Klaxon*’s determination that choice-of-law is state law: a landslide of multiple and inconsistent choice-of-law regimes. Part II also identifies four lessons that must inform a reconstructed federal body of choice-of-law. These lessons reflect important insights from the modern approaches that explain why a simple return to the old system is not advisable, and why continuing to treat choice-of-law as state law is untenable.

Building on these insights, Part III explains why choice-of-law is appropriately federal rather than state law. In the process, Part III shows that this Article’s approach provides an attractive solution to *renvoi*, one of the thorniest conceptual problems in choice-of-law. Part III then suggests that *Klaxon* has been partially overruled by the 1948 Amendments to the Full Faith and Credit Act, and argues that *Klaxon* should be wholly

choice-of-law in its essence polices states’ extraterritorial powers, (3) is substantially responsible for determining the character of our federal union, and (4) serves to maintain the health of our interstate system—three functions that are best and appropriately discharged only by federal law.

21. See *supra* notes 18–19.

22. See *infra* note 76 (critiquing Trautman’s claim).

23. Laycock, *supra* note 15, at 316, 337; see *infra* notes 263–66 (critiquing this view).

24. Contrary to the positions of Horowitz, Trautman, and Laycock, this Article’s primary claim is that two federal statutes authorize state and federal courts to develop a uniform body of federal choice-of-law, and that the resulting doctrines accordingly are not federal common law. See *infra* Part III. Contrary to Professor Baxter, this Article argues that a federal statute compels state courts to develop the federal common law of choice-of-law. See Baxter, *supra* note 17, at 42 (“I cannot justify a federal compulsion [for state courts to adopt any particular choice-of-law rules].”); *infra* Part III.D.1.

25. For one fleeting exception, see *infra* note 182.

overruled so as not to interfere with the Rules of Decision Act. The upshot is that two federal statutes authorize federal and state courts to jointly create a single body of federal choice-of-law. Part III also explains why choice-of-law would constitute federal common law even without these statutes. Part IV anticipates possible objections, and explains why there is reason for cautious optimism concerning domestic choice-of-law's future.

I. PRE-MODERN AMERICAN UNDERSTANDINGS OF CHOICE-OF-LAW

A. CHOICE-OF-LAW AS GENERAL LAW

1. The Concept of General Law

Erie's rejection of "federal general common law"²⁶ is an outgrowth of the Court's adoption of legal positivism.²⁷ *Erie* overturned *Swift v. Tyson*,²⁸ the famed Justice Story opinion holding that federal courts sitting in diversity were not bound by state high court determinations of "general principles of commercial law," but could determine the general law on their own.²⁹ *Erie* said *Swift*'s rule rested on the "fallacy" that "there is a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute"³⁰—which was a "fallacy" because "law in the sense in which courts speak of it today does not exist without some definite authority behind it."³¹ The "sense" to which *Erie* referred was "Austin's legal positivist conception of the nature of law"³² that law must be traceable to some ruler or government.³³ If neither "the Federal

26. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

27. See Jack Goldsmith & Steven Walt, *Erie and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673, 674 n.7 (1998) (collecting scholars who tie *Erie* to legal positivism). While Professors Goldsmith and Walt take a dissenting view, arguing that "*Erie*'s commitment to legal positivism is conceptually and normatively independent of its constitutional holding," *id.* at 675, they "do not deny that there might be a historical link between beliefs about legal positivism and *Erie*'s holding," particularly given "the language in the *Erie* opinion." *Id.* at 694. I discuss *Erie*'s language above in the text.

28. 41 U.S. 1 (1842).

29. *Id.* at 18.

30. *Erie*, 304 U.S. at 79 (internal quotation marks omitted) (quoting Justice Holmes).

31. *Id.* (internal quotation marks omitted) (quoting Justice Holmes).

32. Goldsmith & Walt, *supra* note 27, at 673–74.

33. See JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 30 (Weidenfeld & Nicholson 1954) ("[C]ustomary laws, considered as positive law,

Constitution [n]or . . . acts of Congress”³⁴ provide the rule of decision in a case—but the common law does instead—such common law must be “the law of that State.”³⁵ Because “the voice adopted by the State as its own . . . should utter the last word” as to its content, federal courts sitting in diversity must apply the common law as understood by the highest courts of the state in which they sit.³⁶

It is difficult today for people to comprehend “general law,” much less to understand how it could have held such sway in the nineteenth and early twentieth centuries.³⁷ We are fortunate Professor Caleb Nelson has done so excellent a job explicating the concept of general law.³⁸ As Nelson explains, law in the pre-*Erie* era was divided into “local” and “general.”³⁹ Local law included written (statutory and constitutional law), as well as some “unwritten” law.⁴⁰ Other aspects of unwritten law, however, were “of a more general nature.”⁴¹ “General law” referred to that part of the unwritten law whose “rules [were] not under the control of any single jurisdiction, but instead reflect[ed] principles or practices common to many different jurisdictions.”⁴² According to Blackstone’s influential account, the rules of unwritten law “receive[d] their binding power, and the force of laws, by long and immemorial usage, and by their universal reception throughout the kingdom.”⁴³ Adapted to America, Blackstone’s received teaching was that general law was “shaped from the bottom up by the very people who [were] sub-

are not commands. And, consequently, customary laws, considered as positive law, are not laws or rules properly so called.”); Anthony J. Bellia Jr., *State Courts and the Making of Federal Common Law*, 153 U. PA. L. REV. 825, 891 (2005) (“[T]he rise of positivistic legal thought led courts to conclude that all law, including general law, must be attributable to a sovereign source.”).

34. *Erie*, 304 U.S. at 78.

35. *Id.* at 79.

36. *See id.* (internal quotation marks omitted) (quoting Justice Holmes).

37. *See* Caleb Nelson, *A Critical Guide to Erie Railroad Co. v. Tompkins*, 54 WM. & MARY L. REV. 921, 929 (2013) (“To modern readers, the doctrine articulated by *Swift v. Tyson* might seem baffling.”).

38. *Id.*

39. *See id.* at 925.

40. *See id.*

41. *Id.* (quoting *Swift v. Tyson*, (16 Pet.) 1, 18 (1842)).

42. Nelson, *supra* note 13, at 505.

43. 1 WILLIAM BLACKSTONE, COMMENTARIES *64, *quoted in* Nelson, *supra* note 37, at 931 n.34. Early Americans adopted, but also adapted in important respects, this Blackstonian understanding. *See id.*

ject to it (or their predecessors)” and grew “out of practices that the people themselves ha[d] adopted over time.”⁴⁴

a. *Private International Law*

But *why* was there such thing as general law? The needs of international commerce, in conjunction with pre-twentieth century conceptions of the territorial limits of sovereign powers, are crucial parts of the answer. There long has been international commerce in which merchants from different polities engaged in multi-step transactions that spanned more than one polity. For instance, G (from Germany) may have come to France, where he agreed to buy goods from F (from France) that were to be shipped from Britain to Germany, payable by a bill of exchange upon the shipment’s completion. Such commerce required clarity as to the legal consequence of each step in the business transaction, which in turn required predictability as to what law governed each step.

The subset of the law of nations known as private international law—comprising what today is called admiralty, commercial law, and conflict of laws—facilitated international commerce by providing this needed predictability.⁴⁵ Some parts of a multi-step transnational transaction may have been regulated by the “local” law of a single polity. Choice-of-law principles determined which polity’s law applied, and aimed to ensure that the courts of all countries would come to the same conclusion and thus apply that polity’s law.⁴⁶ Other parts of a

44. Nelson, *supra* note 37, at 931; *see also* RANDALL BRIDWELL & RALPH U. WHITTEN, *THE CONSTITUTION AND THE COMMON LAW: THE DECLINE OF THE DOCTRINES OF SEPARATION OF POWERS AND FEDERALISM* 66 (1977) (showing that customary law was not laid down by the sovereign state, but emanated from the people and was merely recognized by courts).

45. *See* BRIDWELL & WHITTEN, *supra* note 44, at 51–52.

46. *Id.* at 52; *see also* 1 JOSEPH H. BEALE, *A TREATISE ON THE CONFLICT OF LAWS* 4 (1935) (“International commerce created the necessity for some principle of law which should protect the interests and give effect to the undertakings of the foreigner. . . . International trade could not be carried on as has now become necessary unless the trader could be assured that he would not be placed absolutely at the mercy of the vagaries or unknown requirements of the local law, but would find a well-established body of law to protect his rights. This body of law is the Conflict of Laws”); ERNEST G. LORENZEN, *Huber’s De Conflictu Legum*, in *SELECTED ARTICLES ON THE CONFLICT OF LAWS* 136, 160–61 (1947) (noting that most foreign conflicts scholars aimed to adopt a “uniformity” of conflict of laws derived “from a source that [was] superior to the internal law of each state, and this source they conceive[d] to be International Law” so that “[i]nstead of being a part of the internal law of each state, the rules of the Conflict of Laws constitute, in

transaction may not have been regulated by any particular polity, but instead might have been governed by the uniform bodies of transnational admiralty⁴⁷ (primarily regarding transport of goods) and commercial law.⁴⁸

Together, choice-of-law, admiralty, and commercial law ensured that each step in a multi-state commercial transaction would be governed by a single, knowable law. Predictability required that choice-of-law, admiralty, and commercial law be uniform across all jurisdictions, which could occur only if these three fields of law were not part of any single state's legal system but instead were part of international law.

But if these three bodies of law were not part of a single state's legal system, what determined the law's content? Scholars agree that the content of private international law arose from a combination of merchant customs, judicial recognition of such customs in case law, and the critical review of such customs and judicial decisions by scholars.⁴⁹ The judicial role was not limited to recognizing developed customs, but extended to reasoning inductively from the "data points supplied by existing customs" to generate "broader principles" that might suggest "answers to various questions of first impression."⁵⁰ These merchant customs and judicial opinions were then rationalized, organized, and sometimes critiqued by scholars and treatise-writers worldwide.⁵¹ The needs of international commerce thus drove the development of a legal system whose "rules [were] not under the control of any single jurisdiction, but instead reflect[ed] principles or practices common to many different jurisdictions."⁵²

their opinion, a universal system which imposes its rules upon the individual states from without").

47. An extra-state body of admiralty law arose because it was widely believed at the time that a polity's regulatory powers did not extend beyond its physical borders. See BRIDWELL & WHITTEN, *supra* note 44, at 53.

48. Scholars have posited several theories as to why extra-state commercial law arose. See generally Mark D. Rosen, *Do Codification and Private International Law Leave Room for a New Law Merchant?*, 5 CHI. J. INT'L L. 83, 83–85 (2004) (summarizing these).

49. See JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS AND REMEDIES, AND SPECIFICALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS §§ 2–4 (Boston, Charles C. Little & James Brown 3d ed. 1846).

50. Nelson, *supra* note 37, at 934.

51. See, e.g., STORY, *supra* note 49, §§ 12–16. For a list of earlier treatises on which Story relied, see *id.* at xviii–xxii.

52. Nelson, *supra* note 13.

b. *General Law in the United States*

Before *Erie*, a similar law-generating process that was independent of legislatures occurred within the United States in what *Swift* called “general principles of commercial law.”⁵³ Justice Story’s opinion in *Swift* distinguished between “state laws strictly local”—“the positive statutes of the state, and the construction thereof adopted by the local tribunals, and . . . rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character”—and “questions of a more general nature” like “questions of general commercial law”⁵⁴ The latter was “not the law of a single country only, but of the commercial world.”⁵⁵

Understanding general law facilitates appreciation of *Swift*’s conclusion that federal courts could exercise independent judgment as to the general law’s contents. To the extent general law was a “matter of fact” concerning merchant custom,⁵⁶ state courts were no better situated than federal courts to make such determinations. Even where custom did not settle the question, and courts had to reason inductively, “the state tribunals [were] called upon to perform the like functions as ourselves, that is, to ascertain, upon general reasoning and legal analogies what is the just rule furnished by the principles of commercial law to govern the case.”⁵⁷ Accordingly, though decisions of state courts as to the general commercial law were given the “most deliberate attention and respect of this Court,” state case law did not bind federal courts.⁵⁸

2. Choice-of-Law As General Law in Nineteenth Century America

As with commercial law, American courts in the pre-*Erie* era conceptualized domestic choice-of-law as part of the general law, and more specifically, as an extension of private interna-

53. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18 (1842).

54. *Id.* at 18–19.

55. *Id.* at 19.

56. See Michael Steven Green, *Erie’s Suppressed Premise*, 95 MINN. L. REV. 1111, 1129 (2011) (noting that insofar as general law was based on custom, it was to a large extent a “matter of fact,” and therefore “it was not odd that Story thought that courts of different sovereigns could exercise their own judgment about” the general law’s contents).

57. *Swift*, 41 U.S. (16 Pet.) at 19; see also *id.* (speaking of “the general principles and doctrines of commercial jurisprudence”).

58. *Id.*; see also Nelson, *supra* note 37, at 944.

tional law.⁵⁹ Early American courts treated the international law of choice-of-law as authoritative for purposes of determining domestic choice-of-law, and utilized reasoning consistent with the understanding that choice-of-law was part of the general law.⁶⁰ To demonstrate this, this section provides a detailed examination of two early cases,⁶¹ an analysis of two treatises, and an overview of late nineteenth century case law. And because they conceptualized choice-of-law as general law, American courts' efforts to discern that single body of choice-of-law satisfied the Single System Requirement.

a. *Nash v. Tupper*

The 1803 New York case of *Nash v. Tupper*⁶² is both representative and instructive of choice-of-law's connections to the

59. See David F. Cavers, *The Changing Choice-of-Law Process and the Federal Courts*, 28 LAW & CONTEMP. PROBS. 732, 737–38 (1963) (noting that during the *Swift* era “choice-of-law questions fell into the domain of ‘general law’”); Max Rheinstein, *The Constitutional Bases of Jurisdiction*, 22 U. CHI. L. REV. 775, 805 (1955) (showing that in the eighteenth and nineteenth centuries “we find the terms *ius gentium* and Law of Nations applied to that body of legal rules and principles which we now call the ‘law of conflict of laws’ or ‘private international law.’”); see also Lea Brilmayer, *Methods and Objectives in the Conflict of Laws: A Challenge*, 35 MERCER L. REV. 555 (1984); Michael Steven Green, *Choice of Law As General Common Law: A Reply to Professor Brilmayer*, in THE ROLE OF ETHICS IN INTERNATIONAL LAW 125 (Donald Earl Childress III ed., 2012). Most of the modern scholars who have observed choice-of-law's original connection to general law were not focused on choice-of-law, but mentioned this in passing in the course of larger projects concerning federal common law. See BRIDWELL & WHITTEN, *supra* note 44, at 61–97; Bellia, *supra* note 33, at 889–90 (“General law, or the law of nations, governed matters that courts today categorize as . . . conflict of laws, and private international law.”). This Article presents evidence that supports these scholars' observations concerning the general law character of early choice-of-law jurisprudence in this country.

60. See Baxter, *supra* note 17, at 29–30 (“Choice rules were regarded not merely as general rather than local law but as part of a still more august and transcendent body of principle, the law of nations.”).

61. Many others might be cited. See, e.g., *Harvey v. Richards*, 11 F. Cas. 746, 759 (C.C.D. Mass. 1818) (No. 6184) (Story, J.) (“[T]he question . . . is properly [one] of international law, dependent upon no local usages, but resting on general principles.”), cited in Baxter, *supra* note 17, at 30; *Blanchard v. Russell*, 13 Mass. (12 Tyng) 1, 4–8 (1816) (Parker, C.J.) (explaining that “the laws of any State cannot, by any inherent authority, be entitled to respect extraterritorially, or beyond the jurisdiction of the State which enacts them, is the necessary result of the independence of distinct sovereignties,” considering what occurs “when a merchant of *France, Holland, or England, enters into a contract in his own country*” and proceeding to analyze English laws on the choice of law issue).

62. 1 Cai. 402 (N.Y. Sup. Ct. 1803).

general law of private international law. The plaintiff sued in New York for promissory notes made in Connecticut. The parties agreed that the notes were governed by Connecticut law, but disagreed as to whether Connecticut's longer statute of limitations applied, or whether the lawsuit had to be dismissed on account of the forum's shorter statute of limitations.

Private international law was central to the court's analysis. The majority opinion began by stating:

It is a well settled rule, that contracts, with a few exceptions, are to be construed according to the laws of that country, in reference to which they are made. But it is equally well settled, that the remedy on them must be prosecuted according to the laws of that country in which the remedy is sought.⁶³

The first cited case, *Dupleix v. De Roven*,⁶⁴ concerned a Roman contract sued upon in a British court, which dismissed the action on account of England's statute-of-limitations.⁶⁵ The majority then cited a single New York case that similarly had applied the forum's statute of limitations to a promissory note that had been made in another state. Notwithstanding the lawyers' and dissent's lengthy arguments against the rule that forum law governed statutes of limitations, the majority summarily asserted that "[t]he correctness of those decisions"—meaning the single New York case as well as the British decision—"I feel no disposition to controvert."⁶⁶ The majority "conceiv[ed] the law on the point as settled," noting that "with this opinion the Scotch and Dutch laws accord, as will appear from Erskine's *Institutes*, vol. 2, 581, 582; Kaime[s]'s *Equity*, vol. 2, 358; Huberi *Prælectiones*, vol. 2, book 1, tit. 3; *De Conflictu Legum*, sec. 7."⁶⁷

Dissenting Judge Livingston similarly relied on the general law of private international law. "In the exposition of foreign contracts, courts take notice of the laws of the state in which they are made, or manifest injustice would ensue. This is a dictate of common sense, and is become a principle of general law."⁶⁸ Forum law applies regarding "the forms of the country where the action is depending; . . . but in deciding on the mer-

63. *Id.* at 412 (Lewis, C.J.).

64. *Dupleix v. De Roven*, (1705) 23 Eng. Rep. 950 (Ch.); 2 Vern. 540.

65. For a description of the facts that varies from what is reported in *Nash*, see *Le Roy v. Crowninshield*, 15 F. Cas. 362, 365 (C.C.D. Mass. 1820) (No. 8269) (Story, J).

66. *Nash*, 1 Cai. at 413.

67. *Id.*

68. *Id.* at 414 (Livingston, J., dissenting) (emphasis added).

its, the *lex loci* will be the rule.”⁶⁹ Judge Livingston claimed “[t]his distinction is found in the Roman and French law, and Emerigon”—an eighteenth century advocate in the Parliament of Aix-en-Provence⁷⁰—“speaks of it as adopted by all elementary writers.”⁷¹ After quoting two treatises in their original languages of French and Latin, Judge Livingston proceeded to Emerigon’s discussion of a lawsuit in French courts between two Englishmen concerning a contract made in England in which the French court upheld the contract notwithstanding its nonconformance with France’s statute of frauds. “On a point of *general law*, where we have no rule to the contrary, I cannot well err in conforming to one which we find adopted by a foreign tribunal”⁷²

b. *Le Roy v. Crowninshield*

Consider next the 1820 case of *Le Roy v. Crowninshield*.⁷³ This decision is particularly instructive for our purposes because it was written by Justice Story—who thirteen years later would publish a treatise on conflict of laws that would prove enormously influential in the United States,⁷⁴ and nine years after that would write *Swift v. Tyson*, which relied so heavily on general law.⁷⁵ Story, like the judges in *Crowninshield*, understood domestic choice-of-law to be part of the general law of private international law.⁷⁶

Crowninshield addressed the mirror image question at issue in *Nash*: whether the forum would apply its *longer* statute of limitations to allow a contract action that would have been barred under the statute of limitations of the state where the contract had been made. Like the judges in *Nash*, Story treated international choice-of-law as determinative, and otherwise reasoned in a manner that reflected his understanding that it was general law. Like *Nash*, Story’s analysis begins with private international law: “personal contracts are to have the same validity, interpretation and obligatory force in every other

69. *Id.* (emphasis added).

70. See STORY, *supra* note 49, at xix.

71. *Nash*, 1 Cai. at 414.

72. *Id.* (emphasis added).

73. 15 F. Cas. 362 (C.C.D. Mass. 1820) (No. 8269) (1820) (Story, J.).

74. See STORY, *supra* note 49.

75. See *supra* notes 53–58.

76. Professor Trautman accordingly is mistaken when he says Justice Story treated choice-of-law as state law. See Trautman, *Toward Federalizing*, *supra* note 14, at 1715–16.

country, which they have in the country where they are made”⁷⁷ Reflecting choice-of-law’s connection to the other components of private international law, Story explained that “the necessities of the civilized and commercial world rendered [this principle] indispensable.”⁷⁸

But, continued Story, “[a]nother rule equally well settled is, that remedies on contracts are to be regulated and pursued according to the law of the place, where the action is instituted, and not by the law of the place, where the contract is made.”⁷⁹ Story’s explanation was tied to the rule’s source in private international law:

Courts of law are instituted by every nation for its own convenience and benefit, and the nature of the remedies, and the time and manner of the proceedings, are regulated by its own views of justice and propriety, and fashioned by its own wants and customs. It is not obliged to depart from its own notions of judicial order, from mere comity to any foreign nation.⁸⁰

The party who seeks a remedy “must bring himself within the prescription [under forum law], that limits it, and if he does not . . . the prescription” bars him from recovering because “the laws of one country cannot in themselves have any extraterritorial force” in another country,⁸¹ and “every case that comes under our law must be decided by that law, and not by the law of any other country.”⁸² Foreign cases and treatises comprised the bulk of Story’s sources.⁸³

Particularly instructive of Justice Story’s conceptualization of choice-of-law as general law was the determinative role played by “well established” practices.⁸⁴ Story identified the two main arguments traditionally made in support of the rule that statutes of limitations are provided by the forum,⁸⁵ and then

77. *Crowninshield*, 15. F. Cas. at 364.

78. *Id.*

79. *Id.* at 364–65.

80. *Id.* at 365 (emphasis added).

81. *Id.* at 365–66.

82. *Id.* at 365 (quoting *Principles of Equity*, a treatise by eighteenth century British jurist Lord Kaimes).

83. See *id.* at 365–68 (citing Lord Kaimes’s *Principles of Equity*, John Erskine’s *Institutes*, Dutch jurist Ulricus Huberus’s *De Conflictu Legum*, Genoan writer Joseph Casaregis’s *Discursus Legales de Commercio*, French advocate Balthazard Emerigon’s *Traite des Assurances*, Dutch writer Paul Voet’s *De Statutis et Eorum Concursu*, and works by Robert Pothier and Johannes Heineccius, as well as cases from many different countries).

84. *Id.* at 364.

85. *Id.* at 368. The arguments are that “statutes of limitation belong to the regulations of process in every state, and limit the judicial order of

spends more than 3,000 words *refuting* them.⁸⁶ Notably, however, Story ultimately applies the rule with which he disagrees because “the question now before the court has been settled, so far as it could be, by authorities, which the court is bound to respect.”⁸⁷ And what are these authoritative sources? Story first cites to the foreign treatise writers Huberus, Voet, and Kaimes, then “look[s] to the decisions at the common law”—by which he means *English* decisions—and only after all this turns to “the decisions in our own courts,” first considering three New York cases before coming to a single decision “directly in point” by Massachusetts’s highest court, the state in which the federal court was sitting.⁸⁸ Story states “these authorities are too stringent and obstinate to be easily resisted,” and concludes “I feel myself, therefore, constrained to” apply forum law, which allowed the lawsuit to go forward.⁸⁹

Presaging his opinion in *Swift*, Story does not treat the choice-of-law question before the federal circuit court as a matter of state law, nor as a question whose resolution was to be provided by the highest state court in which the federal court sat; the Massachusetts decision was the absolute last datum that Story’s opinion considered, and received but cursory treatment in a single short paragraph.⁹⁰ Story’s approach in *Le Roy* thus is at loggerheads with *Klaxon*.⁹¹

Further, Story did not adopt the *lex fori* rule because the treatise writers and earlier decisions had convinced him that their approach was correct, or because their virtual unanimity gave him some doubts as to his preferred approach. To the contrary, he thought his view was the most sensible as a matter of “principle.”⁹² Nevertheless, insisted Story:

My humbler and safer duty is to administer the law as I find it, and to follow in the path of authority, where it is clearly defined, *even though that path may have been explored by guides, in whose judg-*

proceedings in their courts” and that “statutes of limitation extinguish the remedy only, and not the right, upon contracts.” *Id.*

86. *See id.* at 368–71 (concluding “[t]hat where all remedies are barred, or discharged by the *lex loci contractus*, and have operated on the case, there the bar may be pleaded by the debtor in a foreign tribunal, to repel any suit brought to enforce the debt”).

87. *Id.* at 371.

88. *Id.* at 371–72.

89. *Id.* at 372.

90. *See id.*

91. *See supra* note 76 and accompanying text.

92. *See Crowninshield*, 15 F. Cas. at 371.

ment the most implicit confidence might not have been originally reposed.⁹³

That Story thought “the question now before the court has been settled, so far as it could be, by authorities, which the court is bound to respect”⁹⁴ shows that he believed these foreign treatise writers and international cases were *authorities* that governed the question at hand;⁹⁵ in other words, domestic choice-of-law was continuous with international choice-of-law doctrine. And what determined the contents of choice-of-law was not principle or rationality, but what was determinative for general law: settled practice.⁹⁶

c. *Treatises*

i. Samuel Livermore’s Dissertations

Samuel Livermore published the first American treatise on choice-of-law in 1828.⁹⁷ Like the court opinions just canvassed, Livermore treated domestic choice-of-law as an aspect of the conflicts law that had been developed by foreign scholars and jurists. This is revealed in his treatise’s title: *Dissertations on the Questions Which Arise from the Contrariety of the Positive Laws of Different States and Nations*. Livermore’s methodology was reflective of this understanding. The introduction explains that the treatise “present[s] to the profession a view of the principles maintained by the great jurisconsults of Europe.”⁹⁸ Livermore describes his topic in a manner consistent with the concept of general law, explaining that he “attempt[s] to establish true and certain principles”⁹⁹ and “general principles.”¹⁰⁰ Livermore draws on German, French, and Dutch scholars in

93. *Id.* (emphasis added).

94. *Id.*

95. *See id.* (“The error, if any has been committed, is too strongly engrafted into the law, to be removed without the interposition of some superior authority.”).

96. Story’s treatise endorsed the rule he thought to have been wrong in *Le Roy*, *see* STORY, *supra* note 49, at 971–73 (explaining that statutes of limitations address the “remedy” and “right of action” and accordingly are governed by the *lex fori*), with a caveat not relevant here.

97. *See* SAMUEL LIVERMORE, DISSERTATIONS ON THE QUESTIONS WHICH ARISE FROM THE CONTRARIETY OF THE POSITIVE LAWS OF DIFFERENT STATES AND NATIONS (New Orleans, Benjamin Levy 1828). Livermore’s treatise was not successful. *See* 3 BEALE, *supra* note 46, at 1911.

98. LIVERMORE, *supra* note 97, at 20. Livermore also provides his own “reflections” and “considerations.” *Id.*

99. *Id.*

100. *Id.* at 165.

determining the rules he believes to be applicable to domestic choice-of-law.¹⁰¹

ii. Joseph Story's Commentaries on Conflicts of Laws

Story's *Le Roy* opinion presages the general law approach found in Story's great treatise on conflicts-of-law, which was first published in 1834.¹⁰² At the treatise's start, Story describes conflicts-of-law as "belong[ing] to a branch of international jurisprudence . . ."¹⁰³ Consistent with this, the treatise relies first and foremost on foreign sources. Typically, the treatise first reviews the foreign treatise writers, then proceeds to foreign case law, and only thereafter considers American cases.¹⁰⁴ Story states he aims to identify the "best established approach"¹⁰⁵ and the "principle[s] generally recognised by all nations,"¹⁰⁶ and adopts practices that are widespread even if he disagrees with them.¹⁰⁷ Story hoped the treatise would be of use to non-American lawyers in their legal practices outside of the United States.¹⁰⁸ The treatise in fact had immense influence on European thought, particularly in France and Germany.¹⁰⁹

101. See, e.g., *id.* at 21–36 (consulting sources from all these countries to determine the circumstances under which one state is obligated to give effect to laws from another state); *id.* at 37–38 (considering French and Italian scholars' writings to determine choice-of-law question arising in Louisiana); *id.* at 164–71 (consulting foreign writers to determine whether payment of debts of an insolvent testator decided on basis of law of debtor's domicile or place where debts arose).

102. Chancellor Kent's Commentaries occasionally addressed choice-of-law, but did not do so in a systematic manner, and was only infrequently referenced by Story. See, e.g., 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 453–68 (O.W. Holmes, Jr. ed., Boston, Little, Brown, & Co. 12th ed. 1873) (providing extensive discussion of principle of *lex loci* to contracts in midst of lectures on personal property); Baxter, *supra* note 17, at 26 (noting that Kent's Commentaries "contain[] only isolated references to choice rules scattered throughout the various lectures on substantive topics"). For a comprehensive list of the foreign treatises on which Story relies, see STORY, *supra* note 49, at xviii–xxii.

103. STORY, *supra* note 49, at xi.

104. See, e.g., *id.* §§ 39–106 (evaluating the rules concerning domicile and capacity). For more evidence of Story's profound reliance on foreign sources, see *infra* notes 215–25 & 240–50 (showing that foreign sources provided the conceptual foundation of Story's choice-of-law approach, what this Article dubs the 'anti-extraterritorialism maxim').

105. STORY, *supra* note 49, § 63.

106. *Id.* § 64; see also *id.* § 586 (looking to identify "the general assent of civilized nations in modern times").

107. See, e.g., *supra* note 96.

108. See, e.g., STORY, *supra* note 49, at xiv (enumerating important non-English treatise writers, and observing that "I am not aware, that the works of

iii. Francis Wharton's Treatise

An influential American treatise published by Francis Wharton in 1872 continued to reflect the understanding that choice-of-law was part of the general law of private international law. Just note the treatise's title: *Conflict of Laws, or Private International Law, Including a Comparative View of Anglo-American, Roman, German, and French Jurisprudence*. Wharton's preface speaks of "[t]he general European authoritativeness" of the "complex, but most philosophic system of jurisprudence, which has grown up in Germany, for the determination of Private International relations."¹¹⁰ Wharton accordingly

look[s] to the Anglo-American law on the one side, and that of Germany on the other, as the principal factors in that common basis of jurisprudence to which all who travel or do business in foreign lands must appeal, and which—so far as founded on right reason—must be largely influential in determining the private international relations of the States of the American Union.¹¹¹

d. *Choice-of-Law in Late Nineteenth Century America*

American decisions throughout the nineteenth century continued to treat domestic choice-of-law as part of the general law of private international law. The American decisions of this period regularly cited to the treatises of Wharton and Story,¹¹² and also continued to treat as authoritative the private international law found in foreign cases.¹¹³ In the other direction, American cases also consulted purely domestic choice-of-law decisions (in conjunction with foreign materials) to determine

these eminent Jurists have been cited at the English Bar," and asking "[h]ow it should happen, that, in this age, English Lawyers should be so utterly indifferent to all foreign jurisprudence" insofar as "[m]any occasions are constantly occurring, in which they would derive essential assistance from it, to illustrate the questions, which are brought into contestation in all their Courts.").

109. 3 BEALE, *supra* note 46.

110. FRANCIS WHARTON, A TREATISE ON THE CONFLICT OF LAWS, OR PRIVATE INTERNATIONAL LAW, INCLUDING A COMPARATIVE VIEW OF ANGLO-AMERICAN, ROMAN, GERMAN, AND FRENCH JURISPRUDENCE ii (1872).

111. *Id.*

112. *See, e.g.*, *Seeman v. Phila. Warehouse Co.*, 274 U.S. 403, 408 (1927) (relying on Wharton); *Pritchard v. Norton*, 106 U.S. 124, 130–33 (1882) (relying heavily on both Wharton's and Story's treatises); *Milliken v. Pratt*, 125 Mass. 374, 381 (1878) (relying on Story).

113. *See, e.g.*, *Pritchard*, 106 U.S. at 130–38 (citing both foreign and domestic choice-of-law decisions to determine rule for purely domestic choice-of-law question); *Milliken*, 125 Mass. at 377–80 (first consulting English decisions before considering domestic case law).

international choice-of-law rules.¹¹⁴ These practices are perfectly consistent with domestic choice-of-law having been understood at that time as being part of the general private international law.

Late nineteenth century choice-of-law decisions did not, however, look identical to those of fifty years before. As Story's and Wharton's treatises on conflicts-of-law grew increasingly influential, and as the number of domestic choice-of-law decisions multiplied, the influence of these domestic sources increased, and American cases turned with less frequency to foreign case law.¹¹⁵ Late nineteenth century decisions accordingly do not typically exhibit the degree of reliance on international materials shown in the *Nash* and *Crowninshield* decisions, though foreign citations were still frequent.¹¹⁶

But late nineteenth century decisions still treated choice-of-law as general law, aiming to discern widespread practice rather than focusing on how cases in their particular jurisdiction had answered the question.¹¹⁷ For example, when the United States Supreme Court made choice-of-law determinations upon reviewing appeals from diversity actions, it treated case law from other jurisdictions (both domestic states and foreign countries) as authoritative.¹¹⁸ Consider as well that the United States Supreme Court approvingly noted when state courts had approved of the choice-of-law rules that it—the United States

114. See, e.g., *London Assurance v. Companhia de Moagens do Barreiro*, 167 U.S. 149, 160–61 (1897) (citing to a domestic choice-of-law decision to determine whether English or American law applied to the insurance contract); *Liverpool & Great W. Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397, 447–58 (1889) (analyzing both foreign and purely domestic choice-of-law decisions to determine whether British or American law determined whether common carriers can contractually exempt themselves from their own negligence).

115. See cases discussed *supra* note 112.

116. See, e.g., *Scudder v. Union Nat'l Bank*, 91 U.S. 406, 410–13 (1875) (consulting mostly domestic case law to determine which state's law applied to decide the validity of a bill of exchange, but also considering English decisions).

117. See, e.g., *Liverpool*, 129 U.S. at 458 (noting that its choice-of-law rule was consistent with “the great preponderance, if not the uniform concurrence, of authority”); *Pritchard*, 106 U.S. at 130–38; *Scudder*, 91 U.S. at 410–13; *Milliken*, 125 Mass. at 377–83 (reviewing case law from other countries and other states).

118. See, e.g., *Hall v. Cordell*, 142 U.S. 116, 120–21 (1891) (consulting state cases to ascertain the choice-of-law rule); *Pritchard*, 106 U.S. at 130, 137–41 (same).

Supreme Court—had earlier adopted.¹¹⁹ The Supreme Court also noted when foreign jurists approved of choice-of-law rules that had been advocated in Story's treatise.¹²⁰ And when American courts adopted choice-of-law rules that differed from those of other countries, foreign cases generally were not dismissed as non-binding precedent, but instead were criticized to explain why they were "entitled to little weight."¹²¹ In other words, foreign cases were authoritative (albeit distinguishable), not irrelevant. The unspoken premise behind these approaches to case law from other jurisdictions was that the American courts were aiming to locate a single choice-of-law jurisprudence.¹²² The understanding that choice-of-law was general law, in other words, led American courts to aim to locate a single body of law, thereby satisfying the Single System Requirement.

B. CHOICE-OF-LAW AS (GENERAL LAW-LIKE) STATE LAW

1. Joseph Beale's Treatise and the (First) Restatement

The next comparably influential American conflicts scholar¹²³ was Joseph Beale, the Royall Professor of Law at Harvard, author of a new treatise on conflicts-of-law,¹²⁴ and the reporter and main author of (what proved to be the first) *Restatement of the Conflicts of Law*. Beale largely continued Story's approach to conflicts,¹²⁵ but Beale's treatise also reflects a crucial, though

119. See, e.g., *Pritchard*, 106 U.S. at 131 (noting a rule the Court had laid down and that "its correctness was recognized by" a subsequently decided North Carolina decision); see also *id.* at 139–41 (noting choice-of-law approach adopted by the Supreme Court in two cases and then noting that "[t]hese cases were relied on by the Supreme Court of New York" in a subsequent case).

120. See *id.* at 131 (noting Lord Brougham's observation concerning "the excellent distinction taken by Mr. Justice Story").

121. *Milliken*, 125 Mass. at 381. But see *Pritchard*, 106 U.S. at 131 (noting that continental Europe and England treated statutes of limitations differently for purposes of choice-of-law).

122. This is not to suggest that the decisions in fact were uniform. See 2 BEALE, *supra* note 46, at 1108–09.

123. English scholar A.V. Dicey authored an important and influential book, whose approach was largely adopted by Beale. See generally A.V. DICEY & A. BERRIEDALE KEITH, *CONFLICT OF LAWS* (3d ed. 1922). Many of the early legal realists directed their energies to choice-of-law, but none had the short-term influence of Beale.

124. See generally 1 BEALE, *supra* note 46.

125. See DAVID P. CURRIE, HERMA HILL KAY, LARRY KRAMER & KERMIT ROOSEVELT, *CONFLICT OF LAWS* 5 (8th ed. 2010). Beale rejected Story's comity approach, however, introducing in its place the concept of vested rights. See *id.* For more on vested rights, see *infra* note 131.

until now largely overlooked, reconceptualization of conflicts-of-law: instead of viewing domestic conflicts law as part of the general law of private international law, Beale thought that “Conflict[s] of Laws [was] part of the law of each state,”¹²⁶ more specifically the “common law.”¹²⁷

To clarify Beale’s understanding, the first subpart considers why Beale abandoned the longstanding view that choice-of-law was part of general private international law. The next subpart explains Beale’s understanding of common law, and shows why Beale’s reconceptualization did not, in his eyes at least, undermine choice-of-law’s uniformity across states. Beale had a “general law”-like conception of state common law, and hence understood choice-of-law in a manner that satisfied the Single System Requirement.

2. What Fueled Beale’s Reconceptualization of Choice-of-Law

a. *Why It Wasn’t Legal Positivism*

It is tempting to assume that Beale reconceptualized choice-of-law from general law to state common law for the same reason that *Erie* rejected general law: owing to legal positivist commitments that demanded that law be tied to some sovereign.¹²⁸ This is not so, for an examination of Beale’s philosophy of law¹²⁹ discloses that he was not a positivist. Excavating Beale’s jurisprudence illuminates how Beale could have thought choice-of-law would be predominantly uniform across all jurisdictions (hence satisfying the Single System Requirement) despite its being state common law.

Beale understood legal positivism’s claim that law is “an expression of sovereign will” to mean that law consists solely of “the rules made by the legislative body,” and criticized positivism for “appear[ing] to ignore the *principal* element of law, the so-called ‘unwritten law.’”¹³⁰ Instead of positivism, Beale largely endorsed Sir Frederick Pollock’s position, which Beale summarized as the view that law was the “sum of the rules binding

126. 1 BEALE, *supra* note 109, at 52.

127. *Id.* at 28.

128. *See infra* Part I.C.

129. Justice Frankfurter, a student of Beales while at Harvard Law School, noted that Beale’s course on the Conflict of Laws was in essence a “course in Jurisprudence.” Felix Frankfurter, *Joseph Henry Beale*, 56 HARV. L. REV. 701, 703 (1943).

130. 1 BEALE, *supra* note 46, at 22 (emphasis added).

members of the state as such.”¹³¹ In Beale’s view, law comprised three parts: “[l]aw . . . is made in part by the legislature; in part it rests upon precedent; and in great part it consists in a homogeneous, scientific, and all-embracing body of principle”¹³² Whereas legislation was the paradigm of law for legal positivists,¹³³ Beale believed “principle” to be law’s essence.¹³⁴ This is attributable to Beale’s conception of law: “the one most important feature of law” is “that it is not a mere collection of arbitrary rules, but a body of scientific principle.”¹³⁵ Beale thought the third component of law—principle—was a “branch of practical philosophy,” developed “through the use of reason and experience”¹³⁶

What puts Beale most at odds with legal positivism is his view that the first two components of law *endanger* principle, the third (and for him most important) component of law. “Purity of doctrine may be lost through wrong decisions of courts” and “[t]he application of general principles may be inhibited by legislation.”¹³⁷ In other words, what legal positivists viewed as the only legitimate sources of law endangered what Beale thought to be the “most important feature of law.”¹³⁸ Insofar as he believed scientific principle and practical philosophy to constitute the core of law, Beale apparently thought law’s authority was self-generating, much like the laws of nature and morality. Beale accordingly thought law to be independent of the sovereign state, contradicting legal positivism’s foundational presupposition.

131. *Id.* at 25. Beale proposed one modification, which does not affect the analysis that follows above in text: Beale thought that instead of saying that “rules of law bind individuals,” it instead should be said that “[p]arties are bound, not by the law, but by obligations created by the law.” *Id.* This rephrasing reflects Beale’s understanding of the concept of “vested rights,” which was an outgrowth of his view that laws could not have extraterritorial application, though legal obligations could.

132. *Id.*

133. *See id.* at 22–23 (arguing that the positivist Austin “assimilat[ed] judicial to statute law”).

134. *See id.* at 25 (“Much the largest and most important part of the law, therefore, is this body of principle . . .”).

135. *Id.* at 24–25.

136. *Id.* at 25.

137. *Id.*

138. *Id.* at 24–25.

b. *Domesticating Choice-of-Law*

What led Beale to insist that conflict-of-laws was a part of state law? Not a legal positivistic need to tie conflicts doctrine to a sovereign, but a desire to *disconnect* the subject from foreign law. Consider the following bold statement from Beale's treatise: "It is sometimes urged that the doctrines of the Conflict of Laws have an international sanction, binding to some extent upon the various states. This view is not today seriously held and cannot be sustained. It has never been adopted by any common-law authority."¹³⁹ Beale claims "the doctrines of foreign law have influenced [choice-of-law] only as they have been considered by the authors of some of the treatises on the subject, notably Story."¹⁴⁰ "The courts have developed the subject, as they have developed any other topic of the common law, by the course of decision," and there have been only a "few cases where the decision of the courts has been influenced by a doctrine foreign to the common law"¹⁴¹

This Article is not the place to fully evaluate the historical veracity of Beale's claims. At the very least, Beale's position is inconsistent with the New York Justices' approach in the *Nash* case, and Justice Story's approach in *Crowninshield*. Indeed, whereas Beale goes so far as to argue that foreign authority does not even have the status of "persuasive" precedent,¹⁴² Justice Story treated foreign materials as authoritative in his opinion in *Crowninshield*, and indeed throughout his extraordinarily influential treatise.

3. Beale's Conception of the Common Law

Since Beale identified conflicts-of-law as an aspect of state common law, fully comprehending his conception of common law is necessary to appreciate his understanding of choice-of-law. Two important lessons emerge. First, Beale's idiosyncratic understanding of common law was consistent with its being both state law and essentially uniform across the country (and hence consistent with the Single System Requirement). Second, we will be able to understand why Beale gave no serious

139. *Id.* at 51.

140. *Id.*

141. *Id.* For Beale's explanation as to why domestic choice-of-law was not a part of international choice-of-law, see *id.* at 10–11, 51.

142. See *id.* at 52 (arguing that "there is nothing to be gained by the citation of foreign authority as persuasive to the court in arriving at its decision").

thought as to whether choice-of-law is federal law, but reflexively concluded it was state law.

Beale did not simply identify common law with judge-made rules. Rather, common law referred to the “common elements” found in the legal systems of England and the United States.¹⁴³ The common law encompassed “two kinds of unwritten law,” namely the “law formulated by the courts” and “the general body of legal precepts and legal thought.”¹⁴⁴ The latter refers to the principles and doctrine that constituted Beale’s third component of law.¹⁴⁵

Another characteristic of common law, for Beale, was that it was *state* law. Writing shortly before *Erie*, Beale’s treatise contained a section entitled “Is There a Federal Common Law?”¹⁴⁶ To this he gives a swift (pardon the pun) unqualified answer: no. Mischaracterizing Story’s approach in *Swift v. Tyson*, Beale claimed that *Swift* only held that “on ordinary questions of unwritten law . . . the federal courts were at liberty to follow their own idea of the common law of the state”¹⁴⁷ Beale argued that “federal common law” was a misnomer. “[T]he way in which it was decided, the weight given by the [federal] court to the decisions of courts, and especially of federal courts, in other states, led lawyers to apply the name of ‘federal common law’ to the doctrine.”¹⁴⁸ But Beale denied there was “such thing as a [common] law of the nation apart from the laws of the states.”¹⁴⁹ This explains why once Beale determined that choice-of-law was common law, he never considered whether it was state or federal; on his understanding, common law could only be *state* law. This Article’s third part identifies the fallacy in Beale’s reasoning as it explains why choice-of-law indeed could be federal common law.¹⁵⁰

Though Beale thought choice-of-law to be state common law, his idiosyncratic understanding of common law led him to expect that choice-of-law would be uniform nationwide. Beale believed the common law comprised two parts. First, the com-

143. *Id.* at 10.

144. *Id.* at 26–27.

145. *See supra* text accompanying notes 132–36.

146. *See* 1 BEALE, *supra* note 46, at 25.

147. *Id.* at 26 (emphasis added); *see also id.* (stating that the law “thus declared” by federal courts “was of course the law of the state”).

148. *Id.*

149. *Id.* at 26.

150. *See infra* Part III.A, III.B, & III.D.

mon law was composed of the “common elements” across states,¹⁵¹ with respect to which the “decisions of courts of all such states are important *evidences* of the [common] law.”¹⁵² Second, Beale thought each state’s common law to be distinctive, such that there was a “common law of New York, and a quite distinct common law of Tennessee or of England”¹⁵³ The tensions in Beale’s account are plain: how can common law be simultaneously common across the states and distinctive across each? And if “[t]he doctrines of [the common] law are authoritative in each state whose law is based upon it,” how can each state’s judicial decisions merely be “*evidences* of the [common] law?”¹⁵⁴

The answer to these two questions is that Beale thought the common law *primarily* consisted of the common elements, with only relatively minor variations across states. Growing out of his larger jurisprudence that we examined above,¹⁵⁵ Beale identified the common elements with “principle,” what he believed to constitute law’s core. It was as to principle that the state courts’ decisions constituted merely “important evidences of the [common] law.”¹⁵⁶ It is worth noting how “general law”-like Beale’s conception of this component of state common law was. Indeed, in addition to the *Swift*-like conclusion that state court decisions were mere evidence of this part of the common law,¹⁵⁷ Beale sometimes referred to the common elements as the “general common law.”¹⁵⁸ And Beale did not merely co-opt that locution, but used it much as it had been deployed by Story and others before him: the general common law was the “system which is accepted by all so-called common-law jurisdictions *but is the particular and peculiar law of none*”¹⁵⁹ Thus, Beale thought there was a single common law of New York and Ten-

151. 1 BEALE, *supra* note 46, at 10.

152. *Id.* at 10 (emphasis added).

153. *Id.* at 26–27.

154. *Id.* at 10 (emphasis added).

155. *See supra* notes 130–36.

156. 1 BEALE, *supra* note 46, at 10.

157. *See supra* note 58 and accompanying text.

158. 1 BEALE, *supra* note 46, at 27.

159. *Id.* (emphasis added). What set Beale’s understanding apart from his predecessors was Beale’s exclusion of the civil law countries. *See id.* at 10. This difference does not matter for the point at hand concerning Beale’s expectation, like that of his predecessors, of uniformity within the United States.

nessee as to the “general common law.”¹⁶⁰ It was only outside the realm of principle that each state’s common law, as announced by their courts, could diverge (i.e., be “peculiar” and “particular”).¹⁶¹

So, notwithstanding Beale’s reconceptualization of choice-of-law as state law, Beale (like his predecessors) believed that choice-of-law would be fundamentally uniform. Beale’s treatise, as well as his efforts in the American Law Institute that culminated in the Restatement of Conflicts, aimed at developing robust “common elements”—a robust general common law—that he expected would be uniform for all common law jurisdictions. In short, Beale’s conception of state common law shared much in common with the general law conception of choice-of-law that long had prevailed. Beale conceptualized choice-of-law as common law to disconnect it from foreign sources, not to render choice-of-law heterogeneous across states. Beale’s understanding of choice-of-law, like his predecessors’, was largely consistent with the Single System Requirement.

To be sure, Beale recognized the possibility that mistaken case law or wrongheaded legislation could create deviations from the scientific body of principle and practical philosophy that he labored to articulate.¹⁶² But he hoped that his treatise and restatement would keep judicial errors to a minimum. And as to legislation, Beale believed that “statutes altering the law of a particular state within the domain of the Conflict of Laws are very much less common than they are in most topics of the law.”¹⁶³ Beale undoubtedly hoped this would continue. Indeed, though prominent scholars in Beale’s time were arguing that Congress had power under the Full Faith and Credit Clause’s Effects Clause to enact a federal choice-of-law statute,¹⁶⁴ Beale’s

160. *But see id.* at 52 (“While the general principles of the common law as developed by the states *and as discussed in this treatise*, are like the principles of the common law in force in every common-law state, yet, like any principles of the common law, they are subject to change either by legislation, by judicial decision or by any of the other forces that change the particular law of a state.” (emphasis added)).

161. *Vis-à-vis* such divergences, Beale presumably understood the appellation “*common* law” to refer to the fact that the rule was “unwritten” insofar as its source did not come from the legislature. *See id.* at 26 (describing the court-formulated law as one of “the two kinds of unwritten law”).

162. *Id.* at 52–53.

163. *Id.* at 53.

164. *See, e.g.,* Cook, *supra* note 1, at 428.

treatise is silent on this subject.¹⁶⁵ Beale evidently distrusted Congress as much as he distrusted state legislatures. It was principle—the common elements—that Beale hoped and expected would form the core of choice-of-law.

For all these reasons, choice-of-law's status as state law did not, for Beale, mean that there would be a multiplicity of choice-of-law doctrines across states. But as we shall soon see, Beale's expectations regarding widespread "common elements," and hence uniformity, of choice-of-law were to be sharply disappointed.¹⁶⁶

C. CHOICE-OF-LAW AS CONSTITUTIONAL LAW

Thus far we have seen that domestic choice-of-law long was understood to be a part of the "general law" of private international law. Beale pivoted, believing choice-of-law to be state common law, but his conception of common law shared many characteristics of the general law, most importantly an expectation of cross-state uniformity that did not violate the Single System Requirement. There is a third way choice-of-law was briefly conceptualized in the pre-modern period: as constitutional law.

It has been suggested that the United States Supreme Court began to constitutionalize choice-of-law in the late nineteenth century,¹⁶⁷ but this is mistaken for two reasons. First, careful study of the cases cited for this proposition shows that they did not concern choice-of-law, but addressed different issues.¹⁶⁸ Second, the Court decided tens of cases between 1875 and 1928 in which it resolved choice-of-law questions without advertent to the Constitution.¹⁶⁹

165. See 1 BEALE, *supra* note 46, at 278 (not mentioning Congress's powers under the Effects Clause when discussing the Full Faith and Credit Clause).

166. See *infra* Part II.B.

167. See Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2504 & n.238 (1999).

168. *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), concerned due process limits on the scope of states' regulatory jurisdiction. See *id.* at 587–90 (holding that Louisiana was without power to apply its law to an insurance contract entered into in New York). *Chicago & Alton R.R. v. Wiggins Ferry Co.*, 119 U.S. 615, 622 (1877), held that the Full Faith and Credit Clause required the forum to take evidence concerning non-forum law, but did not indicate what state's law would have to be applied. And *Green v. Van Buskirk*, 72 U.S. (5 Wall.) 307, 313–14 (1866), addressed how the forum had to treat another state's judgment, not another state's laws.

169. For a helpful examination of the Court's choice-of-law decisions concerning contracts, see 2 BEALE, *supra* note 46, at 1106–09. An examination

However, the Court (almost) unquestionably began treating choice-of-law as constitutional law in the 1930s.¹⁷⁰ The clearest example is the 1932 case of *Bradford Electric Light Co. v. Clapper*,¹⁷¹ which held that a New Hampshire state court was constitutionally required to apply a Vermont workers compensation statute to a worker accident that had occurred in New Hampshire.¹⁷² The Court required the forum to apply non-forum law because “full faith and credit [must] be given to the public act of Vermont”¹⁷³ *Clapper* and several other decisions “led the American Law Institute in 1934 to reserve the question whether every problem in conflict of laws had become a question of constitutional law.”¹⁷⁴

Given the Full Faith and Credit Clause’s categorical language—“Full Faith and Credit *shall be given* in each State to the public Acts . . . of every other State”¹⁷⁵—one might wonder why the Full Faith and Credit Clause had not been invoked by American courts *whenever* they confronted a domestic choice-of-law question. This is a good question, about which three things can be said.

First, the Full Faith and Credit Clause did not in fact play any role in resolving domestic choice-of-law questions in the United States prior to *Clapper*. The cases surveyed and referenced above are fully representative of this: choice-of-law decisions were made in consultation with foreign sources, or by otherwise seeking “general” principles, but not by considering

of these cases discloses that the Court decided choice-of-law without adverting to the Constitution.

170. I have argued previously that these cases are best understood as federal common law rather than constitutional law, and continue to believe this to be so. See Mark D. Rosen, *Why the Defense of Marriage Act Is Not (Yet?) Unconstitutional: Lawrence, Full Faith and Credit, and the Many Societal Actors That Determine What the Constitution Requires*, 90 Minn. L. Rev. 915, 957–75 (2006); see also Mark D. Rosen, *Congress’s Primary Role in Determining What Full Faith and Credit Requires: An Additional Argument*, 41 CAL. W. INT’L L.J. 7, 8–28 (2010) [hereinafter Rosen, *Congress’s Primary Role*]. The main point made above in text is unaffected whether this case law is understood to be constitutional law or federal common law because, either way, choice-of-law was conceptualized consistently with the Single System Requirement. That the Court’s Full Faith and Credit jurisprudence is best understood as federal common law means that overturning *Klaxon* would result in less doctrinal disruption than might otherwise appear.

171. 286 U.S. 145 (1932).

172. *Id.* at 159.

173. *Id.*

174. Cheatham, *Federal Control*, *supra* note 17, at 587.

175. U.S. CONST. art. IV, § 1 (emphasis added).

what the Constitution required.¹⁷⁶ Likewise, Justice Story's monumental treatise says absolutely nothing about the Full Faith and Credit Clause's application to sister states' legislation; it only addresses that Clause's requirements as to *judgments* issued by another state's courts,¹⁷⁷ a subject distinct from choice-of-law.

Second, doctrinal considerations explain Full Faith and Credit's long time absence from choice-of-law. In an excellent recent article that builds upon the work of many other scholars, David Engdahl persuasively argues that the original and early understanding was that "full faith and credit" meant only that American courts were required to treat sister-state acts as *prima facie* evidence.¹⁷⁸ On this view, the Full Faith and Credit Clause did not mandate that a forum give effect to sister state legislation,¹⁷⁹ and hence was not relevant to choice-of-law.¹⁸⁰ This explains why American choice-of-law decisions of the eighteenth and nineteenth centuries did not appeal to the Constitution, and raises questions as to why *Clapper* did.¹⁸¹

Third, *Clapper's* move to constitutionalize choice-of-law was short-lived. *Clapper* did not acknowledge that its approach of constitutionalizing choice-of-law was a break with the past,¹⁸²

176. See *supra* Part I.A.2.

177. And as to that, Justice Story literally dedicates only a single paragraph! See STORY, *supra* note 49, § 609.

178. See David E. Engdahl, *The Classic Rule of Faith and Credit*, 118 YALE L.J. 1584 (2009); see also STORY, *supra* note 49, at 1004–05 ("The Constitution . . . did not make the judgments of other states domestic judgments to all intents and purposes; but only gave a general validity, faith, and credit to them, as evidence."); Kurt H. Nadelmann, *Full Faith and Credit to Judgments and Public Acts: A Historical-Analytical Reappraisal*, 56 MICH. L. REV. 33 (1957); Sachs, *supra* note 15, at 1206 & n.25. For a discussion of what it meant for a judgment to be *prima facie* evidence, see Sachs, *supra* note 15, at 1252–53.

179. See Engdahl, *supra* note 178, at 1609.

180. With one important caveat: the Clause gave Congress the power to determine such effects. See *id.*

181. Of course the mere fact that *Clapper* effectuated a change does not on its own mean that it was wrongly decided. Changed applications can be legitimate even under originalist commitments, see JACK M. BALKIN, *LIVING ORIGINALISM* (2011), and all the more so under non-originalist approaches.

182. Justice Brandeis, *Clapper's* author, had stated in a 1916 opinion that the claim that a state court had "made a mistaken application of doctrines of the conflict of laws" was "purely a question of local common law . . . with which this court is not concerned." *Kryger v. Wilson*, 242 U.S. 171, 176 (1916). This proposition was not cited by the Supreme Court until after *Klaxon*, however, and between *Kryger* and the aborted attempt to constitutionalize choice-of-law the Supreme Court continued to treat choice-of-law as if it were a part of

nor did it provide a clear rule for determining when a forum was constitutionally required to apply non-forum law.¹⁸³ In subsequent cases the Court fashioned a balancing test under which choice-of-law was to be decided by “appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight.”¹⁸⁴ With only a few exceptions, cases after *Clapper* held that the forum could apply forum law, even where the non-forum had substantial interests in having its law applied.¹⁸⁵ Less than ten years after *Clapper*, the Court definitively announced in *Klaxon* that choice-of-law was state law.¹⁸⁶

II. MODERN AMERICAN CHOICE-OF-LAW, AND FOUR LESSONS FOR THE FUTURE

Part I identified three different ways choice-of-law was conceptualized in the pre-modern era: it long was understood to be part of the general law of private international law, was reconceptualized as state common law by Beale, and for a short period was treated as federal constitutional law by the Su-

general law, *see, e.g.*, *Seeman v. Phila. Warehouse Co.*, 274 U.S. 403, 407 (1927). In other words, *Kryger's* identification of choice-of-law as state law was but a fleeting blip until *Klaxon*.

183. *Clapper* ruled that full faith and credit required that a defendant be able to invoke a defense available under non-forum law. *See* *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 160 (1932). *Clapper* plausibly noted that allowing plaintiff to circumvent the non-forum's workman's compensation statute would mean that “the effectiveness of the [non-forum] Vermont Act would be gravely impaired.” *Id.* at 159. But *Clapper* also stated “the full faith and credit clause does not require the enforcement of every right conferred by a statute of another state. There is room for some play of conflicting policies.” *Id.* at 160.

184. *Alaska Packers Ass'n v. Indus. Accident Comm'n of Cal.*, 294 U.S. 532, 547 (1935).

185. *See id.*; *see also* *Pac. Emp'rs Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 504 (1939). For a scholarly treatment of these cases, *see* Paul A. Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210, 1219–25 (1946). For some of the few cases where the forum was required to apply non-forum law, *see* *Order of United Commercial Travelers v. Wolfe*, 331 U.S. 586 (1947) (holding the forum had to apply the law of the state of incorporation of a fraternal benefit society); *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178, 182–83 (1936) (requiring the forum to apply non-forum law on the theory that non-forum statute became part of the terms of a contract, not on a balancing of interests approach).

186. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941). From that time forward, the Constitution has not served as the source choice-of-law, but has been understood to provide (exceedingly modest) limits on state choice-of-law doctrines. For a discussion of these constitutional limits, *see* Rosen, *Congress's Primary Role*, *supra* note 170, at 14–16.

preme Court.¹⁸⁷ As different as they were, all three anticipated that choice-of-law would be uniform nationwide; uniformity is an inherent characteristic of general law and constitutional law, and was Beale's expectation because of his general law-like conception of common law. All three conceptualizations of choice-of-law thus satisfied the Single System Requirement.

Expectations of choice-of-law uniformity have been abandoned, however, in the modern era. This Part first explains how and why our present "chaotic" system came about. As the first subsection shows, the Supreme Court's decisions in *Klaxon* and *Wells* declared that choice-of-law was state law that could vary from state to state. The next subsection demonstrates the many different choice-of-law regimes that have since emerged, and shows that they generate disparate outcomes. In the process, the second subsection identifies four lessons that will prove crucial to Part III's argument that choice-of-law should be reconceptualized as federal nonconstitutional law.

A. CHOICE-OF-LAW AS (HETEROGENEOUS) STATE LAW: *KLAXON* AND *WELLS*

Choice-of-law's modern era began in 1941, in the Supreme Court's decision of *Klaxon Co. v. Stentor Electric Manufacturing Co.*¹⁸⁸ *Klaxon* did two things, both of which this Article sharply criticizes. First, *Klaxon* held that federal courts sitting in diversity must apply the choice-of-law rules of the states in which they are located. (Part III explains why this is wrong: federal courts sitting in diversity must apply federal choice-of-law rules.) Second, *Klaxon* held that choice-of-law is state law.¹⁸⁹ (Part III also explains why this is wrong: choice-of-law in state courts is properly understood to be federal law).

Although *Klaxon*'s second holding, that choice-of-law is state common law, superficially might sound as if the Court had simply accepted Professor Beale's approach, *Klaxon* had a fundamentally different conception of common law, with implications orthogonal to Beale's expectations. Whereas Beale understood the bulk of choice-of-law to be principles that would be uniform across states, *Klaxon* did not. To the contrary, *Klaxon* presupposed cross-state non-uniformity of choice-of-law. *Klaxon*

187. *But see supra* note 170.

188. *Klaxon*, 313 U.S. 487.

189. *Id.* at 497 (stating that federal courts must apply the choice-of-law rules declared by the states in which they sit because "the proper function of [a] federal court is to ascertain what the state law is").

justified its holding on the basis of *Erie*, which *Klaxon* described as establishing the “principle of uniformity within a state” as between state and federal courts.¹⁹⁰ *Klaxon* recognized that its holding made possible a “lack of uniformity . . . between federal courts in different states,”¹⁹¹ but thought *this* sort of non-uniformity was “attributable to our federal system, which leaves to a state . . . the right to pursue local policies diverging from those of its neighbors.”¹⁹² Thus, under *Klaxon*, choice-of-law was just another type of state law that might vary across states. In *Klaxon*’s words, “[i]t is not for the federal courts to thwart such local policies by enforcing an independent ‘general law’ of conflict of laws.”¹⁹³ Rather, each state “is free to determine whether a given matter is to be governed by the law of the forum or some other law.”¹⁹⁴

Four observations are in order. First—to state the obvious—*Klaxon*’s conception of choice-of-law as state law marks a bold break from the earlier understandings examined in Part I, including Beale’s. Second, just as *Clapper* nine years earlier had been silent about the novelty of its decision to constitutionalize choice-of-law, *Klaxon* did not acknowledge that it had propounded a fundamentally novel understanding of choice-of-law. Third, *Klaxon* did not explain its conclusion that choice-of-law was state law; it simply asserted so in the *ipse dixit* language reproduced just above. Fourth, *Klaxon*’s very short opinion did not consider the full range of possibilities. *Klaxon* rejected the view that federal courts could “enforce[e] an independent ‘general law’ of conflict of laws,”¹⁹⁵ but did not consider that federal courts could announce a non-constitutional *federal* rule that would be binding on—and hence not independent of—state courts. It is this unconsidered possibility that Part III develops.

These four observations are consistent with something else: that *Klaxon* was decided very quickly. Briefs were submitted on April 10 and 19, oral argument was heard on May 1 and 2, and the Court handed down its opinion only one month later,

190. *Id.* at 496.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* at 497.

195. *Id.* at 496. *Klaxon* plainly meant “independent” of the state’s conflicts rule.

on June 2.¹⁹⁶ Consistent with the published decision's tenor, the parties' briefs focused almost exclusively on *Erie*, and gave little attention to choice-of-law. The core question was whether choice-of-law was "substantive or procedural."¹⁹⁷ The parties paid virtually no attention to the nature of choice-of-law, apart from a fleeting reference to Beale's treatise and dictum from a prior Supreme Court decision.¹⁹⁸ Ironically—and troublingly—while *Klaxon* focused primarily on *Erie*, its most lasting implications have been on choice-of-law.

Klaxon was unanimous, but three Justices in effect dissented from its holding twelve years later in *Wells v. Simonds Abrasive Co.*¹⁹⁹ The plaintiff in *Wells* asserted a statutory wrongful death claim under Alabama law in a Pennsylvania federal court. Pennsylvania had a shorter statute-of-limitations than Alabama, and Pennsylvania's choice-of-law rule provided that statutes-of-limitations were governed by forum law. The majority followed *Klaxon*, stating "[t]he states are free to adopt such rules of conflict of laws as they choose" and requiring the federal court to apply Pennsylvania law.²⁰⁰ Justice Jackson and two others dissented, thinking the Full Faith and Credit Clause required application of Alabama's statute-of-limitations.²⁰¹ Jackson acknowledged *Klaxon* "contain[ed] language that would seem to make all conflict questions depend on the law of the forum," but distinguished it—or, more accurately, aimed to narrow it to its facts—by noting that *Klaxon* concerned "an action on contract" and hence was "but dictum so far as it touches this statutory tort case."²⁰²

Two things are worth noting. First, *Wells* established that *Klaxon*'s dual holdings—that choice-of-law is state law, and that states may select "such rules of conflict of laws as they choose"²⁰³—applied to the entire range of choice-of-law, by

196. See *id.* at 487; Brief for Petitioner, *Klaxon*, 313 U.S. 487 (No. 741) 1941 WL 76680; Respondent's Brief, *Klaxon*, 313 U.S. 487 (No. 741) 1941 WL 76681.

197. Respondent's Brief, *supra* note 196, at *4.

198. See *id.* The earlier decision was *Kryger*, which I discuss *supra* note 182.

199. 345 U.S. 514 (1953).

200. *Id.* at 516.

201. See *id.* at 521–22 (Jackson, J., dissenting) (concluding that the full faith and credit "requir[es] that the law where the cause of action arose will follow the cause of action in whatever forum it is pursued").

202. *Id.* at 520–21 (Jackson, J., dissenting).

203. *Id.* at 516 (majority opinion).

which I mean state laws grounded in both legislation and common law. Second, both the majority and dissent in *Wells* confined their analysis to *constitutional* analysis. No Justice considered the possibility, defended in Part III, that non-constitutional federal law determined the issue.

B. TODAY'S MANY APPROACHES TO CHOICE-OF-LAW

Soon after *Klaxon's* declaration that choice-of-law was state law, all hell broke loose²⁰⁴: a "revolution" occurred in choice-of-law in which the fundamentals of Beale's (and Story's) approach were rejected, and replaced by not one alternative, but a multiplicity of contenders.²⁰⁵ The full story of this revolution has been told well before,²⁰⁶ and I do not intend to repeat it here. I provide a partial recounting for two reasons: (1) to definitively establish the heterogeneity of contemporary choice-of-law in the United States, and (2) to identify four lessons fundamental to Part III's argument that choice-of-law should be reconceptualized as non-constitutional federal law. Both tasks are best accomplished by considering how each of today's choice-of-law methodologies would apply to a single concrete case. I shall use the well-known late nineteenth-century case of *Milliken v. Pratt*.²⁰⁷

Here are *Milliken's* facts. Married women did not have the capacity to contract under Massachusetts law, but did under Maine law.²⁰⁸ Mr. and Mrs. Pratt resided in Massachusetts, Milliken in Maine.²⁰⁹ Mr. Pratt and Milliken agreed that Milliken would sell certain goods to Mr. Pratt on credit, but only if Mrs. Pratt guaranteed her husband's payment.²¹⁰ Mrs. Pratt signed and handed her husband a guaranty contract, which he then deposited in a mailbox near their home in Massachu-

204. This is not to suggest the field was orderly before. Writing in 1924, Ernest Lorenzen observed that "[t]here are, relatively speaking, few rules of the Conflict of Laws which can be said to be recognized by all Anglo-American states, or by the great majority of them." LORENZEN, *supra* note 46, at 11–12.

205. Harold L. Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 775 (1983) (approvingly observing that "[i]t is a commonplace in contemporary conflict-of-laws discourse that we are witnessing a 'revolution' in the branch of that subject known as choice of law").

206. *See id.* at 802–39 (discussing critiques of Beale's territorialism and the emergence of interest analysis, the *Second Restatement, lex fori*, and Leflar's "better law" approach).

207. 125 Mass. 374 (1878).

208. *Id.* at 376–77.

209. *Id.* at 374.

210. *Id.*

setts.²¹¹ After receiving Mrs. Pratt's contract in the mail in Maine, Milliken shipped the goods to Mr. Pratt, who thereafter failed to make payment.²¹² When Milliken sued in a Massachusetts court to enforce Mrs. Pratt's guaranty contract, she argued it was invalid on the ground that married women did not have the capacity to make contracts.²¹³ The choice-of-law question before the court was whether Massachusetts law governed the contract's validity, in which case Mrs. Pratt would prevail, or whether Maine law applied, in which case the guaranty contract was valid and Mr. Milliken would win.²¹⁴

1. Territorialism

The actual court in *Milliken* relied on Story's treatise, applying what has come to be known as the "territorialist" approach to choice-of-law. For our purposes, it will be useful to examine the presuppositions behind Story's methodology before turning to the court's analysis.

a. *Presuppositions and Description*

Near the beginning of his treatise, Justice Story wrote, "[b]efore entering upon any examination of the various heads, which a treatise upon the Conflict of Laws will naturally embrace, it seems necessary to advert to a few general maxims or axioms, which constitute the basis, upon which all reasonings on the subject must necessarily rest"²¹⁵ Two are of interest to us. First, relying primarily on the seventeenth-century Dutch scholar Ulrich Huber,²¹⁶ Story asserted "[t]he first and most general maxim or proposition is that . . . every nation possesses an exclusive sovereignty and jurisdiction within its own territory."²¹⁷ Story thought this international law principle applied fully to sister states,²¹⁸ and hence that "the laws of every

211. *Id.*

212. *Id.* at 375.

213. *Id.*

214. *Id.* at 377.

215. STORY, *supra* note 49, § 17.

216. *See id.* §§ 29, 31; LORENZEN, *supra* note 46, at 155 ("Story gives to [Huber's] maxims his unqualified assent"). To be more precise, what I treat as the first maxim is a combination of Huber's first two, and my second maxim corresponds to Huber's third. *See* STORY, *supra* note 49, § 17.

217. STORY, *supra* note 49, § 18; *see also id.* § 7 ("[A country's law's] can bind only its own subjects, and others, who are within its jurisdictional limits; and the latter only, while they remain therein.").

218. *See id.* § 9.

state affect and bind directly all property . . . within its territory . . . and all persons who are resident within it,” and “no state . . . can, by its laws, directly affect or bind property out of its own territory, or bind persons not resident therein.”²¹⁹ Call this Story’s anti-extraterritorialism maxim. Because states’ regulatory powers were strictly limited by their physical territorial borders, Story’s approach is typically referred to as the “territorialist” approach to choice-of-law.

Story’s second maxim invoked Huber once again. Notwithstanding the anti-extraterritorialism axiom, the courts of state A may, and generally will, as a matter of “comity,” give “force” to the laws of state B insofar as state B’s laws are applied to property, persons and events within state B’s borders.²²⁰ For instance, an English court typically will give force to a contract entered into in France pursuant to French laws. Comity is necessary because “nothing could be more inconvenient in the commerce and general intercourse of nations, than that what is valid by the laws of one place should become without effect by the diversity of laws of another”²²¹ But comity is a matter of the forum’s discretion, not a legal requirement. Accordingly, other states’ laws need not be given force if they are “contrary to [the forum’s] known policy, or prejudicial to its interests.”²²²

These maxims meant that choice-of-law for Story comprised two parts. First were the rules for physically locating persons, things, and occurrences; location was crucial to determining which sovereign’s law applied on account of the anti-extraterritorialism axiom. Second were the rules concerning comity.²²³

b. Application to Milliken, and Modern Territorialism

Let us now turn to the *Milliken* court’s decision. Under the first maxim, determining whether Massachusetts or Maine law applied turned on *where* some crucial event had occurred. Looking to caselaw and quoting Story’s treatise, the court concluded that because “capacity of the contracting party” concerned the

219. *Id.* §§ 18, 20. For a qualification, see *infra* note 249 and accompanying text.

220. See STORY, *supra* note 49, §§ 29, 38.

221. *Id.* § 29.

222. *Id.* § 38.

223. Story was skeptical that comity could be reduced to clear cut rules. See *id.* § 28. The bulk of his treatise accordingly was directed to localizing rules.

“validity of a contract,”²²⁴ capacity was to be determined by the place of contracting.²²⁵ Since the contract was made in Maine,²²⁶ that state’s capacity rules governed, so the guaranty contract was valid. On to the second maxim: since “it is only by the comity of other states that laws can operate beyond the limit of the state that makes them,” the Massachusetts court then considered whether it should decline to give effect to the contract on grounds of “public policy.”²²⁷ *Milliken* gave force to Maine’s law, upholding the validity of Mrs. Pratt’s contract.²²⁸

Joseph Beale carried Story’s territorialist approach forward into the twentieth century. Like Story’s first maxim, Beale’s treatise assumed “[i]t is quite obvious that since the only law that can be applicable in a state is the law of that state, no law of a foreign state can have there the force of law.”²²⁹ Determining physical location accordingly was critical to Beale (as it was to Story), and Beale (like Story) concluded that “[t]he question whether a contract is valid” was to be determined by the law of the “place of contracting.”²³⁰ Beale brought this approach to the Restatement of Conflict of Laws, which provided that “[t]he law of the place of contracting determines the validity and effect of a promise with respect to . . . capacity to make the contract.”²³¹ But Beale rejected Story’s second maxim. Dispensing with comity, Beale believed that “[w]hen a right has been created by law, this [vested] right itself becomes a fact” that “cannot be called into question anywhere.”²³²

Beale’s Restatement is universally referred to today as the First Restatement because the American Law Institute adopted

224. *Id.* § 102b. *Milliken* quoted a different part of Story’s discussion that was not as clear as what I have reproduced above.

225. *See* *Milliken v. Pratt*, 125 Mass. 374, 381 (1877) (quoting Story’s treatise that “capacity of persons to contract” determined by “*lex loci contractus*”).

226. The place of contracting was decided by the forum law, and Massachusetts at the time had not adopted the mailbox rule, but instead viewed acceptance as occurring upon the offeror’s physical receipt of offeree’s acceptance. *See id.* at 376 (noting that the guarantee was executed in Massachusetts and mailed in Massachusetts, but that “[t]he contract between the defendant and the plaintiffs was complete when the guarantee had been received and acted on by them at Portland, and not before”).

227. *Id.* at 382–83.

228. *See id.*

229. BEALE, *supra* note 46, § 5.4.

230. Joseph Beale, *What Law Governs the Validity of a Contract*, 23 HARV. L. REV. 260, 270–71 (1910).

231. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 332 (1934).

232. BEALE, *supra* note 46, § 73.

a second restatement of conflicts sixty-seven years later (what today is known as the Second Restatement of Conflicts). But the First Restatement is not a relic; it still is relied upon by the ten or so states that today utilize what is called the “territorialist” approach to choice-of-law.²³³ A modern territorialist state thus would conclude, as did the 1878 *Milliken* court, that Mrs. Pratt’s contract was valid.²³⁴

2. Modern Alternatives and Four Lessons

Beginning in the early 1900s, the Legal Realist movement propounded a sustained critique of the territorialist system,²³⁵ showing that the apparently rule-bound system of territorialism was indeterminate²³⁶ and laboring to identify the actual considerations that informed courts’ choice-of-law determinations.²³⁷ But notwithstanding the Realists’ critiques, most states in the United States continued using the territorialist methodology well into the 1950s.²³⁸ Today’s heterogeneity of choice-of-law methodologies, which I shall now describe, is thus a relatively new phenomenon.

The discussion that follows toggles back and forth between two stories. The first is a demonstration of the multiple approaches to choice-of-law presently used by states. The second narrative arc identifies four lessons that emerge from the critique of territorialism and territorialism’s alternatives that will inform Part III’s argument that choice-of-law be reconceptualized as federal law. This subsection interweaves

233. See, e.g., Symeonides, *supra* note 2, at 255 (describing an Ohio court resolving a conflict-of-law case).

234. Most modern territorialist states, however, reject Beale’s view that vested rights categorically must be given effect, and instead allow the forum to refuse to give effect to the foreign law (and whatever rights it may have vested) through the public policy exception.

235. See *infra* note 250 and accompanying text.

236. For example, why not say that the legal question at issue in *Milliken* was an aspect of family law capacity, which under territorialism is governed by domicile, rather than the validity of contract, which under territorialism is governed by the place of contract formation? In other words, there is indeterminacy in which state’s law is selected under territorialism where (a) a legal question is susceptible to two different characterizations (such as ‘family law’ or ‘contract formation’) and (b) the two characterizations’ choice-of-law rule select different states’ law.

237. See, e.g., LORENZEN, *supra* note 46 (differentiating between types of considerations that informed court decisions about choice-of-law).

238. See Korn, *supra* note 205, at 820–22 (bringing the cases that “began to pave the way for the first total and explicit break with the traditional approach” in the choice-of-law rules concerning torts and conflicts).

these two narratives because they are related; the lessons simultaneously emerge from, and deepen an understanding of, each of territorialism's alternatives.

a. First Lesson: The Repudiation of Anti-Extraterritorialism

It is important for present purposes to identify a conceptual cornerstone of Story's and Beale's territorialism that has been widely repudiated: the anti-extraterritorialism maxim. As I shall shortly explain, the territorialist methodology does not depend upon the anti-extraterritorialism maxim.²³⁹ But recognizing the fallacy of anti-extraterritorialism will prove to be important to this Article's argument that choice-of-law is federal law, and is necessary to appreciate why territorialism is not the only logical possibility.

i. Description

For Story, the anti-extraterritorialism maxim was self-evident:

It is plain, that the laws of one country can have no intrinsic force, *proprio vigore*, except within the territorial limits and jurisdiction of that country. They can bind only its own subjects, and others, who are within its jurisdictional limits; and the latter only, while they remain therein Whatever extra-territorial force they are to have, is the result, not of any original power to extend them abroad, but of that respect, which from motives of public policy other nations are disposed to yield to them²⁴⁰

The anti-extraterritorialism maxim was embraced by important American jurists who preceded Story,²⁴¹ by many state courts thereafter,²⁴² in late nineteenth-century Supreme Court cases describing the scope of states' powers,²⁴³ and by Joseph Beale.²⁴⁴

239. See *infra* note 263.

240. STORY, *supra* note 49, § 7.

241. See, e.g., *Blanchard v. Russell*, 13 Mass. (12 Tyng) 1, 3 (1816) ("That the laws of any State cannot, by any inherent authority, be entitled to respect extraterritorially, or beyond the jurisdiction of the State which enacts them, is the necessary result of the independence of distinct sovereignties.").

242. See, e.g., *Ala. Great S. R.R. Co. v. Carroll*, 97 Ala. 126, 134 (1892) (holding that Alabama statute "had no efficacy beyond the lines of Alabama" but "is to be interpreted in the light of universally recognized principles of private, international, or interstate law" so that it does not "operate upon facts occurring in another state"); *Milliken v. Pratt*, 125 Mass. 374, 383 (1877).

243. See, e.g., *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877), *overruled by Shaffer v. Heitner*, 433 U.S. 186 (1977) (stating "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory" and "no State can exercise direct jurisdiction and authority over

Story's anti-extraterritorialism maxim relied foremost on the Dutch treatise writer Ulrich Huber.²⁴⁵ Yet as Ernest Lorenzen has shown, in "proclaiming in such unqualified terms the territoriality of all laws, Huber went beyond any of his predecessors."²⁴⁶ French, German, and Italian scholars all recognized that "some laws were deemed to follow the person wherever he went," and accordingly had extraterritorial effect.²⁴⁷ In fact, Story *himself* recognized this; Story discussed the civilians' distinction between real and personal statutes, concluding that "[w]henever [foreign jurists] wish to express, that the operation of a law is *universal*, they compendiously announce, that it is a personal statute; and whenever, on the other hand, they wish to express, that its operation is confined to the country of its origin, they simply declare it to be a real statute."²⁴⁸ Thus Story used "universal" to mean having effect outside a state's territorial borders, meaning that Story understood personal statutes to have extraterritorial effects. Story also acknowledged another "exception, of some importance" to the maxim: "that although the laws of a nation have no direct, binding force, or effect, except upon persons within its own territories; yet that every nation has a right to bind its own subjects by its own laws in every other place."²⁴⁹ As Lorenzen shows, Story's treatise embraced other exceptions to the anti-extraterritorialism maxim.²⁵⁰

persons or property without its territory" in determining territorial limits on state's adjudicatory jurisdiction); *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881) ("No State can legislate except with reference to its own jurisdiction. . . . Each State is independent of all the others in this particular.").

244. See BEALE, *supra* note 46, § 4.12. Beale's anti-extraterritorialism was the product of his jurisprudence, which posited that the "very nature of law" demanded that "law extend[s] over the whole territory subject to it and appl[ies] to every act done there," and that only one law can apply to any single person, transaction or occurrence. See *id.* At one point in his treatise, however, Beale "comes perilously close to recognizing overlapping legislative jurisdiction." Kermit Roosevelt III, *Resolving Renvoi: The Bewitchment of Our Intelligence by Means of Language*, 80 NOTRE DAME L. REV. 1821, 1884 n.205 (2005) [hereinafter Roosevelt, *Resolving Renvoi*].

245. See STORY, *supra* note 49, §§ 29–38; LORENZEN, *supra* note 46, at 136 ("Story himself relied upon Huber more than upon any of the other foreign jurists").

246. LORENZEN, *supra* note 46, at 137.

247. See *id.*

248. See STORY, *supra* note 49, §§ 12–16, at 26–27 (emphasis added).

249. *Id.* § 21.

250. LORENZEN, *supra* note 46, at 3–9.

While the many exceptions in his treatise may mean Story intended to “express only [a] general attitude of the Anglo-American law” rather than a categorical principle of territoriality,²⁵¹ nineteenth- and early twentieth-century Supreme Court cases typically referred to the anti-extraterritoriality maxim as if it were absolute. An 1892 decision declared, without qualification, that “[l]aws have no force of themselves beyond the jurisdiction of the State which enacts them,”²⁵² and a 1914 case stated “it would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State . . . without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority.”²⁵³ One commentator who has catalogued the Court’s “territorial limits . . . on the reach of state laws” vis-à-vis criminal law, tax laws, and business regulations has concluded that “[e]very significant attribute of legislative power available to states was territorially circumscribed . . . by the late nineteenth century as a matter of constitutional principle.”²⁵⁴

But categorical anti-extraterritoriality never squared with actual practice. From early on, states applied their laws to persons, transactions, and occurrences beyond their physical borders. For example, in 1819 Virginia’s General Court held that a Virginia statute which criminalized “all felonies committed *by citizen against citizen*, in any such place” authorized Virginia’s prosecution of a Virginia citizen for having stolen a fellow Virginian’s horse in the District of Columbia.²⁵⁵ A nineteenth-century Texas law provided that “[p]ersons out of the State may commit, and be liable to indictment and conviction for committing, any of the offenses enumerated in this chapter, which do not in their commission necessarily require a personal presence in this state.”²⁵⁶ Interpreting this law, an 1882 Texas decision upheld the application of Texas’s criminal law to an act of forgery of a land certificate for Texas property, though all criminal acts had occurred in Louisiana.²⁵⁷

251. *See id.* at 3 (identifying this possible interpretation of Story).

252. *Huntington v. Attrill*, 146 U.S. 657, 669 (1892).

253. *N.Y. Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914).

254. James Y. Stern, *Choice of Law, the Constitution, and Lochner*, 94 VA. L. REV. 1509, 1516, 1519 (2008).

255. *See Commonwealth v. Gaines*, 4 Va. (2 Va. Cas.) 172, 174 (1819).

256. 1879 TEX. CRIM. STAT. 454.

257. *Hanks v. State*, 13 Tex. Ct. App. 289, 305–09 (1882).

In the twentieth century, the Supreme Court formally recognized the power of states to regulate persons and things outside their physical borders. In *Strassheim v. Daily*, the Court permitted Michigan to prosecute a non-Michigander for acts defrauding Michigan that were undertaken in Illinois.²⁵⁸ Writing for the Court, Justice Holmes wrote “[a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect.”²⁵⁹ Speaking of states’ civil jurisdiction, the Supreme Court observed in the 1930s that “the power of [one state] to effect legal consequences by legislation is not limited strictly to occurrences within its boundaries”²⁶⁰ Today’s restatements and model codes explicitly acknowledge that states have the power to apply their laws extraterritorially.²⁶¹

Though this Article’s focus is on American law, choice-of-law’s longstanding connection to private international law makes it appropriate to observe that Huber’s strict anti-extraterritorialism has not fared well in international law either. The Harvard Research Project famously identified five traditional bases of jurisdiction over crimes under international law, three of which justify extraterritorial regulation.²⁶² These

258. 221 U.S. 280, 281 (1911). For a full discussion, see Rosen, *supra* note 5, at 864–76.

259. *Strassheim*, 221 U.S. at 285.

260. See *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 156 (1932), *overruled in part by Crider v. Zurich Ins. Co.*, 380 U.S. 39 (1965); *Alaska Packers Ass’n v. Indus. Accident Comm’n of Cal.*, 294 U.S. 532, 538 (1935) (applying California’s workmen’s compensation statute, which by its terms applied to “injuries suffered without the territorial limits of this state,” to work accidents occurring in Alaska); see also *Pac. Emp’rs Ins. Co. v. Indus. Accident Comm’n of Cal.*, 306 U.S. 493, 498–500 (1939) (assuming that Massachusetts’ workmen’s compensation law, which by its terms applied to injuries received in course of employment “whether within or without the commonwealth,” could constitutionally be applied to an accident occurring in California).

261. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 reporters’ note 5 (1986) (stating that states within the United States “may apply at least some laws to a person outside [State] territory on the basis that he is a citizen, resident, or domiciliary of the State”); MODEL PENAL CODE § 1.03(1)(f) (1962) (positing that State A may impose liability if “the offense is based on a statute of this State that expressly prohibits conduct outside the State”).

262. See H. R. I. L., *Jurisdiction with Respect to Crime*, 29 AM. J. INT’L L. SUP 435, 445 (1935) (describing regulatory jurisdiction justified on basis of the “national” principle under which a country can regulate its own citizens extraterritorially, the “protective” principle that allows a country to regulate

conclusions have been broadly accepted as reflecting contemporary international norms, and the Third Restatement of the Foreign Relations Law of the United States adopts the research project's principles as the basis for American extraterritorial regulatory jurisdiction.²⁶³

ii. Implications of Anti-Extraterritorialism's Repudiation

The repudiation of Story's first maxim does not necessarily entail the rejection of territorialism as a choice-of-law methodology. Territorialism's rules may (or may not) be a useful method, all things considered, for purposes of choice-of-law. But anti-extraterritorialism's repudiation means that territorialism cannot be defended as the sole legitimate choice-of-law methodology on the basis of deductive logic from principles of sovereignty or territoriality. To explain, Story's first maxim entailed a territorialist choice-of-law methodology that aimed to identify *where* something had occurred because anti-extraterritorialism meant that only the polity where the event transpired had the power to regulate it. But a location-based choice-of-law methodology is no longer the only possibility in a world of extraterritorial regulatory jurisdiction, in which the polity where an event did *not* occur also may have the power to regulate it. Repudiating the anti-extraterritorialism maxim accordingly opens the door to other choice-of-law methodologies.²⁶⁴

There is a second respect in which the first maxim's rejection profoundly alters choice-of-law. Under anti-extraterritorialism, choice-of-law was a method for determining what *single* polity's law applied to a given person, transaction, or occurrence. Only one law could apply—the law of the polity where the event transpired—and the task of choice-of-law was to identify which polity that was. Anti-extraterritorialism's repudiation, by contrast, entails the possibility that two (or more) polities might have the power to regulate a given person, transaction, or occurrence. In the words of the modern Supreme Court, “a set of facts giving rise to a lawsuit, or a particular is-

extraterritorially when its national interest is harmed, and the “passive personal” principle where a country can regulate non-citizens' extraterritorial acts that harm their citizens extraterritorially).

263. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402.

264. For these reasons, I reject Professor Laycock's argument that choice-of-law rules must be territorial.

sue within a lawsuit, may justify, in constitutional terms, application of the law of more than one jurisdiction.”²⁶⁵

This means two or more polities might have concurrent regulatory authority, and each polity may have different regulations. In such a circumstance, a *genuine* choice among conflicting laws may have to be made. After all, notwithstanding Story’s and Beale’s nomenclature of “conflicts of law,” the maxim of anti-extraterritorialism in effect *denied* the possibility of conflict among jurisdictions’ regulations, and hence of any need to choose which polity’s law applied. Put simply, the possibility of conflict—and the resulting need to exercise choice—arises only if states have concurrent regulatory authority.

Choosing among different polities’ conflicting laws is more conceptually complex than determining where something occurred. Indeed, as explained further below, choosing among different polities’ conflicting laws is an enterprise that is inherently and unavoidably subjective—and in that sense deeply political.²⁶⁶ Though the alternatives to territorialism have been largely silent about their connection to anti-extraterritorialism’s repudiation, we shall see that they all presuppose the possibility of concurrent regulatory authority, and hence all reject anti-extraterritorialism. Their recognition that two or more states may have concurrent regulatory powers is the reason why most methodological alternatives to territorialism incorporate substantial subjective components.²⁶⁷

b. Modern Alternatives to Territorialism

Let us now explore how five alternatives to territorialism would analyze *Milliken*: Interest Analysis, the Second Restatement, Significant Contacts, Better Law, and *Lex Fori*.

i. Interest Analysis

We know how an interest analysis state would approach *Milliken* because Brainerd Currie, the scholar who developed interest analysis, provided an enormously influential critique of *Milliken*.²⁶⁸

The first question an interest analysis court asks is what (if any) state’s law would be applicable to Mrs. Milliken’s poten-

265. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 307 (1981).

266. *See infra* note 287.

267. With the one exception of *lex fori*.

268. *See* Brainerd Currie, *Married Women’s Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958).

tial contract. This determination is made by means of ordinary legal analysis: by interpreting statutory language and analyzing case law. Since state law almost never explicitly indicates whether or not it is to apply to circumstances that straddle multiple states, courts applying interest analysis typically must appeal to the purposes behind a given law. If interpretation of both states' legal materials reveals that only one state's law applies, then there is a "false conflict," and the court can only apply the one state's law that is applicable. If analysis indicates that more than one state law is applicable, then there is a "real conflict."²⁶⁹ (What to do with such real conflicts will be addressed shortly).

It is worth noting that the category of real conflicts is inconsistent with the anti-extraterritorialism maxim. Under the maxim, only one state's law determines the validity of a contract—the place where the contract was made. Because Massachusetts law rejected the mailbox rule in *Milliken's* day, and instead deemed a contract to form at the place of acceptance (Maine), only Maine's law possibly could apply. Real conflicts, in other words, are an artifact of concurrent regulatory jurisdiction.

Currie proposed that the purpose of Massachusetts's law disallowing married women's contracts was to "protect [] married women."²⁷⁰ Continues Currie in a famous passage: "What married women? Why, those with whose welfare Massachusetts is concerned, of course—i.e., Massachusetts married women."²⁷¹ On this view, Massachusetts's law, under which married women were without the capacity to contract, indeed applied to Mrs. Pratt. Currie thought the policy behind Maine contract law was to protect the security of its residents' contracts, and hence that Maine's law applied to protect citizen Milliken.²⁷² The *Milliken* case thus presents a "real conflict."

Currie thought courts lacked the institutional capacity to resolve real conflicts, and that Congress instead should resolve them pursuant to the Full Faith and Credit Clause's Effects

269. There is a third possibility under interest analysis: that *no* state's law applies, what has been dubbed an "unprovided-for case." I discuss this third case in greater detail below. *See infra* notes 342–51.

270. Currie, *supra* note 268, at 239.

271. *Id.* at 234.

272. *See id.*

Clause.²⁷³ In the absence of federal statute, Currie concluded that when faced with a real conflict, the forum should simply apply forum law.²⁷⁴ Some scholars have tried to develop a principled defense of Currie's rule.²⁷⁵ A state fully following Currie's approach accordingly would have applied the law of Massachusetts, thereby finding against Mr. Milliken.

Some interest analysis states (most notably California)²⁷⁶ have rejected Currie's solution to real conflicts, and instead apply a "comparative impairment" analysis. Comparative impairment requires a court to apply the law of the state whose interests would be most gravely impaired if its law were not applied, thereby minimizing overall costs. On *Milliken's* facts, this would mean comparing the costs to Massachusetts of not protecting married women (if Massachusetts law were not applied) as against the costs to Maine of not protecting the security of its citizens' contracts (if Maine law were not applied). The outcome almost always will be indeterminate, for reasons soon to be explained.²⁷⁷

ii. The Second Restatement

Since twenty-three states have adopted the *Second Restatement* for choice-of-law questions concerning contracts,²⁷⁸ let us now see how *Milliken* would be analyzed under that approach to choice-of-law. The *Second Restatement* provides that "[i]ssues in contract are determined by the law chosen by the parties"²⁷⁹ or, if none has been chosen, "by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction . . . under" a laundry list of "principles" that are found in section 6.²⁸⁰ The section 6 principles include

- (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested

273. BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 124–25 (1963); *infra* Part III.B (demonstrating Congress's powers to enact choice-of-law rules for both state and federal courts).

274. *Id.* at 119.

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

276. See *Bernhard v. Harrah's Club*, 546 P.2d 719, 723–25 (Cal. 1976).

277. See *infra* notes 310–20.

278. Symeonides, *supra* note 2, at 279.

279. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 186 (1971). The *Restatement* provides two caveats regarding the parties' ability to choose the governing law. See *id.* § 187(2).

280. *Id.* § 188(1).

states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.²⁸¹

The *Restatement* further specifies that “in applying the principles of Section 6, a court is to “take[] into account” the “place of contracting,” “the place of negotiation of the contract,” “the place of performance,” “the location of the subject matter of the contract,” and “the domicile, residence, nationality, place of incorporation and place of business of the parties.”²⁸² Finally, “[t]hese contacts are to be evaluated according to their relative importance with respect to the particular issue.”²⁸³

The *Second Restatement* is notoriously indeterminate. Enumerating what seems to be all conceivably relevant considerations, it provides no guidance when different factors point to the application of different states’ laws. Because Mrs. Pratt’s guaranty contract contained no choice-of-law provision, the question under the *Second Restatement* would be which state “has the most significant relationship”²⁸⁴ to the contract, as determined by the Section 6 principles. Principles (b) and (c)—“the relevant policies of the forum” and “other interested states”²⁸⁵—call for interest analysis, and so would generate a real conflict. Principle (c) further specifies that a court should consider “the *relative* interests of those states in the determination of the particular issue,”²⁸⁶ inviting a comparative impairment analysis, which is indeterminate for reasons soon to be explained.²⁸⁷ The “protection of justified expectations”²⁸⁸ (principle (d)) would favor Maine law on the theory that the parties are presumed to have intended to create valid contracts.²⁸⁹ “Certainty, predictability and uniformity of result”²⁹⁰ could be argued either way.

Second Restatement courts typically do not consider all of Section 6’s principles, and a frequently overlooked considera-

281. *Id.* § 6.

282. *Id.* § 188(2).

283. *Id.*

284. *Id.* § 188(1).

285. *Id.* § 6.

286. *Id.* (emphasis added).

287. *See infra* notes 310–20.

288. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

289. *Cf. Pritchard v. Norton*, 106 U.S. 124, 137–38 (1882) (holding that parties are presumed to have intended to create a valid contract).

290. *Id.*

tion is principle (a)'s "needs of the interstate . . . system[]."²⁹¹ If it were applied, principle (a) might favor application of Maine law, which arguably facilitates interstate commerce. Principle (e), the "basic policies underlying the particular field of law,"²⁹² would favor Maine law to the extent the "basic policy" underlying contract law is facilitating transactions, though principle (e) also could be argued to favor Massachusetts law insofar as contract law paternalistically protects persons.

iii. Significant Contacts

Five states use a "significant contacts" and/or "center-of-gravity" test for resolving choice-of-law questions regarding contracts,²⁹³ which is akin to the *Second Restatement* "most significant relationship" test but without the section 6 principles. This test requires the court to identify all relevant contacts that the parties had with each state and select the state with the greatest number and importance of contacts. This test is indeterminate for three main reasons. First, the number of contacts is a function of how each contact is characterized, and multiple characterizations are possible. For instance, is there a single Maine contact described by Mrs. Pratt's guaranty contract with Milliken, or should each of Mr. Milliken's actions in Maine regarding the guaranty contract (for instance concerning its negotiation, its receipt, his acting upon it) count as a separate contact? Second, there is uncertainty as to whether all contacts count, or only those that are (deemed to be) relevant to the choice-of-law decision at hand. For example, do any, or all, of Mr. Pratt's contacts with Massachusetts and Maine in relation to the sales contract count for purposes of determining which state's law applies to determine the validity of the guaranty contract? Third, most courts that utilize the significant contacts test do not claim to decide simply based on which state has the largest number of contacts. This means they assess the relative weight of the different contacts, a self-evidently open-ended inquiry. The center-of-gravity test is intended to be more intuition-based than significant contacts, but in practice it too tends to look to contacts.

291. Gary J. Simson, *Choice of Law After the Currie Revolution: What Role for the Needs of the Interstate and International Systems?*, 63 *MERCER L. REV.* 715, 724 (2012).

292. *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 6.

293. Symeonides, *supra* note 2, at 279.

As applied to the facts of *Milliken*, the significant contacts and center-of-gravity tests are indeterminate, for the reasons mentioned above. Massachusetts law may be selected on the basis that the Pratts at all times were there, and Mrs. Pratt's guaranty contract was in aid of a delivery of goods to Massachusetts. On the other hand, Maine also had many contacts: Mr. Milliken at all times was there, the guaranty contract was accepted and hence became a contract there, and Mr. Milliken acted upon both the goods and guaranty contracts in Maine.

iv. Better Law

Two states use what is known as the "better law" approach, based on the work of the late Dean Robert A. Leflar, for resolving choice-of-law questions concerning contracts.²⁹⁴ Leflar claimed to identify "five major choice-influencing considerations, within which all or most of the factors that ordinarily affect choice-of-law decisions can be incorporated":²⁹⁵ (1) predictability of results, (2) maintenance of the interstate and international order, (3) simplification of the judicial task, (4) advancement of the forum's governmental interests, and (5) application of the better rule of law. Leflar purported to strip away the "manipulative devices to cover up"²⁹⁶ that led courts to decide as they did, and to forthrightly describe the factors that courts actually take into account.²⁹⁷

As to the first factor, Leflar wrote that "[u]niformity of results, regardless of forum, has always been a major goal in choice-of-law theory."²⁹⁸ Leflar explained the third factor to mean that courts "use their own procedural rules."²⁹⁹ Leflar's understanding of the remaining factors in effect rendered his system a variant of interest analysis. Leflar explained the second factor as meaning that "[n]o forum whose concern with a set of facts is negligible should claim priority for its law over the law of a state which has a clearly superior concern with the facts"³⁰⁰ This reduced the second factor to interest analy-

294. *Id.*

295. Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1585-87 (1966).

296. *Id.* at 1588.

297. *Id.* at 1585-86.

298. *Id.* at 1586.

299. *Id.* at 1587.

300. *Id.* at 1586. Further, "nor should any state's choice-of-law system be based upon deliberate across-the-board 'forum preference.'" *Id.* This is a rejection of the system known as *lex fori*, under which the forum simply

sis's insight regarding "false conflicts,": a court first should determine if more than one state's law applies and, if not, should apply the single applicable law.³⁰¹ Leflar's fourth and fifth factors largely address real conflicts: the fourth factor favors forum law so long as it "has a genuine concern with the facts in a given case"³⁰²—what in effect justifies Currie's rule that forum law applies where there is a real conflict—and the fifth factor provides that courts appropriately may choose the substantive law they objectively believe to be the best.³⁰³

As applied to *Milliken*, Leflar's approach would permit the Massachusetts court to resolve the real conflict in either of two ways: choosing the law it thought to be best (either Massachusetts because it protected a class of people needing protection, or Maine's because the Massachusetts law was archaic or otherwise unwise), or applying Massachusetts law because the forum had a genuine concern with the case.

v. *Lex fori*

Some states apply a choice-of-law rule of *lex fori*, under which forum law applies so long as the forum has any significant contact.³⁰⁴ *Lex fori* presently is applied by only two states in respect only to torts,³⁰⁵ though it has been endorsed by many scholars as the presumptive rule that should apply to contracts as well.³⁰⁶ Scholars supportive of this approach typically view *lex fori* as a strong, though not absolute, presumption to be overridden "only in such distinctive problem areas where a transnationally [and country-wide] uniform pattern of

applies forum law. A few modern states have adopted *lex fori* vis-à-vis tort law. Symeonides, *supra* note 2, at 279.

301. As I explain below, this reflects an incomplete understanding of what is required by facilitating the interstate system.

302. Leflar, *supra* note 295, at 1587.

303. *Id.* at 1588.

304. See, e.g., Saleba v. Schrand, 300 S.W.3d 177, 181 n.2, 182 (Ky. 2009) (holding that, absent a "special reason", the law of the forum state, Kentucky, should apply regarding torts).

305. Symeonides, *supra* note 2, at 279.

306. See Albert A. Ehrenzweig, *The Lex Fori – Basic Rule in the Conflict of Laws*, 58 MICH. L. REV. 637, 679 (1960); Amos Shapira, "Grasp All, Lose All": *On Restraints and Moderation in the Reformulation of Choice of Law Policy*, 77 COLUM. L. REV. 248, 256–57 (1977). Prominent contemporary endorsers include Dean Simson, see Simson, *supra* note 291, at 726–27, and perhaps Louise Weinberg, see Weinberg, *supra* note 275, at 65–67, 87–94 (proposing forum law-solution to real conflicts using rationale that arguably supports *lex fori* more generally).

decisionmaking is patently indicated.³⁰⁷ A *lex fori* approach in *Milliken* would have led to the application of Massachusetts law.³⁰⁸

c. *Second Lesson: The Heterogeneity of the Modern Approaches*

The second lesson from the modern period is straightforward: there is a multitude of approaches to choice-of-law that the states presently employ. As illustrated by our exercise with *Milliken*, both analysis and outcomes vary depending upon the choice-of-law methodology.

d. *Third Lesson: The Existence and Intractability of Real Conflicts*

The third lesson from the modern approaches is that there can be real conflicts, and that such conflicts are intractable. All alternatives to classical territorialism recognize—consistent with contemporary Supreme Court doctrine³⁰⁹—that states can have concurrent regulatory jurisdiction, and that more than one state’s substantively divergent laws can apply to a particular person, transaction, or occurrence.³¹⁰ When two or more such laws apply we have a real conflict—something that was conceptually impossible under territorialism’s anti-extraterritoriality axioms, under which only one state’s law could govern a single transaction or occurrence.³¹¹ Sixty years of case law and intense scholarly thought have failed to uncover a satisfactory judicial solution to real conflicts.³¹² Currie’s proposal that forum law should be applied is administratively simple but normatively unsatisfactory, for it impairs prelitigation predictability as to governing law, results in inconsistent outcomes, and encourages forum shopping. Leflar’s better law approach likewise undermines prelitigation predictability, generates inconsistent results, and suffers from the

307. Shapira, *supra* note 306, at 265–69.

308. The uncertainty is generated by the fact that scholars supportive of *lex fori* have recognized the need for an exception to protect justified expectations. *See id.* at 265–66.

309. *See Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313–20 (1981) (holding that Minnesota state law could apply to a tort that occurred outside the state).

310. This is true of the scholarly forms of *lex fori* that recognize *lex fori* to be a strong, but rebuttable, presumption. *See, e.g.,* Shapira, *supra* note 306, at 265–69.

311. *See supra* Part II.B.1.

312. *See* Mark D. Rosen, *Should “Un-American” Foreign Judgments Be Enforced?*, 88 MINN. L. REV. 783, 819 n.179 (2004).

added drawback of vesting judges with decisionmaking authority—choosing what they think to be the best law—that is not properly theirs in a democracy.

The most conceptually promising approach to resolving real conflicts is comparative impairment. Comparative impairment posits that real conflicts should be resolved by means of a decision rule that minimizes the costs of non-application of the two states' laws.³¹³ In other words, a court should apply the law of the state whose interests would be most impaired were its law not applied. Though such a decisionmaking rule seems wise,³¹⁴ it is exceedingly difficult for a single court to implement. After all, how are the costs of non-application to be measured and compared? Each state's law typically reflects diverging judgments as to facts, and as to how incommensurable commitments are to be harmonized. When state laws are a result of these sorts of differences, comparative impairment cannot generate determinate answers.

To illustrate, consider *Milliken* once again. Massachusetts valued security of contracts, but thought it more important to protect married women. Maine either thought married women did not need special protection (i.e., had a different assessment of facts), or thought it more important to uphold contracts (i.e., had a different values assessment). If the difference between the two states' laws reflected differing assessments of facts, how is a court applying comparative impairment to generate a determinate answer? The answer is simple: it cannot. Comparative impairment is similarly indeterminate if the two states agreed as to facts but differed as to commitments. Protecting married women and securing contracts are both commitments,

313. See generally Baxter, *supra* note 17 (discussing rationale behind comparative impairment). There is a vast literature on comparative impairment. In addition to Baxter's article, the most important analyses include William H. Allen & Erin A. O'Hara, *Second Generation Law and Economics of Conflict of Laws: Baxter's Comparative Impairment and Beyond*, 51 STAN. L. REV. 1011, 1034–37 (1999); Leo Kanowitz, *Comparative Impairment and Better Law: Grand Illusions in the Conflict of Laws*, 30 HASTINGS. L.J. 255 (1978); Herma Hill Kay, *The Use of Comparative Impairment To Resolve True Conflicts: An Evaluation of the California Experience*, 68 CALIF. L. REV. 576 (1980); Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 316–18 (1990).

314. Though one might ask why the states would not instead select a rule that sought to maximize the benefits of applying state law. The results of Comparative Impairment and (what might be called) "Comparative Betterment" conceivably could diverge, and why is the former decisional rule preferable to the latter?

but they are what philosophers call “incommensurable”: it is not possible to translate both of them to a meaningful common metric such that an objective comparison can be made between them. Making decisions between or among incommensurable commitments accordingly is an exercise of subjective choice rather than cold logic. Indeed, such choices define and express, and in that sense are deeply constitutive of, the decisionmaker’s character;³¹⁵ an individual’s choice among competing incommensurable commitments goes far to determining who she is as a person,³¹⁶ and a state’s decision among competing incommensurable commitments is a core determinant of its political culture.

There is no “view from nowhere” from which a single institution can undertake a comparative impairment analysis.³¹⁷ Accordingly, comparative impairment clarifies why real conflicts present intractable dilemmas, but does not provide courts tools to generate determinate solutions. Fortunately, as I have explained in detail elsewhere, legislators can undertake comparative impairment by negotiating solutions to real conflicts before they occur.³¹⁸ The bad news concerning real conflicts, accordingly, is not that they cannot be managed, but just that courts cannot manage them well.

Another approach to managing real conflicts is to let citizens choose the law themselves through contractual choice-of-law provisions.³¹⁹ Such a “party autonomy” approach doesn’t contradict the argument above that real conflicts are conceptually intractable; it eliminates the conflict rather than resolving it. But party autonomy has limitations. First, it is an option only where parties have an *ex ante* relationship, and hence is

315. See Elijah Millgram, *Incommensurability and Practical Reasoning*, in *INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON* (Ruth Chang ed.) 151, 151–69 (focusing on individual decision making under circumstances of incommensurability); Joseph Raz, *Incommensurability and Agency*, in *INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON*, *supra*, at 110, 127 (arguing that choice, not rationality, governs the selection among incommensurables); Charles Taylor, *Leading a Life*, in *INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON*, *supra*, at 178–83 (arguing that justified choice among incomparables can be made by analyzing how the competing goods fit within the “shape” of a person’s life).

316. See Taylor, *supra* note 315.

317. *But cf.* THOMAS NAGEL, *THE VIEW FROM NOWHERE* (addressing the problem of how to combine subjective and objective viewpoints).

318. See Rosen, *Congress’s Primary Role*, *supra* note 170, at 21–25.

319. Advocates of this approach do not believe it to be limited to resolving real conflicts.

available for only a subset of choice-of-law questions. Further, party autonomy is normatively suspect where one of the contracting parties is a repeat player with superior information and resources to the other contracting party, for party autonomy allows the repeat-player to systematically choose the substantive law that benefits it.³²⁰ This can have undesirable distributive consequences, and also may undermine paternalistic law and laws that protect third-party interests.³²¹

e. Fourth Lesson: Fading of Interstate Considerations

The final lesson to draw from our survey of alternatives to territorialism is that contemporary choice-of-law approaches do not take much account of the health of the interstate system. We can readily hypothesize how this has come to pass: the most influential alternative to territorialism, Currie's governmental interest approach, focuses *exclusively* on states—ascertaining the state “interests” behind the different states’ laws—and literally takes no account of the interstate system.³²² Leflar's second factor is “maintenance of the interstate . . . order,” but he (and cases following him) treated this as being interchangeable with the charge that courts should be aware of false conflicts.³²³ The *Second Restatement's* section six principles include “the

320. See, e.g., HERMA H. KAY, LARRY KRAMER & KERMIT ROOSEVELT, CONFLICT OF LAWS 115–16 (9th ed. 2013) (detailing plan of Citicorp, a New York holding company, to undertake steps so South Dakota usury law, which allows charges of up to twenty-four percent interest, would apply to consumer credit card contracts).

321. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) (1971) (explaining that the parties' choice of law is disregarded if “application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue”). A considerable body of case law refuses to enforce choice-of-law provisions on the ground that the chosen law contravenes public policy. See Symeonides, *supra* note 2, at 247–52 (discussing recent cases concerning enforceability of choice-of-law and choice-of-forum provisions).

322. See Simson, *supra* note 306, at 722 (“[I]nterest analysis leaves little room for courts to consider policies other than those reflected in states' domestic laws . . .”); Trautman, *Toward Federalizing*, *supra* note 14, at 1721–22.

323. See *Milkovich v. Saari*, 295 Minn. 155, 157 (1973) (“[N]o more is called for than that the court apply the law of no state which does not have substantial connection with the total facts and the particular issue being litigated.”); Leflar, *supra* note 295, at 1587 (“No forum whose concern with a set of facts is negligible should claim priority for its law over the law of a state which has a clearly superior concern with the facts.”).

needs of the interstate and international systems,”³²⁴ but this also has not received much attention from courts or commentators.³²⁵ As Dean Simson has observed, “in practice, the needs of the interstate and international systems have figured only marginally in courts’ decisions on choice of law. Even on the rare occasions that the needs are mentioned in the courts’ opinions, they often play no meaningful role in the final resolution.”³²⁶

III. RECONCEPTUALIZING CHOICE-OF-LAW AS FEDERAL LAW

Building on the insights from Parts I and II, this Part presents this Article’s core claim: that in a post-*Erie* positivist world in which law must be traceable to some sovereign, domestic choice-of-law rules must be federal law. Section A explains why, on functional and conceptual grounds, choice-of-law must be federal law. Section B fortifies Section A’s argument on positive grounds, showing that the Constitution gives Congress the power to prescribe uniform choice-of-law rules that would be applicable in both state and federal courts. Section C argues that the 1948 amendments to the Full Faith and Credit Act partially overruled *Klaxon*, and that *Klaxon* should be fully overturned to revive language in the Rules of Decision Act that authorizes federal courts to create federal choice-of-law rules. Section D explains that even without these two federal statutes, choice-of-law would best be understood as a nationwide, uniform body of federal common law.

A. WHY CHOICE-OF-LAW IS FEDERAL LAW

For functional and conceptual reasons, domestic choice-of-law is best understood as being federal law.³²⁷ First, as Subsec-

324. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(a) (1971).

325. See, e.g., Larry Kramer, *On the Need for a Uniform Choice of Law Code*, 89 MICH. L. REV. 2134, 2141 (1991) (arguing “we must think about choice of law more like treaty negotiations, where the ‘correctness’ of a particular solution is simply a matter of what the states agree to do,” thus overlooking systemic considerations).

326. Simson, *supra* note 306, at 749; Luther L. McDougal III, *Toward the Increased Use of Interstate and International Policies in Choice-of-Law Analysis in Tort Cases Under the Second Restatement and Leflar’s Choice-Influencing Considerations*, 70 TUL. L. REV. 2465, 2466–69 (1996).

327. See Hart, *supra* note 18, at 514 (concluding that questions addressed by conflict of laws are “essentially federal, in the sense that they involve, by hypothesis, more than one state.”); Trautman, *Toward Federalizing*, *supra*

tion 1 explains, choice-of-law can only discharge its function of managing the differences of substantive law across polities if there is a single uniform set of choice-of-law rules across those polities—what this Article has been calling the Single System Requirement. Interestingly, all three pre-modern conceptualizations of choice-of-law surveyed in Part I—choice-of-law as general law, as Bealean common law, and as constitutional law—satisfied the Single System Requirement. In a post-*Erie* world, federal law holds out the only prospect for satisfying the Single System Requirement. Subsections 2 through 4 argue that, as a conceptual matter, federal law is the appropriate apparatus for policing the limits of states' extraterritorial powers, determining the nature of our federal union, and maintaining the health of the interstate and federal systems.

1. An Historical and Functional Argument for the Single System Requirement

a. The Single System Requirement, and the Unyielding Need for Uniform Results

As Part I showed, choice-of-law historically has functioned as a system for managing substantive differences of law across polities to facilitate cross-polity transactions; it was originally developed in Europe to serve this goal, and was imported into this country to do the same. Choice-of-law can effectively manage the differences in substantive law across polities only if choice-of-law generates uniform outcomes across those polities. That is to say, the chosen law—the law deemed applicable to a person, transaction, or occurrence that straddles multiple polities—cannot vary depending upon which polity's court is asked to determine which law applies. If choice-of-law does not generate uniform results, then it will not be predictable as to which polity's law applies.

The absence of predictability is deeply problematic, for predictability is necessary for both people and polities: predictability allows parties to rationally plan their activities with the knowledge of what law applies, and thereby enables the regulating polity's laws to be efficacious. To elaborate, without predictability, there will be pre-litigation uncertainty, or mistake,

note 14 (“I have no doubt that choice of law as between states of the United States is, in theory, inherently and unarguably a federal question.”); *see also* Gottesman, *supra* note 16, at 32 (arguing that choice-of-law is a “uniquely appropriate federal role”).

as to which state's law applies. People will be unable to conform their actions to legal requirements, or to intelligently bargain in the shadow of the law. Such legal uncertainty also undermines states' capacity to effectively regulate, to the extent that compliance requires knowledge as to what law governs.³²⁸ Furthermore, if the need for litigation should arise, heterogeneous choice-of-law regimes and their attendant non-uniformities will encourage forum shopping, and may impose unnecessary litigation costs—for instance, fighting as to which choice-of-law rules apply, and efforts to transfer forum so as to trigger a choice-of-law system that will select the favored substantive law. For all these reasons, if a choice-of-law system does not generate uniform results, choice-of-law cannot successfully accomplish its managerial functions.

Choice-of-law can generate uniform results, and hence allow for predictability as to applicable law, only if one condition holds: if all the polities whose differences in substantive law occasion the need for choice-of-law use the same choice-of-law rules.³²⁹ This is what gives rise to what I have been calling choice-of-law's 'Single System Requirement.' Predictability is lost if the Single System Requirement is not met. If two polities use different choice-of-law rules—such that state A's choice-of-law rules select state Z's contract law whereas state B's choice-of-law rules select state Y's—then parties cannot predict what law will govern, and choice-of-law will fail as a management system.

328. Compliance sometimes is possible even under conditions of uncertainty as to which state's law governs. For example, if one state's law is stricter than another's with respect to only a single dimension, it is possible to comply with both state's laws. But compliance with the stricter law may in some circumstances be in tension with the less strict state's law. For example, if the less strict state's policy is to permit persons to be unregulated where its restrictions are inapplicable, then compliance with the stricter state's law due to uncertainty as to which state's law applies must be deemed to undermine the policy of the less-strict state.

329. See Hart, *supra* note 18, at 514 (“[U]niformity of obligation as between particular individuals, regardless of the locus of litigation, is almost invariably desirable; and the essence of this can be achieved without enacting uniform substantive laws. The promotion of this kind of uniformity . . . is one of the functions of the principles of the conflict of laws.”).

b. *The Single System Requirement As a Solution to Renvoi*

i. The Problem of Renvoi

An additional consideration demonstrates that choice-of-law has a Single System Requirement. The Single System Requirement eliminates what is widely described as the most conceptually intractable problem in choice-of-law, renvoi.³³⁰ Demonstrating this necessitates full discussion of the intricate subject of renvoi. Readers who are not already familiar with renvoi may wish to jump ahead ten pages to Part III.A.1(c); while the analysis of renvoi below strengthens the case for the Single System Requirement, the less technical considerations discussed thereafter fully ground this Article's argument that choice-of-law is inherently federal.

To explain renvoi, let us slightly rework the facts of the well-known case of *In re Schneider's Estate*.³³¹ Consider a domiciliary of State A who, at his death, has real property in State B. Assume that the decedent's will is valid under State A's law, but not State B's. Assume further that State A's choice-of-law rule provides that the law of the place where the real property is located governs the will's validity as regards that property (the situs rule), whereas State B's choice-of-law rule is that a will's validity is governed by the law of the testator's domicile (the domicile rule).

Note what will occur if a lawsuit concerning the will's validity as applied to the real property is litigated in the court of State A. Applying State A's choice-of-law rule, Court A will determine that the question of the will's validity should be determined by the law of State B. But when Court A goes to apply the law of State B, it must consider what to do about State B's choice-of-law rule, which provides that the will's validity should be governed by *State A's* law. There are only two options, neither of which is palatable.

330. For an extensive list of scholars who identify renvoi as intractable, see Roosevelt, *Resolving Renvoi*, *supra* note 244, at 1822–24. For thorough discussions of the many unsuccessful solutions to renvoi that have been propounded by American scholars, see Larry Kramer, *Return of the Renvoi*, 66 N.Y.U. L. REV. 979, 984–97 (1991). Most recently, proponents of interest analysis thought their approach eliminated the problem of renvoi, but Larry Kramer and Kermit Roosevelt have persuasively debunked that claim. *See id.* at 997–1012; Roosevelt, *Resolving Renvoi*, *supra*, note 244, at 1850–64. I discuss Professor Roosevelt's intriguing proposed solution to renvoi below. *See infra* Part III.A.1.b.iii.

331. 96 N.Y.S.2d 652 (N.Y. Sup. Ct. 1950).

First, Court A can apply State B's choice-of-law rule—in the arcane language of choice-of-law, Court A can 'accept the renvoi.' But doing so will generate an infinite loop, for State A's choice-of-law, it should be recalled, determines that State B's law applies (which in turn determines that State A's law applies, which in turn determines that State B's law applies, *ad infinitum*).³³² The infinite loop can be eliminated if, after accepting the renvoi from State B, Court A disregards its own choice-of-law rule (rejects the renvoi) and applies only its 'internal law' concerning testamentary validity. But what justification can there be for accepting the renvoi once and once only—that is to say, for State A to apply choice-of-law rules twice (first the choice-of-law of its own state and then State B's domiciliary rule), and thereafter to ignore choice-of-law rules? To this day, there is no widely accepted answer to this question.³³³

The second option is that after Court A applies its choice-of-law rule—which, to recall, indicates that State B's law governs the will's validity—Court A can ignore State B's choice-of-law rule ('reject the renvoi') and straightaway apply State B's testamentary rules to the will (apply only State B's 'internal law', not its 'whole law,' in the language of renvoi). Rejecting the renvoi avoids the risk of an infinite loop, but what is the justification for Court A's decision to apply only *its* state's choice-of-law rule? No widely accepted answer to this question has yet been identified.³³⁴

ii. Solving Renvoi by Banishing It: The Single System Requirement

This Article solves renvoi by eliminating it: renvoi arises only if different states have different choice-of-law rules, and this Article's core claim is that there must be a single federal choice-of-law system operative in both state and federal courts.³³⁵ Put differently, the paradox of renvoi is additional ev-

332. Renvoi also arises if State B's choice-of-law rules would select the substantive law of State C. For present purposes we need not explore this even more complicated scenario, which only amplifies the point made above in the text.

333. See CURRIE ET AL., *supra* note 125, at 64–70; *supra* note 330.

334. See *id.*

335. Professor Roosevelt has stated that "eliminat[ing] the possibility of renvoi . . . requires complete uniformity in choice-of-law methodology, internal law, and characterization techniques—at which point, obviously, there is very little need for choice of law." See *Resolving Renvoi*, *supra*, note 244, at 1830. While Roosevelt is right to dismiss as impossible such a trifecta uniformity, see

idence for the Single System Requirement. Satisfying the Single System Requirement—ensuring that there is a single choice-of-law system over the jurisdictions whose differences in substantive law choice-of-law manages—is the only way to avoid the paradox of renvoi.

My renvoi-avoiding argument on behalf of the Single System Requirement would be weakened, though not fatally undermined, if there were a satisfactory alternative solution to renvoi. Such an alternative would weaken my argument on behalf of the Single System Requirement because renvoi would no longer be a veritable paradox; a solution's ability to sidestep an unsolvable paradox constitutes strong evidence that the solution contains a conceptual advance.³³⁶ In separate articles, Professors Larry Kramer and Kermit Roosevelt each have demonstrated the insufficiencies of the proposed solutions to renvoi that were advanced in the twentieth century.³³⁷ I find their analyses persuasive, and accordingly incorporate their arguments by reference.

Accompanying Professor Roosevelt's review of the unsatisfactory past solutions, however, is an ingenious novel solution to renvoi.³³⁸ The strength of my claim on behalf of the Single

id. ("Renvoi . . . is aptly termed one of the 'pervasive problems' in choice of law." (citations omitted)), he overstates the uniformity necessary to eliminate renvoi. Uniformity as to internal law and characterization techniques is necessary only within a territorialist approach to choice-of-law, for only territorialism relies on characterization and internal law to locate where a transaction or occurrence has taken place. Though this Article is not the place to fully work out the details of federal choice-of-law, this much can be said: the fact that territorialism demands uniformity of substantial swaths of substantive law to achieve uniformity of choice-of-law results is a strong reason for rejecting territorialism as a candidate insofar as one of choice-of-law's core tasks is to generate uniform results that permit *ex ante* predictability. I provide a few more general observations concerning the specifics of federal choice-of-law below. *See infra* notes 474–77.

336. Even the existence of a remedy for renvoi would not necessarily destroy my claim that the Single System Requirement's circumvention of renvoi constitutes strong evidence in its favor. Whether the existence of a solution in fact rendered the Single System Requirement's avoidance of renvoi normatively irrelevant would turn on a detailed analysis of the solution's strengths and weaknesses. For example, a 'solution' that created problems, or that was based on counterfactual assumptions, would do little to undermine the strength of an approach that obviated the problem. Moreover, the existence of even a fully satisfactory solution to renvoi would not necessarily undermine this Article's argument for the Single System Requirement, because avoiding a problem altogether still might be normatively preferable. Further, some problems have multiple good solutions.

337. *See Kramer, supra* note 330; *Roosevelt, supra* note 330.

338. *See Roosevelt, Resolving Renvoi, supra*, note 244.

System Requirement's elimination of renvoi accordingly depends in part on whether Roosevelt's solution is satisfactory.³³⁹ For the reasons explained below, I believe Roosevelt's solution to be brilliant but deeply problematic. It thus does not deflate the power of the Single System Requirement's elimination of renvoi.

iii. Professor Roosevelt's Proposed Solution to Renvoi

Roosevelt argues that where the choice-of-law rules of two states each determine that the other state's substantive law applies—as in the variation on *In re Schneider's Estate* discussed above—the solution is that *no* state's substantive law applies. Roosevelt's solution, in other words, draws upon, and expands, the component of interest analysis known as the “unprovided-for” case. In Roosevelt's words, “renvoi is simply a special instance of the unprovided-for case.”³⁴⁰

To appreciate Roosevelt's argument, it is important to quickly explain the notion of the unprovided-for case. The first step of interest analysis is to determine whether each state's law would apply to the multistate set of facts.³⁴¹ “False conflicts” are present where only one state's law applies, whereas “true conflicts” are where two (or more) states' laws apply. But there is a third possibility: that *no* state's law applies. And that is the unprovided-for case. As I shall now explain, though the unprovided-for case is a perfectly valid concept, Roosevelt's invocation of it as a solution to renvoi is problematic, and ultimately unworkable.

A concrete example will aid our analysis, so let us consider the classic case of *Erwin v. Thomas*.³⁴² After Mr. Erwin was injured by Mr. Thomas in Washington, Erwin's wife sued Thomas in Oregon for loss of consortium.³⁴³ Oregon law permitted such claims, whereas Washington did not allow wives to sue for loss of consortium.³⁴⁴ Applying interest analysis, the Oregon court determined that Washington law would not apply to these facts; the court thought the purpose of the Washington law was to protect Washington defendants from having to pay for loss of

339. *But see supra* note 336.

340. *See* Roosevelt, *Resolving Renvoi*, *supra*, note 244, at 1885.

341. *See supra* notes 268–70.

342. 506 P.2d 494 (Or. 1973).

343. *Id.* at 494–95.

344. *Id.* at 495.

consortium,³⁴⁵ and there was no Washington defendant on the case's facts.³⁴⁶ The court also concluded that Oregon law was inapplicable; the court thought Oregon law aimed to compensate Oregon wives, and there was no Oregon wife in the case.³⁴⁷

Although several scholars have argued that the possibility of the category of an unprovided-for case proves that interest analysis is conceptually unsound,³⁴⁸ Professor Larry Kramer persuasively argues that an unprovided-for case on facts like *Erwin* is simply an unproblematic instance where "[t]he plaintiff has no cause of action . . . because she suffered no legally cognizable injury."³⁴⁹ The appropriate response to an unprovided-for case of this sort is simply to dismiss for failure to state a claim on which relief can be granted—a pedestrian occurrence that in no way undermines interest analysis's conceptual coherence.³⁵⁰

Though Professor Kramer's explanation of the unprovided-for case is to my mind irrefutably sound, Professor Roosevelt's reliance on unprovided-for cases to resolve *renvoi* does not work, for four reasons. Accordingly, the Single System Requirement's circumvention of *renvoi* remains a robust argument on the requirement's behalf.

First, Roosevelt's approach generates more gaps in the law than good sense suggests exist. For example, Roosevelt's approach leads to the conclusion that no state's law governs the validity of domiciliary A's will in *In re Schneider's Estate*. Consider as well the question in *Milliken* regarding the validity of Mrs. Pratt's guaranty contract: because Massachusetts choice-of-law indicated that Maine law applies, and Maine's choice-of-

345. Professor Kramer persuasively critiques this interpretation of Washington law. See Larry Kramer, *The Myth of the "Unprovided-For" Case*, 75 VA. L. REV. 1045, 1062 (1989).

346. 506 P.2d at 496.

347. *Id.*

348. See Kramer, *supra* note 345, at 1046 (citing arguments to this effect propounded by Professor Aaron Twerski, Dean John Hart Ely, and Professor Lea Brilmayer).

349. *Id.* at 1062. Professor Kramer ultimately concludes that the privileges and immunities clause would obligate Oregon to apply Oregon law and that *Erwin v. Thomas* therefore is not really an unprovided-for case. See *id.* at 1073. I do not agree with that component of Kramer's argument, though this already lengthy Article is not the place to explain why; this Article's argument on behalf of the Single System Requirement does not at all depend upon the conceptual soundness of unprovided-for cases.

350. Professor Roosevelt agrees. See Roosevelt, *Resolving Renvoi*, *supra*, note 244, at 1885 (endorsing Kramer's solution).

law rule would have selected Massachusetts contract law (on the assumption the mailbox rule was operative in Maine, so that any contract would have come into existence in Massachusetts, where Mr. Pratt mailed the contract), Roosevelt would conclude that no law governed the validity of Mrs. Pratt's contract. Yet the conclusion that no law governed either of these situations seems unsound. Lawmakers and citizens likely would expect that *some* law governed the will's validity, and the validity of Mrs. Pratt's contract. Let us call the absence of law in each of these cases, under Professor Roosevelt's approach, a "Surprising Gap."

The category of a Surprising Gap does not entail a rejection of unprovided-for cases. Tools that Professor Roosevelt has helped publicize enable us to see why. Roosevelt helpfully suggests that choice-of-law analysis consists of two steps: (1) identifying the 'scope' of each state's law to determine what kind of case there is (for instance a false or true conflict) and, if there is a true conflict, (2) applying a "rule of priority" to determine "which of the conflicting rights will prevail."³⁵¹ It makes perfect sense to invoke the category of the unprovided-for case when analysis at the first step determines that a multistate circumstance falls outside the scope of both states' laws; that is what happened, for instance, in the above-discussed case of *Erwin v. Thomas*. The category of a 'Surprising Gap' hence sheds no doubt on the validity of unprovided-for cases.

Professor Roosevelt's tools also help us to see, however, why his proposed solution to renvoi creates veritable Surprising Gaps. It makes no sense to conclude that there is an unprovided-for case where analysis of the scope of each state's laws determines that *both* would apply, and renvoi results only because each state uses a different "rule of priority." Calling such a circumstance an unprovided-for case is, in fact, perverse; rather than being unprovided-for, the circumstance is *over*provided-for, in the sense that multiple states' laws are *prima facie* applicable. We confront renvoi—each state's choice-of-law rule selects a different state's substantive law—only because the states disagree as to which state's law should prevail in that circumstance of both states' substantive laws being *prima facie* applicable. Frequently, a state's decision to forego applying its own law, and to instead apply another state's law, reflects that state's commitment to comity (its desire to be accommodating of

351. *Id.* at 1871.

the other state).³⁵² Surely a circumstance where each state would like to apply its own law, but out of comity would apply the other's, is not appropriately described as an *unprovided-for* case where neither state's law applies, as Professor Roosevelt would have us do.

Second, under Roosevelt's approach, Surprising Gaps in substantive law vis-à-vis transborder occurrences will increase to the extent that states' choice-of-law rules diverge. This is so because the more that states' choice-of-law rules diverge, the greater is the likelihood that states' choice-of-law rules will identify different state law as being applicable. Yet there is no justifiable basis for thinking that increasing divergences in choice-of-law *should* escalate the number of unprovided-for cases. This is an additional consideration that suggests Roosevelt's solution is conceptually off-the-mark.

To his credit, Roosevelt acknowledges that his solution "is in a certain sense the death of choice of law"—that it is an "abandonment of the fundamental aspiration of the field of conflict of laws" that "will surely strike some as shocking."³⁵³ But Roosevelt does not come to terms with the breadth of the gaps in law that his approach produces, nor with the fact that the number of gaps likely will increase should states' choice-of-law regimes continue to diverge. Roosevelt's solution depends upon the existence of Substantial Gaps not heretofore recognized, and it likely would increase those gaps if states' choice-of-law systems continue to diverge. These concerns must count as arguments against his solution—particularly if there is an alternative solution to *renvoi* (namely, the Single System Requirement) that does not generate Surprising Gaps.

Third, there is no simple, normatively justifiable way that the forum's legislature, or its courts, can fill the Surprising Gaps that appear under Roosevelt's proposed solution. A Surprising Gap appears where two conditions obtain: (1) Forum A's choice-of-law rule determines that State B's law applies and (2) State B's choice-of-law rule determines that Forum A's law applies. Call this 'the two-factor circumstance.' The only way Forum A's legislature (or courts) can fill that Surprising Gap is by prescribing a substantive law that will apply in the two-factor circumstance. Any such solution will be quite odd; plugging the gaps requires the forum to have, first, a conditional choice-of-

352. Cf. Kramer, *supra* note 345, at 1052.

353. Roosevelt, *Resolving Renvoi*, *supra*, note 244, at 1888 (citations omitted).

law rule under which another state's law governs unless that state's choice-of-law indicates that the forum's substantive law applies, and also, second, a substantive rule that will apply in that circumstance. That's pretty strange.

And the problems of legislative remedying of Rooseveltian gaps go beyond strangeness. What substantive law should the forum prescribe? There are only two possibilities, and both are problematic. First, Legislature (or court) A could create a unique substantive rule that would govern should the two-factor circumstance pertain. Second, Legislature (or court) A could provide that Forum A's substantive law incorporates B's substantive law.³⁵⁴

The first solution creates a troubling asymmetry: the identical set of facts that straddle more than one state sometimes will result in the application of another state's substantive law, and other times in the application of A's substantive law, and which obtains will depend entirely on the foreign state's choice-of-law rules.³⁵⁵ The second solution is functionally equivalent to a court's rejecting the *renvoi* insofar as it in effect disregards the foreign state's choice-of-law rule—a practice that is functionally identical to rejecting the *renvoi*, which to this day has not been successfully justified.³⁵⁶

Furthermore, both solutions are prone to generating non-uniformity of results across state courts, thereby undermining predictability and incentivizing forum shopping. To illustrate, imagine that both the forum and foreign states adopt the first solution—that is to say, each adopts a unique rule (A_1 and B_1) to

354. The second solution is equivalent to the legal realists' "local law" approach to resolving *renvoi*. See Roosevelt, *Resolving Renvoi*, *supra*, note 244, at 1842–43.

355. It might be thought that there is a valid counter-argument: there is no troubling asymmetry because a set of facts Y that straddles States A and B is *not* identical to the same set of facts Y that straddles States A and C if C has different law than B. The counter-argument is generally valid vis-à-vis substantive laws; if B and C have different tort rules, then there *is* a meaningful difference between facts Y that straddle A and B, on the one hand, and facts Y that straddle A and C. But there is an important question that must be resolved to determine whether the counter-argument is valid as applied here—is the counter-argument valid vis-à-vis states' different choice-of-law rules? Answering this question would appear to replay the question that lies at the heart of *renvoi*, as to whether the non-forum's choice-of-law is deemed to be law that must be applied by the forum, and for that reason is likely intractable. And that is why the statement above in text, to which this footnote is attached, remains valid.

356. For a thorough critique of this solution, see Roosevelt, *Resolving Renvoi*, *supra*, note 244, at 1843–49.

be applicable in the event the two-factor circumstance arises. If P files suit in court A, then rule A₁ will apply, whereas rule B₁ will apply if the lawsuit is filed in court B. Non-uniformity of results will also occur if both states adopt the second solution: if P files suit in court A, then rule B will apply, whereas rule A will apply if the lawsuit is filed in court B. Uniform results will obtain only if one of two events occur: (1) the unlikely event that all state legislatures determine that the identical substantive rule R is to apply when the two-factor circumstance arises, or (2) the fortuitous circumstance where one of the two states giving rise to the two-factor circumstance has adopted the first solution and the other has adopted the second. Surely uniform results should not hinge on unlikely events or mere fortuity.

Fourth, Roosevelt's solution is undesirable because it continues the contemporary approach of treating conflicts as state law.³⁵⁷ The core of Roosevelt's argument is that whether foreign law applies can only be determined by the foreign state because applicability of the foreign state's law is exclusively a question of state law.³⁵⁸ This assumption is deeply problematic: for the reasons explained already in this Part III.A.1, along with those to come in Part III.A.2, choice-of-law is best understood as being federal law.³⁵⁹

In conclusion, this Article's federal choice-of-law approach satisfies the Single System Requirement and thereby solves *renvoi*, but without the untoward consequences of Roosevelt's

357. *See id.* at 1888.

358. *See id.* (concluding that *renvoi* is the byproduct of the mistaken notion that "forum law can determine the scope of foreign law," a proposition that "is an unconstitutional usurpation of authority, a denial of the basic proposition that a state's courts have the last word on the meaning of their own law").

359. To be more precise, determining when a state's law applies to an occurrence that straddles multiple states is *primarily* a function of federal law. Fully explaining why this determination is primarily, not exclusively, a function of federal law is complicated, and the subject of a work-in-progress. A brief preview of that article's argument nonetheless may be useful here. Whether a foreign law *prima facie* applies to a multi-state circumstance turns on the scope of state law, which is a matter of state law. Much of the time, however, more than one states' laws will be applicable to a multistate circumstance; put differently, there are far fewer false conflicts than interest analysis ordinarily purports to identify. This means that choice-of-law's frequently will have to determine which of two or more *prima facie* applicable states' laws will be applied, and *that* is a matter of federal rather than a state law. All state courts (as well as federal courts) have the power to aim to answer this federal question of which of two *prima facie* applicable state laws should be applied, and such resolutions ultimately are subject to Supreme Court review and congressional revision.

approach. By satisfying the Single System Requirement, the federal law approach eliminates the very source of renvoi. And it resolves renvoi in a manner that is consistent with deeply held and longstanding intuitions. Thus, under the federal approach, there *is* law that addresses the validity of A's will in *In re Schneider's Estate*, and of Mrs. Pratt's contract in *Milliken*. Renvoi's infinite loop is avoided because there is a single body of choice-of-law rules, applicable in both states' courts (and federal courts as well), that selects one state's substantive law to govern these validity questions. Whereas under Roosevelt's approach "choice-of-law rules cannot resolve the very question that called them into being,"³⁶⁰ under this Article's federal approach choice-of-law *can* discharge the tasks that called it into being.

To be sure, renvoi still can arise under this Article's approach for so long as neither Congress nor the courts have definitively identified a nationwide choice-of-law rule. But any such renvoi risks are contingent, not an inherent property of a federal approach to choice-of-law. Only the federal approach to choice-of-law, which meets the Single System Requirement, is capable of eliminating renvoi.

c. Longstanding Historical Practice, the Single System Requirement, and Federal Law

The analysis above shows there was wisdom in the longstanding historical practice, shown in Part I, of conceptualizing choice-of-law as a type of law that, by its nature, was everywhere uniform. All three pre-modern conceptualizations of choice-of-law surveyed in Part I—choice-of-law as general law, as Bealean common law, and as constitutional law—accordingly satisfied the Single System Requirement. The relatively recent contemporary phenomenon of multiple choice-of-law systems violates the Single System Requirement, and for that reason is fundamentally incompatible with what choice-of-law aims to accomplish. Put simply, a multiplicity of choice-of-law systems is itself a conceptual oxymoron.

In our contemporary post-*Erie* country, federal law holds out the best hope of satisfying the Single System Requirement by delivering the nationwide uniformity that domestic choice-of-law requires.³⁶¹ Consider state law's inherent deficiencies.

360. Roosevelt, *Resolving Renvoi*, *supra*, note 244, at 1888.

361. See Freund, *supra* note 185, at 1211 ("Uniformity can be achieved most naturally by the adoption of uniform rules of conflict of laws.").

Klaxon's conception of choice-of-law—under which choice-of-law is state law that is *expected* to vary across states—is literally antithetical to uniformity. Though state law is not necessarily incompatible with uniformity—there could be a uniform choice-of-law statute formulated by the Uniform Law Commission and adopted by all state legislatures³⁶²—state law poses many practical barriers to uniformity. Not every state may agree to enact the ‘uniform’ law. Even those legislatures that do may make changes to the uniform legislation, creating non-uniformities in statutory language. Finally, even where there is identical statutory language, non-uniformities almost invariably will be introduced by the supreme courts of each state, each of which has final interpretive authority over its state’s law.³⁶³

Federal law sidesteps all these impediments to uniformity. Whereas each state holds a veto power under a uniform laws approach, the federal legislative process³⁶⁴ can generate a nationwide uniform choice-of-law statute upon receiving simple majorities in Congress with presidential support. The ability to generate binding rules absent unanimity is important where coordinating rules are necessary because unanimity requirements undersupply valuable law.³⁶⁵ Supreme Court review likewise holds out the possibility of nationwide uniform interpretation of the statute, or of federal common law doctrines for choice-of-law.

2. Why Choice-of-Law Is Inherently Federal: Three Conceptual Arguments

The previous subsection looked to history to locate a feature—consistency with the Single System Requirement—that was shared by multiple conceptualizations of choice-of-law, and then argued that choice-of-law is today best understood as federal law on account of contemporary jurisprudential commitments having nothing to do with choice-of-law—namely our post-*Erie* positivist need to tie law to some sovereign. The previous subsection then bolstered the argument on behalf of the

362. For such a call, see Kramer, *supra* note 325.

363. See generally DAVID F. CAVERS, THE CHOICE-OF-LAW PROCESS 233 (1965) (noting these things).

364. I explain below Congress’s sources of power to enact nationwide uniform choice-of-law statutes.

365. See DAVID M. ESTLUND, DEMOCRATIC AUTHORITY: A PHILOSOPHICAL FRAMEWORK 243–45 (2008). See generally ADRIAN VERMEULE, MECHANISMS OF DEMOCRACY: INSTITUTIONAL DESIGN WRIT SMALL 73–176 (2007).

Single System Requirement by showing that it can solve the paradox of renvoi.

This subsection argues that choice-of-law is appropriately understood as federal because it accomplishes three inherently federal functions³⁶⁶: it polices states' extraterritorial powers, is substantially responsible for determining the nature of our federal union, and maintains the health of the interstate system. These three tasks are inherently federal because they are not of interest to only a single state, they cannot properly or effectively be decided by single states, and they are best decided by the federal government on functional and normative grounds.

a. Policing States' Extraterritorial Powers

First, choice-of-law discharges the inherently federal function of policing the scope of states' extraterritorial powers.³⁶⁷ Treating choice-of-law as state law is to allow each state to determine for itself whether its or another state's law is to govern a person, transaction, or occurrence that both states have constitutional power to, and wish to, regulate. Consider the *Harrah's Club* case, where California residents who had been served excessive alcohol in a Nevada tavern later had a car accident in California while returning home.³⁶⁸ California law allowed recovery against the Nevada tavern keeper for injuries suffered in California that had been proximately caused by his sale of alcohol in Nevada, whereas Nevada law did not.³⁶⁹ Both states had power, consistent with the Constitution, to apply their laws. Under the modern view that choice-of-law is state

366. In so doing, this subsection does not confine itself to history, but suggests that choice-of-law is best understood, as a conceptual matter, as federal law—not as general law or Bealean common law.

367. Choice-of-law acts in conjunction with other doctrines, including federal limitations on states' extraterritorial regulatory jurisdiction, to discharge this role. See Rosen, *supra* note 5, at 871–913. For other arguments that choice-of-law discharges an inherently federal function, see Baxter, *supra* note 17, at 22–23 (“[T]he process of resolving choice cases is necessarily one of allocating spheres of legal control among states Responsibility for allocating spheres of legal control among member states of a federal system cannot sensibly be placed elsewhere than with the federal government.”). Unlike the argument presented here, Baxter did not think Congress had the power to prescribe choice-of-law rules for states. See *id.* at 42 (arguing that that “every state should, as a matter of state law, adopt the comparative impairment principle; but I cannot justify a federal compulsion to do so.”). For my response to Baxter, which identifies and explains the source of such congressional power, see *infra* notes 382–88.

368. *Bernhard v. Harrah's Club*, 546 P.2d 719, 720 (Cal. 1976) (en banc).

369. *Id.* at 721.

law, the California court was able to decide as a matter of state law whether to apply California or Nevada law.³⁷⁰ As argued above, real conflicts like *Harrah's Club* are intractable³⁷¹—they are not susceptible to determinate, principled resolution, but instead are necessarily decided through a process of indeterminate factual and political prognostication, and then by rendering inherently subjective tradeoffs among those court-determined factual and policy differences that are incorporated in the two states' laws. With this understanding, it is not too surprising that the California court in *Harrah's Club* chose to apply California law, and it seems likely that a Nevada court would have chosen otherwise.³⁷² What *is* surprising is that the law determining which state's law applied presently is deemed to be *state* law.

Modern political theory is rightfully suspicious of claims that bureaucracies can be trusted to determine the scope of their own powers. And when the competing state laws reflect deep differences in the values of each respective state, allowing each to choose for itself is tantamount to asking the proverbial fox to guard the henhouse. These problems are not sidestepped by the fact that courts are the typical decisionmakers; most state judges are elected, and even those that are appointed can be expected to share their state's political preferences insofar as they are appointed by the state's politicians. Making matters worse, state legislatures have the ultimate power to set choice-of-law rules under most modern choice-of-law methodologies.³⁷³

In short, the modern understanding that states possess extraterritorial regulatory authority that generates real conflicts constitutes another reason why the law that sorts out such conflicts—choice-of-law—must be federal, not state.

b. Helping To Determine the Character of our Federal Union

Choice-of-law plays a significant role in determining the very character of the federal system. Allowing room for legal pluralism is one well-recognized benefit of federalism; federalism allows states to take different regulatory approaches vis-à-vis policies concerning which neither the Constitution nor fed-

370. *See id.* at 722.

371. *See supra* Part II.B.2.d.

372. *Harrah's Club*, 546 P.2d at 725–26.

373. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 6(1) (1971) (“A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.”).

eral law demand national uniformity.³⁷⁴ On the other hand, our federal system also values allowing citizens of each state to have an opportunity to travel to sister states where, in addition to taking in the scenery, they can have access to the laws of those sister states. These two values—legal pluralism and what might be called legal tourism—frequently can come into conflict. For instance, State A’s more restrictive laws designed to paternalistically protect its citizens or protect the interests of third parties (say, State A’s limitations on gambling) will be undermined to the extent that a citizen A from State A can simply cross the border and be subject to State B’s pro-gambling laws. What is true of gambling laws is equally true of a host of deeply controversial laws about which states take divergent regulatory approaches: for instance parental notification statutes and motorcycle helmet laws.³⁷⁵

This Article is not the place to seek to resolve the difficult normative question of how to harmonize these competing values of legal pluralism and legal tourism.³⁷⁶ What is relevant for present purposes are two related points. First, how the competing values are harmonized is a substantial determinant of the character of our federal system. Second, in today’s jurisprudential world where states have substantial overlapping regulatory jurisdiction—such that both the domiciliary state and the tourism state typically have power to regulate citizen A consistently with the due process clause—choice-of-law is the main tool for reconciling the competing values of legal pluralism and legal tourism. For instance, choice-of-law would determine whether citizen A, while she is in state B, will be subject to state A’s anti-gambling laws or state B’s allowance to gamble.

The upshot is this: to the extent that choice-of-law determines how the competing values of legal pluralism and legal tourism are to be balanced, choice-of-law is determining the character of our federal union, and hence properly has the status of federal rather than state law.

374. See generally Mark D. Rosen, “Hard” or “Soft” Pluralism?: Positive, Normative, and Institutional Considerations of States’ Extraterritorial Powers, 51 ST. LOUIS U. L.J. 713, 744–50 (2007).

375. See generally Rosen, *supra* note 5, at 882–91.

376. See generally Rosen, *supra* note 374 (fleshing out these competing considerations more fully).

c. *Maintaining the Health of the Interstate System*

Third, choice-of-law ensures that the interstate system is well-functioning.³⁷⁷ Predictability as to what state's law will apply to a multi-state transaction or occurrence—which, as discussed above, requires satisfaction of the Single System Requirement—is only one way choice-of-law affects the interstate system's health. Choice-of-law doctrines also can help reduce transaction costs—both contracting and litigation costs—associated with interstate activity. Further, choice-of-law has effects on interstate frictions. For instance, a choice-of-law rule that permits a forum not to apply non-forum law may open the door to the widespread circumvention and hence undermining of non-forum law³⁷⁸—something that can produce interstate friction.

More generally, because determining the character of our federal system and maintaining the interstate system's health are inherently federal matters, it follows that choice-of-law also is appropriately federal since it is so deeply interwoven with both. Post-*Klaxon* empirical evidence substantiates this conceptual claim: choice-of-law has largely ignored interstate and federal considerations³⁷⁹ since it has been viewed as state law. Moreover, although federal interests in theory could be managed by the states, as through the uniform law process, this seems to be a second-best solution. Leaving management of federal interests to the states is an approach reflecting not the spirit of our Constitution but that of the Articles of Confederation.³⁸⁰ Instead, federal interests are best guarded by federal officials, who are charged with protecting federal matters. State officials typically—and properly—are concerned with state interests.

377. Indeed, the Second Restatement goes so far as to say that “[p]robably the most important function of choice-of-law rules is to make the interstate and international systems work well.” RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 6 cmt. d.

378. See generally Rosen, *supra* note 5, at 864–76.

379. Cf. CAVERS, *supra* note 363, at 220 (noting the federal system need not respect state lines).

380. See generally Jack N. Rakove, *The Collapse of the Articles of Confederation*, in THE AMERICAN FOUNDING: ESSAYS ON THE FORMATION OF THE CONSTITUTION 225–45 (J. Jackson Barlow, Leonard W. Levy & Ken Masugi, eds., 1988) (noting the widely accepted understanding that the Articles of Confederation problematically left too much power to the states to govern matters concerning the nation as a whole).

B. CONGRESSIONAL POWER TO PRESCRIBE CHOICE-OF-LAW

The above arguments concerning the federal character of choice-of-law are bolstered by the Constitution's allowance for the federalization of choice-of-law. Let us first consider Congress's power to prescribe uniform federal choice-of-law rules that would be applicable in state courts before considering choice-of-law in the federal courts.

Congress's power vis-à-vis state courts comes from the Full Faith and Credit's Effects Clause. The Clause's first sentence declares that "Full Faith and Credit shall be given *in each State* to the public Acts . . . of every other State," and the second provides that "Congress may by general Laws prescribe the Manner in which such [public] Acts, Records and Proceedings shall be proved, *and the Effect thereof.*"³⁸¹ The Constitution's drafting history demonstrates that "public Acts" included state legislation, and that Congress's powers to prescribe the "Effects thereof" encompassed "public Acts."³⁸² Early congresses believed their powers extended to prescribing the effects of state records and judgments,³⁸³ and the Court has consistently

381. U.S. CONST. art. IV, § 1 (emphasis added).

382. For the definitive early argument to this effect, see Cook, *supra* note 1, at 425–26, 433–34 ("[T]he language of the clause was intended by its framers to give Congress the power 'by general laws' to 'prescribe the effect,' *i.e.*, the legal effects or consequences, in other states of the 'public acts, records and judicial proceedings' of a state—including, therefore, *legislative acts* as well as *judgments* and all other *records* and *judicial proceedings*," and that "Congress could by enacting such a statute substitute, at least to a large extent, a code of uniform national law."). An early version of the Full Faith and Credit Clause only granted Congress power to prescribe "the effect which judgments obtained in one State shall have in another." *Id.* at 425 (emphasis omitted). Gouverneur Morris thought this too narrow, and proposed an amendment essentially identical to the constitutional language that ultimately was adopted. *See id.* Commenting on Morris' changes, Doctor Johnson "thought that the amendment, as worded, would authorize the General Legislature to declare the effect of the Legislative acts of one State in another State," and no one is recorded as disagreeing. *Id.*; *see also* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 484–85 (Max Farrand ed., 1911). *See generally* CAVERS, *supra* note 363, at 246, 249 (noting that the Effects Clause "has dangled a tantalizing alternative before scholars who have brooded over the difficulties of developing a satisfactory system of judge-made rules to govern choice of law by the states of the Union," though ultimately concluding that legislative solutions to choice-of-law present a "limited, but by no means unimportant, opportunity"); Gottesman, *supra* note 16, at 23 ("Scholars are virtually unanimous in their view that Congress has the power to enact federal choice of law statutes."); Sachs, *supra* note 15, at 1227–29.

383. *See* Sachs, *supra* note 15, at 1240–78. *But see id.* at 1273 (noting one congressman who "idiosyncratically" argued that Congress only had the power to prescribe authentication procedures, not effects).

explained that the Effects Clause gives Congress power to determine the “extra-state effect of [state] statutes.”³⁸⁴ Though the Framers did not understand “public Acts” to include state common law,³⁸⁵ there are powerful arguments for concluding that the Effects Clause should be understood to encompass common law after *Erie*,³⁸⁶ and “[t]here is a categorical statement by the Supreme Court of the United States that common law is within the protection of the [Full Faith and Credit] clause.”³⁸⁷

384. *Pac. Employers Ins. Co. v. Indus. Accident Comm’n*, 306 U.S. 493, 502 (1939) (speaking of “the case of [state] statutes, the extra-state effect of which Congress has not prescribed, as it may under the constitutional provision”); see *Sun Oil Co. v. Wortman*, 486 U.S. 717, 728–29 (1988) (deciding that the Full Faith and Credit Clause did not preclude a forum state from applying its statute of limitations to all claims in a nationwide class action on the ground that it was “procedural,” but also noting that at “[i]f current conditions render it desirable that forum States no longer treat a particular issue as procedural for conflict of laws purposes . . . it can be proposed that Congress legislate to that effect under the second sentence of the Full Faith and Credit Clause.”).

385. *Cook*, *supra* note 1, at 434 n.27a (concluding for that reason that “Congress has power to prescribe the effect of state statutes only, and not that of state ‘common law.’”).

386. As Elliott Cheatham has argued, “[i]t would be a serious breach in our constitutional system if the protection given in interstate matters were wholly dependent on the formal nature of the state law involved—statute or common law.” Cheatham, *Federal Control*, *supra* note 17, at 602. Michael Gottesman has persuasively argued that insofar as *Erie* ruled that “[s]tate laws resulting from judicial enunciation of ‘common law’ are for federal constitutional or statutory purposes indistinguishable from state laws adopted by the legislature . . . it would be wholly anomalous to construe the Full Faith and Credit Clause as distinguishing between state judicial and legislative lawmaking” for purposes of the Effects Clause. Gottesman, *supra* note 16, at 27. Support for this conclusion comes from the recent decision of *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, where Justice Scalia’s plurality opinion concluded that the Takings Clause applies to state court changes in common law, though the Framers would not have thought so since they believed “courts had no power to ‘change’ the common law.” 560 U.S. 702, 727 (2010). “Where the text they adopted is clear,” said Justice Scalia, “what counts is not what they envisioned but what they wrote.” *Id.* The Full Faith and Credit Clause likewise could be said to have “clear” text that encompasses common law within the phrase “Judicial proceedings,” see Gottesman, *supra* note 16, at 26 (noting Justice Jackson’s view), “records,” see *id.* (noting Harold Crosskey’s suggestion), or “public [A]cts,” see Cheatham, *Federal Control*, *supra* note 17, at 602.

387. Cheatham, *Federal Control*, *supra* note 386, at 603 n.77 (citing to *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 436 (1943), which referred to “the faith and credit . . . to which local *common* and statutory law is entitled under [th]e Constitution and laws of the United States” (emphasis supplied by Cheatham)). A four-Justice plurality voted to overrule *Magnolia*, though on different grounds, in *Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980).

Let us now proceed to choice-of-law in the federal courts. The need to apply choice-of-law rules vis-à-vis competing state laws arises in federal courts when they exercise either diversity or supplemental jurisdiction.³⁸⁸ Eminent scholars long have thought that the Diversity Clause includes the power to generate choice-of-law rules to decide the cases that are before the federal court.³⁸⁹ A recent edition of Hart and Wechsler's *Federal Courts* concludes that "Congress, acting under its power to make laws 'necessary and proper' to the exercise of jurisdiction under Article III, could certainly enact, or authorize the formulation of, federal choice-of-law rules for the federal courts."³⁹⁰ Such congressional authority would apply to federal courts' exercise of both diversity and supplemental jurisdiction, and is independent of Congress's powers under the Effects Clause to prescribe choice-of-law rules for state courts.

C. INSTITUTIONAL CONSIDERATIONS

The conclusion that Congress has the power as a matter of positive law to enact choice-of-law rules for both federal and

388. To be clear, we are concerned only with circumstances where a federal court must choose between the substantive law of two (or more) sister states—not choice-of-law between federal and state law, which is addressed by preemption doctrine and the Supremacy Clause.

389. Drawing heavily on a seminal article by Henry Friendly, the American Law Institute concluded that "one of the purposes sought to be achieved by the creation of the diversity jurisdiction might well have been the application of choice-of-law rules different from, or at least independent of, those of the state courts." AM. L. INST., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 446 (1969) (citing Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 496 (1928)); see also Baxter, *supra* note 17, at 37–39. For reasons that by now should be clear, I take issue with the ALI's suggestion that the federal choice-of-law rules might be "different from" those of state courts; choice-of-law must be uniform across federal and state courts. AM. L. INST., *supra*, at 446. That federal courts would have a power "independent of" states to determine choice-of-law, *id.*, may seem inconsistent with Part I's claim, *supra*, that choice-of-law was understood to be an aspect of general law, AM. L. INST., *supra*, at 446. It is not, because diversity jurisdiction addressed concerns that state courts might not be trustworthy. See Friendly, *supra* ("[T]here was much reason to fear that the courts of a state having laws favorable to debtors would apply these laws in favor of their own residents even though the debt was payable in another state."); Baxter, *supra* note 17, at 37.

390. FALLON, JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 565 (6th ed. 2009). It should be noted that Hart and Wechsler's *Federal Courts*'s conclusions as to congressional power to "formulate" choice-of-law rules may be in tension with the ALI's suggestion that the federal judicial power, like all judicial power, includes "the power to formulate choice-of-law rules." AM. L. INST., *supra* note 389, at 444.

state courts is sensible from the perspective of comparative institutional analysis.³⁹¹ As Professor Roosevelt has helpfully explained, choice-of-law consists of two components: (1) determining the scope of two (or more) states' laws for the purpose of ascertaining whether there is a false conflict or whether there is a real conflict in which two (or more) states' laws are *prima facie* applicable, and, if the latter, then (2) determining which state's law should apply.³⁹² I have already explained why federal institutions are superior to state institutions for discharging these two tasks.³⁹³ It also is true that Congress is institutionally superior to federal courts to undertake them. As explained above, real conflicts are intractable for courts because they require a court to render prognostications as to fact and values, and ultimately to balance states' incommensurable policy preferences.³⁹⁴ Courts are not well-suited to making these types of determinations, which helps explain why the Supreme Court's efforts to solve real conflicts through constitutional doctrine have been unsuccessful.³⁹⁵ Congress, by contrast, is the appropriate institution as a matter of democratic theory to render these deeply subjective decisions. It also has the most suitable institutional characteristics to discharge the tasks involved in resolving real conflicts. To profoundly compress an argument I've made elsewhere at length,³⁹⁶ legislatures are designed to, and well-practiced in, making tradeoffs among incommensurable commitments. Congress is composed of the states' representatives, who are better situated than federal courts to identify their state's interests. Congress's prospective rule-making encourages *ex ante* negotiations among state representatives, and the legislative process allows simultaneous tradeoffs across multiple issues that facilitate compromise solutions.³⁹⁷

To say that Congress appropriately has final say over choice-of-law is not to suggest that courts have no role to play. To the contrary, choice-of-law in all likelihood is best generated by an interplay between courts and Congress.³⁹⁸ Legislators do

391. For a discussion of comparative institutional analysis, see NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES* 3–5 (1994).

392. See Roosevelt, *Resolving Renvoi*, *supra*, note 244, at 1869–72.

393. See *supra* notes 174–86.

394. See *supra* Part II.B.2.d.

395. See *infra* note 469.

396. See Rosen, *Congress's Primary Role*, *supra* note 170, at 17–25.

397. See *id.*

398. For an expanded version of this argument, as applied to the similar (though not identical) context of constitutional decisionmaking, see Mark D.

not have the time or competence to create choice-of-law rules from scratch; intelligent choice-of-law rules probably cannot be generated by legislators' armchair hypotheticals or through deductive reasoning. By contrast, courts' case-by-case, inductive approach is well suited to identifying the competing considerations that give shape to different choice-of-law rules. But while courts play a vital role in developing choice-of-law rules in a common law, case-by-case fashion, there is an intractability to choice-of-law that makes it unamenable to solutions about which all reasonable minds can be expected to concur.³⁹⁹ For this reason it is normatively appropriately that the judiciary's choice-of-law rules are provisional, in the sense that they can be legislatively revised. The courts' provisional solutions can provide Congress a menu of well-considered options that clarify the tradeoffs inherent in each choice-of-law alternative. As a matter of both democratic theory and institutional design, Congress is the appropriate institution for negotiating over, and ultimately choosing among, the court-identified options.

Doctrinally, two paths allow the type of judicial-legislative interplay that is best suited to generating intelligent choice-of-law rules. Congress can enact open-ended choice-of-law statutes that vest courts with significant discretion in fleshing out the choice-of-law rules. Or, absent congressional action, courts can elaborate choice-of-law rules that have the status of federal common law. Either way, Congress would have the ultimate revisionary authority over the choice-of-law that courts have created. Section D argues there already exist two statutes that authorize federal and state courts to elaborate a single body of federal choice-of-law that can satisfy the Single System Requirement. Section E explains that even without these statutes, federal and state courts would have authority to generate a federal common law of choice-of-law that satisfies the Single System Requirement.

Rosen & Christopher W. Schmidt, *Why Broccoli? Limiting Principles and Popular Constitutionalism in the Health Care Case*, 61 UCLA L. REV. 66, 132–44 (2013). I hope to apply these ideas to the issue at hand of choice-of-law in a subsequent article.

399. Cf. STORY, *supra* note 49, § 28 (endorsing the proposition that “in the conflict of laws, it must often be a matter of doubt, which should prevail”).

D. TWO STATUTORY BASES FOR JUDICIAL DEVELOPMENT OF A SINGLE COMPREHENSIVE BODY OF FEDERAL CHOICE-OF-LAW

Two federal statutes together authorize courts—both state and federal—to develop a single body of federal choice-of-law that would be applicable in both federal and state courts. A post-*Klaxon* amendment to one of those statutes—the Full Faith and Credit Act—constitutes statutory authorization for state courts to develop federal choice-of-law rules on a case by case basis, and arguably allows federal courts to do so as well. *Klaxon*, however, stands as an obstacle to the second statute—the Rules of Decision Act—which has clearer language than the Full Faith and Credit Act authorizing federal courts to generate federal choice-of-law in diversity cases. This is yet another reason why *Klaxon* should be formally overruled.

1. The Full Faith and Credit Act

The Full Faith and Credit Act (FF&C Act) was amended in 1948—after *Klaxon* was decided—to provide that the “[a]cts” of the sister states “shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.”⁴⁰⁰ (Before 1948, the statute did not contain the word “[a]cts.”)⁴⁰¹ This statutory directive can be fulfilled only if there is a uniform choice-of-law in all state courts that satisfies the Single System Requirement.

To understand why, consider once again the *Harrah’s Club* case, where a Nevada tavern keeper overboozed a California resident who subsequently had a car accident in California.⁴⁰² California’s choice-of-law principles, as we saw, selected California law. Nevada had different choice-of-law rules than California, and Nevada courts almost certainly would have selected

400. 28 U.S.C. § 1738 (1948).

401. *Id.* The 1948 amendment has been called “perplexing” by scholars, see Alfred Hill, *The Erie Doctrine and the Constitution*, 53 NW. U. L. REV. 541, 548 & n.183 (1958), and has been almost entirely ignored by courts and scholars, but see *Carroll v. Lanza*, 349 U.S. 408, 422 (1955) (Frankfurter, J., dissenting) (“[T]he new provision of [the full faith and credit statute] cannot be disregarded. In 1948 Congress for the first time dealt with the full faith and credit effect to be given statutes. . . . Hence, if [the amendment] has any effect, it would seem to tend toward respecting Missouri’s legislation.”); Cheatham, *A Federal Nation*, *supra* note 17, at 114 (“The 1948 amendment to the full faith and credit statute has presented a new basis for the possibility that national rules of conflict of laws have entirely supplanted the state rules.”).

402. See *supra* note 345.

Nevada law. This circumstance violates the FF&C Act: the California act does not have the “same full faith and credit”—that is to say, the same effect⁴⁰³—in a Nevada court as it has in a California court.⁴⁰⁴ The Nevada act likewise does not have the same effect in California courts as it would have in Nevada.⁴⁰⁵ And the FF&C Act’s statutory language of “acts” should be understood to extend to common law, just as (and for the same reasons that) the Full Faith and Credit Clause’s language of “acts” does.⁴⁰⁶ In short, the FF&C Act’s requirement that California’s act “have the same full faith and credit in every court . . . as [it has] in the courts of” California only can be met if both California and Nevada courts use the same choice-of-law rules, satisfying the Single System Requirement.⁴⁰⁷

Further, the Act’s requirements apply to “every court within the United States,” which includes federal courts, as Congress can require under the Diversity Clause.⁴⁰⁸ Fulfilling the Act’s requirements accordingly demands that federal courts use the same choice-of-law rules as state courts. If they did not—if federal courts used one set of choice-of-law rules and state courts another—then the California act may not have the “same full faith and credit in every court . . . as [it has] in the courts of” California.⁴⁰⁹

In short, analysis of the FF&C Act confirms that, as a matter of positive law, choice-of-law must satisfy the Single System Requirement by being uniform over the jurisdictions whose substantive law it manages.⁴¹⁰

403. 28 U.S.C. § 1738. Stephen Sachs persuasively argues that the original 1790 Act’s language of “full faith and credit” was meant to refer to authentication rather than effect. *See* Sachs, *supra* note 15, at 1278. This does not undermine the argument above in text. Regardless of how the Act originally was understood, the United States Supreme Court interpreted full faith and credit to mean effects in the 1813 case of *Mills v. Duryee*, 11 U.S. 481 (1813), which was thoroughly known and accepted by Congress and the state courts by the early 1820s. *See id.* at 1274–76. *Mills’s* interpretation unabatedly continued until Congress amended the Act in 1948, and continues to this day.

404. *See* Laycock, *supra* note 15, at 296 (making same argument).

405. For the same reasons provided above, the statutory term “acts” should include common law. *See supra* notes 385–87.

406. *See supra* notes 386–88.

407. 28 U.S.C. § 1738.

408. *Id.*; *see supra* note 390.

409. 28 U.S.C. § 1738.

410. *See supra* notes 327–36162.

Since only federal law can provide such uniformity of choice-of-law rules, it follows that the FF&C Act authorizes the creation by judges in both state and federal courts of a single body of federal choice-of-law rules that is applicable in both federal and state courts. The resulting body of federal choice-of-law rules can be described in one of two ways: either as the product of statutory interpretation (of what it means for one state's act to "have the same full faith and credit in every court"),⁴¹¹ or as federal common law necessary to effectuate the statute.⁴¹² However described, the courts' choice-of-law rules always would be subject to congressional revision.

If this proposed interpretation of the FF&C Act is correct, then *Klaxon* has been legislatively overruled by the 1948 amendments. Congress had the power to do so because *Klaxon* was not a constitutional decision.⁴¹³ On the other hand, courts may be reluctant to find legislative revision because nothing in the legislative history suggests Congress intended the 1948 Amendments to overrule *Klaxon*.⁴¹⁴ Even without overruling *Klaxon*, however, the FF&C Act still could be understood to authorize state and federal courts to create federal choice-of-law rules on the basis of the statutory interpretation of the Act provided above. On this approach, the 1948 amendments would have blunted *Klaxon*'s bite, requiring federal courts sitting in

411. 28 U.S.C. § 1738.

412. For present purposes, nothing turns on which locution is adopted. Cf. Peter Westen & Jeffrey S. Leyman, *Is There Life for Erie After the Death of Diversity?*, 78 MICH. L. REV. 311, 332 (1980) ("The difference between 'common law' and 'statutory interpretation' is a difference in emphasis rather than a difference in kind. The more definite and explicit the prevailing legislative policy, the more likely a court will describe its lawmaking as statutory interpretation; the less precise and less explicit the perceived legislative policy, the more likely a court will speak of common law. The distinction, however, is entirely one of degree.").

413. *Klaxon* nowhere suggested its holding was constitutional. Further, as Professor Cavers explains, "the Constitution does not require the federal judicial system to respect state lines. If the system were to cease to do so, the command of *Klaxon* would no longer be reasonable." CAVERS, *supra* note 363, at 220 n.39; see also Hill, *supra* note 401, at 543–46 (concluding that federal courts have constitutional power to make choice-of-law rules); Roosevelt, *supra* note 19, at 17 n.90.

414. The 1948 Act was part of a massive overhaul of the judicial code, and there is virtually no legislative history concerning the meaning of the amendment's addition of the word "acts" to § 1738. The Historical and Revision Notes are not illuminating, explaining that the new language was included to "follow[] the language of Article IV, section 1 of the Constitution." 28 U.S.C. § 1738. I have reviewed the voluminous legislative history and found nothing else.

diversity to apply the (federal!) choice-of-law rules that the state courts do. There is nothing awry with such a proposed interpretation of the amendments, as Congress unquestionably has the power to make legislative alterations of the Court's non-constitutional decisions.⁴¹⁵

2. The Rules of Decision Act

The Rules of Decision Act (RDA), enacted in 1790, authorizes federal courts to develop federal choice-of-law rules,⁴¹⁶ but has been paralyzed by *Klaxon*. The RDA provides that “[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.”⁴¹⁷ The RDA addresses the two types of choice-of-law determinations that are necessary to fully prescribe what law federal courts are to apply. The Act’s “except” clause addresses ‘vertical federalism’ choice-of-law: it instructs that the “law of the several states” apply “except” if federal law otherwise applies.⁴¹⁸ The Act’s final words address ‘horizontal federalism’ choice-of-law: in cases where federal law does not apply, federal courts are to apply “the laws of the several states . . . *in cases where they apply*.”⁴¹⁹ The italicized language thus presupposes the existence of a choice-of-law rule that determines *which* state’s law properly “appli[es]”⁴²⁰—something that Chief Justice Marshall recognized back in 1825.⁴²¹

415. See generally Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317 (2014).

416. See Hart, *supra* note 327, at 17 (quoting the Rules of Decision Act’s language of “in cases where they apply” and concluding that “[t]he federal courts are in a peculiarly disinterested position to make a just determination as to which state’s laws ought to apply where this is disputed”). Professor Baxter came to a similar conclusion fifty years ago, see Baxter, *supra* note 17, at 40–41. For a modern assertion of this view, see Kevin M. Clermont, *The Repressible Myth of Shady Grove*, 86 NOTRE DAME L. REV. 987, 998 & n.45 (2011).

417. 28 U.S.C. § 1652 (1948).

418. *Id.*

419. *Id.* (emphasis added).

420. *Id.*

421. See *Wayman v. Southard*, 23 U.S. 1, 48 (1825) (writing that the Rules of Decision Act reflects the choice-of-law “principle that in every forum a contract is governed by the law with a view to which it was made”), *quoted in* Baxter, *supra* note 416, at 41 & n.144.

The crucial question is this: what is the choice-of-law rule that the RDA presupposes? The answer was straightforward at the time of the Act's enactment in 1790: the general law because, as shown in Part I, general law was the one and only choice-of-law then recognized.⁴²² The answer must change in a post-*Erie* world in which there no longer is general law.⁴²³ Professor Cavers thought the RDA's language of "in cases where they apply"⁴²⁴ referred to the choice-of-law rules of the state in which the federal court sat, thereby providing a statutory basis for *Klaxon*.⁴²⁵ Professor Baxter disagreed, believing "in cases where they apply" licensed the creation of a body of *federal* choice-of-law rules by federal courts, and that "*Klaxon* should be overturned."⁴²⁶ Professor Hart likewise thought the RDA allowed federal courts to develop a federal body of choice-of-law.⁴²⁷

Professors Hart and Baxter must be correct because, as this Article has exhaustively argued, choice-of-law is best understood as being federal law. Accordingly, "in cases where they apply" authorizes federal courts to elaborate a body of federal choice-of-law doctrine to govern horizontal choice-of-law questions that arise in their courts, which is always subject to congressional revision.⁴²⁸ The RDA's broad delegation to courts is akin to the Sherman Act's pithy formulation, which licensed federal courts to develop an elaborate body of federal antitrust law on a case-by-case basis.⁴²⁹ *Klaxon*, however, cripples this part of the RDA for so long as it remains good law. This is yet another reason why the case should be formally overturned.

Two related final thoughts. The FF&C Act itself provides an additional counterargument to Professor Cavers's interpretation of the RDA. After all, if the RDA authorizes *Klaxon*, as Cavers thought, then the multiplicity of choice-of-law regimes

422. *Cf. id.* at 48 (referring to the choice-of-law principle incorporated in the Rules of Decision Act as a "universal law").

423. For a general discussion concerning what circumstances justify changed interpretations of statutes, see WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994).

424. 28 U.S.C. § 1652.

425. CAVERS, *supra* note 363, at 220 & n.39.

426. Baxter, *supra* note 416, at 41 (quoting 28 U.S.C. § 1652) (internal quotation marks omitted).

427. *See* Hart, *supra* note 327, at 515 (concluding that the Rules of Decision Act allows federal court "development of a sound body of private interstate law" of conflict of laws).

428. 28 U.S.C. § 1652.

429. *See* Mark D. Rosen, *Nonformalistic Law in Time and Space*, 66 U. CHI. L. REV. 622, 624–27 (1999).

it spawns undermines the FF&C Act. This undercuts Professor Cavers's interpretation under the principle that statutes should be construed harmoniously.⁴³⁰ That same principle supports this Article's interpretation of the RDA, because it meshes perfectly with the FF&C Act's requirement that sister states' acts "shall have the same full faith and credit *in every court within the United States*" as they have in their states of origin.⁴³¹

E. CHOICE-OF-LAW AS FEDERAL COMMON LAW

If it should be determined that neither the FF&C Act nor the RDA authorizes courts to develop federal choice-of-law rules, there is one last doctrinal basis for holding choice-of-law to be federal: overturning *Klaxon* and declaring choice-of-law to be federal common law.⁴³² Although I believe the FF&C Act (and the RDA, were *Klaxon* overturned) already authorizes the creation of federal choice-of-law rules for the reasons explained above, the federal common law argument is very strong. Subsection One provides a five-step argument that leads to the conclusion that, even absent any federal choice-of-law statutes, once *Klaxon* were overruled, the choice-of-law rules created by federal and state courts would have the status of federal common law. Subsection Two identifies the institutional implications of this conclusion.

1. That Choice-of-Law Would Be Federal Common Law

Were *Klaxon* to be overruled, and if there were no federal choice-of-law statutes, the choice-of-law rules created by federal and state courts would have the status of federal common law. A five-step argument shows this to be correct.

First, as explained earlier, the Constitution grants Congress power to create choice-of-law rules for both federal and state courts.⁴³³ Second, this constitutional grant to Congress

430. See *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 739 (1989) (Scalia, J., concurring) ("[S]tatutes dealing with similar subjects should be interpreted harmoniously.").

431. 28 U.S.C. § 1738 (emphasis added); see *supra* notes 400–08.

432. See *supra* notes 14–15 (identifying three other scholars who have so argued). Elsewhere I have argued that, as a matter of positive law, the Court's Full Faith and Credit jurisprudence is best understood as federal common law, not constitutional doctrine. See Rosen, *Congress's Primary Role*, *supra* note 170, at 8–28. This reduces the extent to which overturning *Klaxon* would disrupt other doctrine, though reversing *Klaxon* unquestionably would have downstream effects on other decisions.

433. See *supra* Part III.B.

preempts the states from creating choice-of-law rules that have the status of state law.⁴³⁴ This second step of the argument does not automatically follow from the first because the federal and state governments frequently have overlapping regulatory authority.⁴³⁵ The second step, in other words, is that choice-of-law is “exclusively federal . . . as to require uniform national disposition.”⁴³⁶ This Article’s arguments as to why choice-of-law is federal—the need to satisfy the Single System Requirement, and choice-of-law’s inherently federal functions of policing states’ extraterritorial powers, determining the character of our federal union, and maintaining the health of the interstate system—establish that choice-of-law must be *exclusively* federal. Buttressing this conclusion, choice-of-law bears striking resemblance to other exclusively federal fields. Consider “interstate and international disputes implicating the conflicting rights of States.”⁴³⁷ So, for example, as to disputes concerning interstate water rights and borders, state law is preempted “not by Congress but by the Constitution,”⁴³⁸ and federal common law resolves conflicting claims if no federal statutes provide the answer. Likewise, choice-of-law governs disputes among states concerning their regulatory limits. Like interstate disputes concerning water rights and borders, choice-of-law is “intrinsicly federal” insofar as it governs regulatory disputes between the states, and is best conceptualized as being federal common law in the absence of congressional action.⁴³⁹

Third, federal courts have power to create federal choice-of-law rules on a case-by-case basis. The third step does not follow ineluctably from the first and second, for there could be *no* operative law in the absence of congressional action. But such is not the case with choice-of-law rules, because creating choice-of-law rules to determine which state’s law is operative is necessary for the disposition of interstate cases, and for that rea-

434. See Mark D. Rosen, *Was Shelley v. Kraemer Incorrectly Decided? Some New Answers*, 95 CALIF. L. REV. 451, 492–98 (2007) (explaining “constitutional preemption”).

435. For instance, the federal and state governments both have power over immigration. See *Arizona v. United States*, 132 S. Ct. 2492, 2507–10 (2012).

436. *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301, 307 (1947); see *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964) (discussing how state law preempted where there are “uniquely federal interests”).

437. *Tex. Indus.*, 451 U.S. at 641.

438. See Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1076 (1967).

439. Horowitz, *supra* note 14, at 1202 (quoting *Sabbatino*, 376 U.S. at 425).

son is part of the judicial power to decide ‘cases’ and ‘controversies’ that involve interstate facts.⁴⁴⁰

Fourth, state courts also have the judicial power to create federal choice-of-law rules. This is so because they too must generate choice-of-law rules to decide the interstate cases before them. These choice-of-law rules are created on a case-by-case basis (i.e., are common law) and, for the reasons explained in this Article, are federal. And choice-of-law is not unique in this regard; state courts long have created federal common law.⁴⁴¹

Fifth, and finally, because choice-of-law must be uniform to satisfy the Single System Requirement and thereby serve its managerial function, the federal common law of choice-of-law cannot incorporate state law and vary across states, as federal common law sometimes does.⁴⁴² Instead, all federal and state courts throughout the country, supervised ultimately by the United States Supreme Court, must work to develop a single body of federal choice-of-law.

2. Institutional Implications

If judge-created choice-of-law rules were federal common law (as opposed to judicial doctrines implementing the FF&C Act and the RDA), any judicial choice-of-law doctrines would always be subject to congressional revision (just as would be the case were the caselaw deemed to be interpretations of the FF&C Act and the RDA).⁴⁴³ To put the matter more bluntly, Congress would have the power to reject the federal common law choice-of-law rules that courts—even the Supreme Court—adopted.

Congress’s power to have the final say over choice-of-law derives from the Full Faith and Credit Clause’s Effects Clause. As explained immediately above, for so long as Congress does not exercise its Effects Clause powers, courts hearing cross-state matters must decide those cases and, in so doing, develop

440. See Hill, *The Erie Doctrine*, *supra* note 401, at 544 (arguing that federal courts’ power to create “choice of law rules of their own devising” comes from Article III’s vesting in federal courts the “judicial power of the United States”).

441. See Bellia, *supra* note 33 (noting that state courts have substantial adjudicatory jurisdiction over federal law, and must clarify and fill gaps when applying federal law, just as federal courts do).

442. See, e.g., *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 504 (2001).

443. See Rosen, *supra* note 434, at 492–93.

and utilize choice-of-law doctrines to determine which state's law applies. But the fact that courts were the first-movers would not oust Congress of its Constitution-granted authority over choice-of-law. Courts' choice-of-law rules hence would be akin to dormant commerce clause doctrine: dormant commerce clause rules created by courts, regarding matters that Congress could (but has not) regulated under the Commerce Clause, do not displace Congress's commerce clause authority. Just as Congress may statutorily override judicial dormant commerce clause doctrines,⁴⁴⁴ so too Congress would not be bound by, but could reject, courts' federal common law choice-of-law doctrines. And it is sensible that Congress have ultimate decision-making power over choice-of-law rules for the reasons explained above.⁴⁴⁵

IV. POSSIBLE OBJECTIONS, AND CAUTIOUS OPTIMISM FOR THE FUTURE

A. POSSIBLE OBJECTIONS

A ready template of objections to this Article's argument can be found in the strong defenses of *Klaxon* that were propounded by an all-star lineup of scholars from two generations ago, including Professors David Cavers and Alfred Hill.

Klaxon's defenders made an array of arguments to the effect that overruling *Klaxon* would diminish "uniformity and certainty in the choice-of-law rules."⁴⁴⁶ Overruling *Klaxon* would lead to forum-shopping "since, as in pre-*Erie* days, counsel could shop without sending cases off to other states, often without having the case leave counsel's home town."⁴⁴⁷ They also argued that overruling *Klaxon* would create uncertainty in controversies involving two states with the same choice-of-law rules since federal courts might choose altogether different choice-of-law rules.⁴⁴⁸ But none of these objections applies to this Article's argument, because they all presume the existence

444. See, e.g., *Maine v. Taylor*, 477 U.S. 131, 138 (1986) ("It is well established that Congress may authorize the States to engage in regulation that the Commerce Clause would otherwise forbid."); see also *New York v. United States*, 505 U.S. 144 (1992) (standing for the same proposition, in holding that Congress may grant states the right to regulate interstate transportation of radioactive waste).

445. See *supra* notes 391–99.

446. Cavers, *supra* note 59, at 741.

447. CAVERS, *supra* note 363, at 222.

448. See Cavers, *supra* note 59, at 741.

of one choice-of-law rule in state courts and different federal rules in federal courts. Under the Single System Requirement championed in this Article, by contrast, a single choice-of-law regime would be applicable in all federal and state courts. There accordingly would be no incentive for intrastate forum shopping for superior choice-of-law rules, nor any incentive for interstate forum shopping for choice-of-law.

Most of the arguments on *Klaxon's* behalf are premised on the notion that choice-of-law is fundamentally a matter of state law. Thus, Professor Cavers's primary claim, it is fair to say, was that overruling *Klaxon* would invade "state autonomy in determining the reach of state law."⁴⁴⁹ Cavers rhetorically asked whether a "federal district judge [should] be empowered to curtail that state's authority whenever the accident of diversity litigation brings the state law within his jurisdictional reach?"⁴⁵⁰ and concluded a state should "be master of its own house."⁴⁵¹ Professor Hill and Professor Cheatham made similar arguments,⁴⁵² as does the most recent edition of *Hart & Wechsler's Federal Courts* when it asks "[c]an a federal court in State Y disregard the state's choice of its own law without seriously undermining a substantive state policy?"⁴⁵³

The answer to all these objections is that while states have the prerogative to decide whether their law extends to an interstate matter (within the limits on prescriptive jurisdiction set by the Court's constitutional jurisprudence), determining which of several states' *prima facie* applicable laws applies is *not* the prerogative of any single state.⁴⁵⁴ As argued above, it instead is a federal function.⁴⁵⁵ The understanding that choice-of-law rule

449. See CAVERS, *supra* note 363, at 217.

450. *Id.* at 217–18. Cavers's question also assumes that different choice-of-law rules would apply in state courts, contrary to this Article's claim.

451. *Id.* at 218.

452. Cheatham, *Federal Control*, *supra* note 17, at 588 (expressing concern about federalizing choice-of-law on account of "the destruction or diminution of state power, with the consequent weakening of local self-government. In conflict of laws it may be unwise, or at least premature, to sacrifice state independence and diversity."); Hill, *supra* note 440, at 556 (arguing against federal choice-of-law rules on the ground that "the exercise of federal jurisdiction should not be the occasion for what would, in practical effect, be a substantial diminution of the power of a state, within its own borders, to vindicate its policies as against the competing policies of other states," though noting that "[t]his is not an unshakable premise").

453. FALLON, *supra* note 390, at 567.

454. For a similar argument, see Roosevelt, *supra* note 19, at 21.

455. See *supra* Part III.A.

is federal law accordingly does not invade “state autonomy”⁴⁵⁶ or “undermin[e] a substantive state policy.”⁴⁵⁷ Rather, choice-of-law is appropriately part of the federal law that determines the allowable scope of state autonomy and policies, helps establish the nature of our federal union, and maintains the health of our interstate federal system.

The misconception that choice-of-law is state rather than federal law drives another argument propounded by *Klaxon*’s defenders. Cavers argued “the federal courts do not constitute a judicial system which is organized to execute the great responsibility with which it would be entrusted” were *Klaxon* overruled.⁴⁵⁸ Cavers believed that “[s]uch a system requires a supreme court;” “for the resolution of nonconstitutional choice-of-law cases the federal courts do not have a supreme court, and clearly they should not have one.”⁴⁵⁹ What Cavers meant was that the Supreme Court had not been formulating choice-of-law rules,⁴⁶⁰ and that on account of “the great national importance of most of the problems with which it chooses to deal, the Court *should not* clog its docket with private litigation involving choice-of-law questions.”⁴⁶¹ Other matters, Cavers asserted, were “far too important to be set aside for the perplexing choice-of-law problems that arise in private litigation.”⁴⁶²

With all due respect, Professor Cavers’s argument here is 180 degrees off the mark.⁴⁶³ A full appreciation of the many federal interests explained in this Article that are implicated by choice-of-law makes clear that the Supreme Court’s absence from choice-of-law has been costly and wrongheaded. It has kicked the can of choice-of-law to the states, which are not responsible for, are uninterested in, and incapable of responsibly formulating rules that guard federal interests, and which are

456. CAVERS, *supra* note 363, at 217.

457. FALLON, *supra* note 390, at 567.

458. CAVERS, *supra* note 363, at 220–21.

459. *Id.* at 221.

460. Cavers, *supra* note 59, at 738 (noting that deciding cases that “can give direction to, and impose uniformity upon, the courts subordinate to it . . . is a function which clearly the Supreme Court of the United States has not been discharging with respect to diversity cases involving choice-of-law problems for many decades”).

461. CAVERS, *supra* note 363, at 221 n.40 (emphasis added).

462. Cavers, *supra* note 59, at 739.

463. Cavers’s descriptive claim likely builds on his assumption (discussed above) that *Klaxon*’s overruling would lead to separate state and federal choice-of-law regimes. After all, Supreme Court absenteeism is less likely where the choice-of-law operative in all courts is federal law.

incapable of achieving the uniformity demanded by the Single System Requirement that is a *sine qua non* of an effective system of choice-of-law. The Supreme Court's absenteeism is an argument for overturning—not keeping—*Klaxon*.

Klaxon's defenders raised two pragmatic arguments that apply to this Article's proposal. The first is that overruling *Klaxon* would result in transition costs. The day after *Klaxon* were overruled, or recognized as having been legislatively overruled, there would be uncertainty as to the applicable choice-of-law rules.⁴⁶⁴ Further, as Cavers wrote, courts would be confronted with "the existence of a substantial body of federal precedents (many of them over fifty years old)"—which by now are more than 100 years old, virtually all of which preceded the choice-of-law revolution.⁴⁶⁵ Would that old territorialist jurisprudence, which was subject to the legal realists' scathing critiques, be binding precedent?

This is an important, but manageable, issue. There always are transition costs when moving from one legal regime to another; such costs are not trumping reasons for maintaining the status quo, but must be considered in relation to the costs of not changing, which this Article has suggested are substantial. Further, transition costs can be contained. For example, the Supreme Court decision declaring *Klaxon*'s demise should explain that courts would not be limited by the old jurisprudence, and furthermore should provide a framework to guide the development of federal choice-of-law doctrine. This Article is not the place to do this in great detail, though the Article's final subpart provides some preliminary guideposts.⁴⁶⁶

Perhaps the main anxiety animating *Klaxon*'s defenders was concern that overruling the case would short-circuit the choice-of-law revolution against territorialism that had just then begun.⁴⁶⁷ While these concerns may have been valid when they were made—in the early 1960s—it is difficult to credit them today. The alternatives to territorialism have had the opportunity to refine themselves for more than half a century

464. Indeed, the transition costs would be greater under this Article's proposal than what Cavers et al. contemplated insofar as the uncertainty would extend to the choice-of-law rules in state courts.

465. Cavers, *supra* note 59, at 738.

466. See *infra* Part IV.B.

467. See Cavers, *supra* note 59, at 738 (stating that "an about-face on *Klaxon* would" lead federal courts to "turn[] their backs on the very process of change from which improvement in choice-of-law decisions is expected to come.").

across more than fifty jurisdictions. And while Cavers could proclaim in 1959 that he “s[aw] no evidence that *Klaxon* has given rise to a crisis,”⁴⁶⁸ it is hard to believe he would say the same today, when sister states use nearly a half-dozen different choice-of-law methodologies.

Another possible objection is that this Article ignores the lessons of history, namely the Supreme Court’s failed efforts in the 1930s, which it formally abandoned some decades later, to use the Full Faith and Credit Clause to generate choice-of-law rules.⁴⁶⁹ But this objection also fails. The Court’s aborted effort aimed at *constitutionalizing* choice-of-law doctrine, an exclusively judicial task for all practical purposes. This was doomed to failure, for the criteria the Court thought guided choice-of-law—a “balancing” of the competing states’ interests—is beyond courts’ capacities; like comparative impairment, it required prognostication as to facts and a balancing of incommensurables.⁴⁷⁰

By contrast, this Article understands judicial solutions to be statutory interpretation or provisional federal common law. Judicial doctrines hence would be subject to congressional revision. Choice-of-law accordingly would be jointly developed by courts and Congress. Institutional synergy is important because Congress has institutional characteristics crucial to developing intelligent choice-of-law rules, but is incapable of doing so without judicial input.⁴⁷¹

B. CAUTIOUS OPTIMISM

Perhaps the strongest objection to this Article’s proposal is skepticism that any acceptable choice-of-law regime can be ju-

468. Cavers, *supra* note 59, at 753.

469. See *supra* Part I.C. In a moment of extraordinary candor, the Supreme Court explained “[w]e have, in the past, appraised and balanced state interests when invoking the Full Faith and Credit Clause to resolve conflicts between overlapping laws of coordinate States. This balancing approach quickly proved unsatisfactory. As Justice Robert H. Jackson . . . aptly observed, ‘it [is] 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.’ In light of this experience, we abandoned the balancing-of-interests approach under the Full Faith and Credit Clause.” *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488, 495–96 (2003) (citations omitted).

470. See *supra* notes 314–22.

471. See Rosen, *Congress’s Primary Role*, *supra* note 170, at 17–28; *supra* notes 391–399. Full explication of this must await another day.

ditionally created, based on the less than satisfactory outcome of the twentieth century choice-of-law revolution in this country. History may be said to provide additional support for such suspicion, insofar as nearly 800 years of international efforts to generate choice-of-law rules⁴⁷² has failed to yield a single widely accepted solution. America's experience, in conjunction with the international efforts, may lead one to conclude that choice-of-law grapples with intractable problems to which there are no good answers.⁴⁷³

I believe, however, that such cynicism about improving choice-of-law is misplaced. To begin, only limited lessons can be drawn from international choice-of-law because there are two fundamental disconnects between domestic and international choice-of-law. First, sister states stand in a different relationship to one another than do foreign countries. That factor alone means that choice-of-law rules that are appropriate when deciding between French and German law may not properly govern domestic choice-of-law problems. Second, there is a far greater chance of achieving a uniform choice-of-law system within the United States than internationally—once it is recognized that choice-of-law is federal, and that it is under the ultimate checks of the Supreme Court and Congress.

Further, justifiable frustrations with the past sixty years' choice-of-law revolution cannot legitimately cast doubt on the possible success of this Article's proposal, for two reasons. First, choice-of-law's status as state law over the past half century has generated a multiplicity of choice-of-law regimes such that the Single System Requirement has not been met. The multiplicity of choice-of-law regimes accordingly undermines the efficacy of each and every choice-of-law regime, making it impossible to definitively evaluate any one of them.

Second, choice-of-law has been profoundly misunderstood since *Klaxon*, insofar as it has been viewed as a matter of "local polic[y]"⁴⁷⁴ that aims at advancing a state's "governmental interests," when it in fact is fundamentally federal in character

472. See STORY, *supra* note 49, §§ 3–16 (providing historical overview of choice-of-law).

473. *Cf. id.* § 28 (endorsing the observation that "[w]hen so many men of great talents and learning are thus found to fail in fixing certain principles, we are forced to conclude, that they have failed, not from want of ability, but because the matter was not susceptible of being settled on certain principles [I]n the conflict of laws, it must often be a matter of doubt, which should prevail" (quoting *Saul v. His Creditors*, 5 Mart. (n.s.) 569, 595–96 (La. 1827)).

474. *Klaxon Co. v. Stentor Co.*, 313 U.S. 487, 496 (1941).

and purpose. This misconception itself has distorted choice-of-law's development, with the result that disappointments with the choice-of-law revolution cannot legitimately ground skepticism about this Article's proposal of reconceptualizing choice-of-law as non-constitutional federal law.

Indeed, the understanding that choice-of-law is federal law that must satisfy the Single System Requirement provides the proper—and, indeed, a very helpful—framework for the future development of choice-of-law rules. For example, a state court developing choice-of-law should not consider whether applying its law would advance its state's interest, but must ask whether all state and federal courts plausibly could be expected to adopt its choice-of-law approach.⁴⁷⁵ This “generalizability requirement” would eliminate many choice-of-law rules presently used.⁴⁷⁶ The generalizability requirement also identifies several insights from the choice-of-law revolution that would be components of any federal choice-of-law: for example, false conflicts and comparative impairment. Further, the understanding that choice-of-law is federal permits identification of the overarching purposes that properly guide choice-of-law's development: supporting our federal system by facilitating the smooth operation of the interstate system while ensuring that states remain meaningfully empowered.

This Article is not the place to fully work out the detailed doctrinal implications that follow from the understanding that choice-of-law is federal.⁴⁷⁷ In the end, it likely is the case that multiple choice-of-law solutions are conceptually and normatively sound, and that what matters is that one—and only one—solution be operative at any point in time. And that, too, is something only federal law can accomplish in our post-*Erie* world.

475. Cf. Bellia, *supra* note 33, at 919 (making a similar argument about reasoning courts should use when generating federal common law).

476. For example, the requirement would eliminate Leflar's best law approach, *lex fori*, and the rule used by Minnesota that was upheld by the Supreme Court in the *Hague* decision. See *Allstate Insur. Co. v. Hague*, 449 U.S. 302 (1981) (upholding a Minnesota court's application of Minnesota law in a circumstance where, virtually all commentators agree, that state had only three *de minimis* contacts with the parties and transaction, and another state had far more intense interests in having its law applied); see CURRIE ET AL., *supra* note 125, at 348 (“[C]onflicts scholars have made a cottage industry of criticizing the plurality opinion in *Hague*”).

477. I presently am at work on this project.