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EQUAL CITIZENS OF EQUAL AND TERRITORIAL STATES: THE CONSTITUTIONAL FOUNDATIONS OF CHOICE OF LAW

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One consequence of dividing a single nation into fifty quasi-sover- 
eign states is a constant need to choose the law that governs interstate 
disputes. Choice of law takes on a whole new significance in such a 
nation. We have handled the problem badly; indeed, we have not even 
looked to the right sources of law. We took a fundamental wrong turn 
at the very beginning of modern choice-of-law scholarship.

The continuing error has been to ignore the constitutional prin- 
ципles that control choice-of-law questions. As Justice Jackson suggested 
a generation ago, choice of law within the United States is inherently 
constitutional law. Choice-of-law questions are about the allocation of 
authority among the several states. Allocation of authority is what con-
stitutions do. The essential function of constitutions is to constitute the 
many units of government in our federal system and define and limit 
the power of each. It would be an astonishing oversight if our funda-
mental law did not state general principles allocating authority among 
states and if those principles did not have implications for choice of 
law. This article explores the positive law bases for choosing among 
competing intuitions about the limits of state authority and for provid-
ning federal answers to choice-of-law questions.

I do not claim that the Constitution dictates a unique set of choice-
of-law rules, but I do claim that the Constitution contains three prin-
ciples from which all domestic choice-of-law rules must be derived. 
These three principles are:

1. The principle of equal citizens: States must treat the citizens 
of sister states equally with their own.

2. The principle of equal states: States must treat sister states as 
equal in authority to themselves.

1. Robert H. Jackson, Full Faith and Credit—The Lawyer's Clause of the 
Constitution, 45 Colum. L. Rev. 1, 2, 6-7 (1945).
3. The principle of territorial states: The fundamental allocation of authority among states is territorial.

The Constitution states the first two principles in operational terms, most explicitly in Article IV, in the Privileges and Immunities and Full Faith and Credit Clauses. The third principle is largely implicit, so obvious that the Founders neglected to state it. But the texts of state and federal constitutions, state organic acts, and state admission acts contain ample evidence of this allocation of authority.

The choice-of-law implications of the first two principles are negative; they state what choice of law rules cannot be. Choice-of-law rules may not prefer local citizens to citizens of a sister state; that is the principle of equal citizens. And they may not prefer forum law to the law of sister states; that is the principle of equal states. Many modern choice-of-law theories violate one or both of these principles.

The implications of the third principle are affirmative: all choice-of-law rules must be consistent with, and derived from, the fundamentally territorial allocation of authority among the states. State interests are still relevant, especially in developing rules for locating relationships, intangibles, and other subjects of regulation not embodied in a single physical place. But a state’s claim to regulate behavior or to govern a dispute must be based on some thing or event within its territory. And in deciding which things or events control choice of law, a state’s interests in enriching local citizens and extending the territorial reach of its own law are illegitimate. They simply should not count.

A corollary proposition follows from these three principles. The constitutional principles that govern choice of law are federally enforceable like any other constitutional principle. Full enforcement requires specific federal choice-of-law rules derived from the three constitutional principles. Congress could enact such rules, but it has chosen simply to restate one of the constitutional provisions and leave the details to the courts. It therefore falls to the federal courts to derive specific choice-of-law rules in the course of adjudicating disputes under the Constitution and the implementing statute.

The three constitutional principles, plus the corollary proposition about federal enforcement, are independent in the sense that readers persuaded of any one or two or three of them can accept that much without accepting the rest. But they are interdependent in the sense that together they form a coherent and mutually supporting foundation on which to develop a system of choice-of-law rules.

After introducing some necessary background, I will consider the three constitutional principles in turn. Each section develops one of
the principles from the primary sources of constitutional law, and then
turns to that principle's implications for choice of law. The final section
considers the need for implementing rules and federal authority to
specify such rules, and it tentatively suggests some territorial choice-of-
law rules for a modern society.

I. SOURCES OF LAW

A. The Academic Debate

The modern debate over choice of law has been ably summarized
elsewhere, and it is sufficient here to review the broad outlines. Some
academic approaches to choice of law are largely compatible with the
constitutional principles I identify, but others work from premises that
are flatly unconstitutional.

From the mid-eighteenth to the early twentieth centuries, Anglo-
American law produced a crude system of territorial choice-of-law
rules. These rules were crystallized in Joseph Beale's treatise, and in
the Restatement of Conflicts for which he was the reporter, despite
intense criticism from other academics. Beale attempted to derive all
his rules from the single premise that a right vested under the law of
the place of the last event necessary to assertion of the right.

Each theorist after Beale offered his own theory to replace the Re-
statement. The most important of these academic theories was
Brainerd Currie's interest analysis, which urged courts to begin by
considering each state's interest in applying its own law. The new theo-
ries were as inconsistent with each other as they were with the Restate-
ment, but collectively they swept the academy. For a generation, it was
hard to find a serious scholar who would defend territorial choice of

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8. Restatement of Conflict of Laws (1934) [hereinafter Restatement].
10. See, e.g., Restatement, supra note 8, §§ 311–31, at 377; Beale, supra note 7, § 8A.6, at 62.
12. See Currie, supra note 11.
law rules. Aaron Twerski\(^1\) and Alfred Hill\(^2\) were the principal exceptions; they urged that traditional territorial rules be modernized rather than abandoned.

The Restatement (Second) attempted to accommodate all these competing theories.\(^3\) It directed courts to apply the law of the state with the most significant relationship to the controversy, after considering every factor thought to be relevant under any theory then extant.\(^4\) Trying to be all things to all people, it produced mush. Interest analysts view it as defective,\(^5\) but they tend to claim it as a "modern" theory.\(^6\) In the last decade, the academic battle has resumed. Lea Brilmayer,\(^7\) John Corr,\(^8\) Jack Davies,\(^9\) John Ely,\(^10\) Harold Korn,\(^11\) and Alfred Hill, The Judicial Function in Choice of Law, 85 Colum. L. Rev. 1585 (1985) [hereinafter Hill, Judicial Function]; Alfred Hill, Choice of Law and Jurisdiction in the Supreme Court, 81 Colum. L. Rev. 960 (1981); Alfred Hill, Governmental Interest and the Conflict of Laws—A Reply to Professor Currie, 27 U. Chi. L. Rev. 463 (1960).


15. Restatement (Second) of Conflict of Laws (1971) [hereinafter Restatement (Second)].

16. See id. § 6.


Michael McConnell, Gerald Neumann, and Linda Silberman, as well as Donald Regan in the closely related context of extra-territorial regulation, have all attacked the new theories and urged some modernized version of territorialism, without the baggage of Beale’s theory of vested rights and last events. Perry Dane and Michael Gottesman have urged determinate solutions that share the goals of territorialism, and that would likely be mostly territorial in implementation, but that need not be territorial in theory. Larry Kramer and Joseph Singer have offered the most thoughtful and original responses to these assaults, each attempting to accommodate some of the territorialist objections. Neither has gone nearly far enough to satisfy my objections, but Kramer has been denounced for heresy by a committed interest analyst.

The territorialist critics of interest analysis include both conflicts scholars and constitutional scholars. The nonterritorial choice-of-law theories have all come from conflicts scholars. Most of these scholars have argued that their field is common law or perhaps statutory law but certainly not constitutional law. However, there are notable exceptions even within the specialty: William Baxter, Michael Cardozo, Harold

28. For a thorough criticism of Beale’s vested rights reasoning, see Brilmayer, supra note 6, at 11–41.
30. See Gottesman, supra note 17.
31. See Kramer, supra note 17; see also Larry Kramer, More Notes on Methods and Objectives in the Conflict of Laws, 24 Cornell Int’l L.J. 245 (1991) [hereinafter Kramer, More Notes].
Horowitz, Gary Simson, and James Sumner have all argued that the Full Faith and Credit Clause requires some form of federal choice-of-law rules. The most remarkable exception was Brainerd Currie himself, who appeared to concede that his interest analysis would be unconstitutional in many or even most of its applications. Currie believed that the Full Faith and Credit Clause permitted any interested state to apply its own law. But Currie and his co-author, Herma Schreter, also believed that the Privileges and Immunities and Equal Protection Clauses severely limited the state's ability to pursue its interest in preferring its own citizens.

Currie's followers ignored this concession and pursued interest analysis with little regard for the Constitution. For most contemporary choice-of-law scholars, the Constitution does not control choice of law so much as choice-of-law theory informs the meaning of the Constitution. Most of them have little or nothing to say about constitutional text, history, or structure. They simply assume that the relevant constitutional clauses are relaxed and nonspecific, rather like a substantive due process requirement of reasonableness. They tend to use their

38. See James D. Sumner, Jr., The Full-Faith-and-Credit Clause: Its History and Purpose, 54 Or. L. Rev. 224, 246–49 (1975); see also sources cited infra notes 275–276 (arguing that Full Faith and Credit Clause presupposes federal choice-of-law rules).
41. See Robert A. Sedler, Constitutional Limitations on Choice of Law: The Perspective of Constitutional Generalism, 10 Hofstra L. Rev. 59, 59–60 (1981) (noting that conflicts scholars approach constitutional limitations on choice of law from a "conflicts perspective" and not from a "constitutional perspective"). Unfortunately, Sedler makes the same mistake. See infra notes 43, 203–205 and accompanying text.
own preferred choice-of-law theories to identify a few extreme cases that might violate these vague limits. Thus, some interest analysts argue that there should be "no constitutional limits on the choice of an interested state's law." In a striking inversion of the familiar compelling-interest exception to full enforcement of constitutional rights, another suggested that the Full Faith and Credit Clause applies to choice of law only when there is "a compelling need" to apply it. Some scholars urge more restrictive constitutional limits than the Supreme Court has recognized, but even they tend to urge only modest change.

B. Common Law and Constitutional Law

The judicial reaction to all this has been mixed. At the level of state common law, a modest majority of states has adopted one or more of the newer theories. But only a handful of states has clearly adopted interest analysis, and the First Restatement is still the law in a plurality of states. About a third of the states, and perhaps nearly (concluding there should be no constitutional limits on choice of law); Sedler, supra note 41, at 101 ("there should not be any significant constitutional limitations on choice of law").


46. See, e.g., Brilmayer, supra note 6, at 141 (proposing a "minimal reasonableness threshold"); Peter Hay, Full Faith and Credit and Federalism in Choice of Law, 34 Mercer L. Rev. 709, 729 (1983) (proposing to require a "substantial connection...to the parties and the transaction"); James A. Martin, The Constitution and Legislative Jurisdiction, 10 Hofstra L. Rev. 133 (1981) (elaborating Brilmayer's proposal to require contacts that would be legally relevant to a wholly domestic case); Arthur T. von Mehren & Donald T. Trautman, Constitutional Control of Choice of Law: Some Reflections on Hague, 10 Hofstra L. Rev. 35, 49-50 (1981) (suggesting rebuttable presumptions that states not prefer their own law or their own residents, or depart from generally accepted choice-of-law norms).

47. See Weintraub, supra note 11, § 6.16, at 318-22 (reporting that thirty-three states have adopted a "modern" choice-of-law theory in tort cases); id. at 66 (Supp. 1991) (claiming thirty-five such states); Herma H. Kay, Theory Into Practice: Choice of Law in the Courts, 34 Mercer L. Rev. 521, 591-92 (1983) (reporting twenty-eight such states); Robert A. Sedler, Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the 'New Critics,' 34 Mercer L. Rev. 593, 593-94 & n.4 (1983) (reporting thirty-one such states).

48. See Kay, supra note 47, at 591-92 (reporting only two such states, plus six others applying combined approaches in which interest analysis may be an element); Gregory E. Smith, Choice of Law in the United States, 38 Hastings L.J. 1041, 1172-74 (1987) (reporting only five such states for torts and four for contracts).

49. See Smith, supra note 48, at 1172-74.
half, retain rules that interest analysts consider premodern.50 Premodern usually means territorial. The modern theories have also incorporated territorial elements; in working on this article, I was pleasantly surprised by the frequency of territorial decisions. Indeed, I have come to suspect that one could explain a majority of contemporary choice-of-law results in territorial terms. That claim is wholly impressionistic; only a systematic survey could establish the facts. But it is at least clear that the new theories never dominated the courts to the extent that they once dominated the academy.51

At the constitutional level, the modern Supreme Court has all but abandoned the field. It has never considered a Privileges and Immunities Clause challenge to a state choice-of-law rule, and it has removed most of the content from the Full Faith and Credit Clause. In 1935, without any real analysis, the Court accepted the premise that states may apply their own law when they have a sufficient interest in doing so.52 There followed a long period of inconclusive decisions, many of them decidedly territorial.53 But no state choice-of-law decision was invalidated after 1951. It gradually became clear, as the Court now says explicitly, that "frequently . . . a court can lawfully apply either the law of one State or the contrary law of another."54

The apparent end of all meaningful limits came in 1981, in *Allstate Insurance Co. v. Hague.*55 There the Court upheld Minnesota's applica-
tion of its own law to invalidate a clause in an insurance policy issued in Wisconsin to a Wisconsin resident killed in a Wisconsin accident. The plurality implied that the Court will invalidate a state's choice of its own law only when the State "has had no significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction." The "contacts" relied on were irrelevant to the legal issues in the case: the decedent's widow moved to Minnesota (after the claim arose), the insurer did business in Minnesota (and every other state), and decedent had worked in Minnesota (but his death was not job related). Hague may mean that there are no limits whatever on a state's power to apply its own law to benefit a resident litigant.

The Court did find some limits on the states in Phillips Petroleum Co. v. Shults, striking down the application of Kansas law to oil leases in Louisiana, Oklahoma, and Texas, with no Kansans on either side of the lease. Apparently a state cannot apply its own law when it has neither a territorial contact nor a resident litigant. But three years later the Court allowed Kansas to evade even this rule, affirming a judgment that the law in the other three states was the same as Kansas law. This required a prediction that none of the three states would apply its own textually applicable statute to the case.

One state's honest misunderstanding of another state's law does not present a federal question; the Supreme Court of the United States is no more authoritative on Texas law than the Supreme Court of Kansas. But this interpretation of sister-state law cried out for serious review under the Court's sensible rule from other contexts: an evasive or insubstantial ground of decision that avoids a federal right is not an adequate and independent state ground immune from Supreme Court review. As matters stand, the Full Faith and Credit Clause means almost nothing, and state courts can often evade the little that it does mean.

Congress has failed to fill the vacuum resulting from the Supreme Court's withdrawal. The field has been left to state courts and aca-

56. Id. at 308.
57. For further analysis of the irrelevance of these contacts, see Brilmayer, Legitimate Interests, supra note 19, at 1319-20, 1341-47.
58. 472 U.S. 797, 814-23 (1985); see also McCluney v. Schlitz Brewing Co., 649 F.2d 578, 580 n.2, 583-84 (8th Cir.) (invalidating application of Missouri law to discharge of employee hired in Missouri but subsequently transferred elsewhere, who returned to Missouri after his discharge in Wisconsin), aff'd mem., 454 U.S. 1071 (1981).
60. For analysis of the sheer dishonesty of the Kansas holding, see id. at 743-49 (O'Connor, J., dissenting); cf. Shults, 472 U.S. at 816-18 (apparently reading Texas and Oklahoma law as Justice O'Connor read it two years later).
demic theorists, substantially freed of any federal constraint. The results have been predictably chaotic, because federal abdication leaves no disinterested umpire to resolve an important class of interstate disputes. State law cannot supply the answers, because the questions are about interstate relations and no state is empowered to answer for any other.\textsuperscript{62}

C. \textit{International Law and Constitutional Law}

I am speaking only of choice of law within the United States. It is a serious mistake to discuss domestic and international choice-of-law cases interchangeably, even though that practice is nearly universal in the conflicts literature.\textsuperscript{63} The confusion of domestic and international cases both flows from and reinforces the failure to recognize that choice of law in the United States is constitutional law. International choice of law has obvious parallels, and the three principles I have stated would serve well in a wide range of cases.\textsuperscript{64} But international choice of law differs from domestic choice of law in two fundamental ways.

First, international choice of law is derived from wholly different sources. How U.S. courts treat foreign law is a matter of comity and diplomacy, the voluntary choice of a sovereign power. How Texas courts treat the law of a sister state is a matter of law, not comity, and the choice is no longer voluntary. For this purpose Texas is not a sovereign state; it surrendered this portion of its sovereignty when it joined the Union.\textsuperscript{65}

Much of the Constitution addresses the task of creating one nation out of separate states, and of doing so without abolishing those states. Many constitutional provisions are designed to foster national unity and to move interstate relations away from the international model. The provisions most relevant here are the Privileges and Immunities,\textsuperscript{66}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{62} See Baxter, supra note 34, at 23 ("Responsibility for allocating spheres of legal control among member states of a federal system cannot sensibly be placed elsewhere than with the federal government."); Jackson, supra note 1, at 26 (arguing that decision should not be left to states, because "the mutual limits of the states' powers are defined by the Constitution").
\item \textsuperscript{63} See, e.g., Weintraub, supra note 11, § 9.2A, at 521–23; Brilmayer, Interstate Equality, supra note 19, at 400; Larry Kramer, Vestiges of Beale: Extraterritorial Application of American Law (publication arrangements pending). I will occasionally cite international choice-of-law cases where the judges treated them as indistinguishable from domestic cases. Such opinions illustrate the relevant views of the judges who decided them, even though in my view they are subject to a different source of law.
\item \textsuperscript{64} See Wilhelm Wengler, The Significance of the Principle of Equality in the Conflict of Laws, 28 Law & Contemp. Probs. 822 (1963) (discussing my first two principles in context of international law and comity).
\item \textsuperscript{65} For a similar comparison of domestic and international choice-of-law principles, see Jackson, supra note 1, at 30.
\item \textsuperscript{66} U.S. Const. art. IV, § 2, cl. 1.
\end{itemize}
\end{footnotesize}
Full Faith and Credit, Extradition, and Free Navigation Clauses, the Supreme Court's jurisdiction over suits between states, the prohibition of war and diplomacy between states, the prohibition of state taxes on imports and exports, and in a part of the original plan that became a monstrous failure, the Fugitive Slave Clause. With respect to all these matters the states were forbidden to treat each other like foreign countries. All these changes from international practice make analogies to international choice of law the wrong place to begin analysis. Relations among American states were a new thing under the sun, and a choice-of-law system for those states must come from the Constitution that created their relationships.

Second, international choice of law requires more flexibility than domestic choice of law. Within the United States, the intensity of conflicts of law is limited by a common culture and political tradition, a shared set of constitutional rights, and the guarantee of a republican form of government. Unworkable conflicts can often be eliminated by preemptive federal law, or even by constitutional amendment, as in the minimum standards of individual rights provided by the Thirteenth and Fourteenth Amendments. Domestic choice of law need not be flexible enough to deal with totalitarian states, revolutionary states, legally unsophisticated states, or states with legal and cultural traditions fundamentally different from our own.

We may view sister-state law as seriously unjust on particular points, but these disputes are minor variations within substantially similar legal systems. Slavery was the great uncompromisable exception, but slavery has been uniformly abolished. Abortion may be an equally uncompromisable exception, but no state has yet tried to prosecute resident women who undergo abortions out of state, or even forbid insurance coverage for such abortions, and perhaps none will. In any event, two such controversies in two hundred years remain exceptional, and no set of legal rules or judicial decisions could resolve such deeply felt moral and political conflicts. Disagreements over spousal immunity rules or enforcement of gambling debts are simply not analogous to disagreements over slavery and abortion. Even if the Constitution spoke less clearly than I think it does, it would be a serious error to design choice-of-law rules around slavery and abortion, instead of around the thousands of routine conflicts between ordinary laws.
In short, international choice of law needs accessible escape hatches; domestic choice of law does not. In domestic choice of law, it is possible to lay down constitutional principles and live within them. The next three sections explore the three choice-of-law principles in our fundamental law.

II. The Principle of Equal Citizens

A. The Privileges and Immunities Clause

The principle of equal citizens is set forth most explicitly in the Privileges and Immunities Clause of Article IV. The same principle is included in the more general guarantee of the Equal Protection Clause, and it is implicit in the Commerce Clause, both considered below.

The Privileges and Immunities Clause is no mere technical detail. Taken at face value, it is universal in its scope, absolute in its terms, and critical in its contribution to national unity. It says: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." The core concept is stunningly simple: An American citizen visiting a sister state is "entitled to all Privileges and Immunities of Citizens." An Australian in Texas is an alien, but a Californian in Texas is in some sense a citizen, or at least equal to a citizen. The Californian is entitled to all the privileges and immunities accorded to Texans. In short, we must treat her like a Texan. To use a famous phrase, Texas must accord her "equal concern and respect."

One seeking to limit the effect of the Clause may seek to reduce its scope or to reduce the standard of judicial review. The two techniques are independent of each other, and both have been tried. I consider each in turn.

1. The Scope of the Clause. — The principal effort to reduce the scope of the Clause argues that "Privileges and Immunities" was a term of art, so that the Clause is limited to the term's specific referents. But there is both textual and historical evidence that the phrase was not a term of art. The Constitution twice guarantees privileges and immunities, once in the Privileges and Immunities Clause of Article IV, and once in the Privileges or Immunities Clause of the Fourteenth Amendment. John Ely has shown that "privileges or immunities" was not a term of art in 1868, and I have seen no evidence that "privileges and immunities" was a term of art in 1868.
immunities" was any more a term of art in 1787.

The two clauses have very different meanings, and the change in conjunction has nothing to do with it. The Article IV clause provides that citizens of one state shall be treated like citizens in other states. Persons claiming rights or benefits under the clause get the rights or benefits of a reference group—local citizens. If the rights of local citizens change, the rights of visitors under the clause change derivatively. This is an equality right.

The Fourteenth Amendment clause provides that no state shall infringe the privileges or immunities of citizens of the United States. Whatever these privileges or immunities are thought to be—whether there are many or hardly any, and even if their content changes over time—they depend directly on federal law applicable to all and not on the rights of some reference group. All persons get the rights guaranteed by the clause without regard to how any other person is treated. This is a substantive right.

It is not an equality right; the Equal Protection Clause is the equality provision of the Fourteenth Amendment.

Thus, the Article IV clause created equality rights; the Fourteenth Amendment clause created substantive rights. Fourteenth Amendment privileges and immunities are defined by federal law; Article IV privileges and immunities are defined by state law. If we insist that the phrase have the same meaning in both clauses, it is impossible to make sense of either clause. If the phrase were a term of art, it could not have been used in two such different senses.

Mark Gergen, who has helpfully collected the early uses of the phrase, concludes that it referred only to commercial rights. I do not doubt that the needs of merchants were the problem most salient to the Founders, but the Clause is not textually limited to them. Even if I were persuaded that the Clause is limited to merchants, I would argue that virtually any discrimination against visitors from sister states harms the interests of out-of-state merchants. The only exception would be purely recreational interests, such as the hunting rights at issue in

82. The change in conjunction responds to the affirmative and negative introductions to the two clauses. The Article IV clause states an affirmative guarantee: Visiting citizens are entitled to both privileges and immunities. The Fourteenth Amendment forbids a deprivation: Citizens cannot be deprived of either privileges or immunities. The two formulations are logically equivalent; each protects both "privileges" and "immunities."

83. For the distinction between equality rights and substantive rights, see Kenneth Simons, Equality as a Comparative Right, 65 B.U. L. Rev. 387 (1985).


86. See id.
Baldwin v. Fish and Game Commission.\textsuperscript{87}

The principal evidence that the Clause was not limited to the needs of merchants comes from comparing the constitutional clause to its antecedent in the Articles of Confederation. The antecedent clause guaranteed "all the privileges and immunities of free citizens," and also "all the privileges of trade and commerce."\textsuperscript{88} The felt need to specify privileges of trade and commerce is inconsistent with the claim that "privileges and immunities" was a term of art for those privileges and none other. Moreover, the language that referred specifically to trade and commerce was omitted from the Constitution, and the more general language was retained. If the clause were limited to trade and commerce, we would expect it to be the other way around.

The argument to this point is textual, not intentionalist.\textsuperscript{89} We do not know what the Founders were thinking, but we know what they ratified. With a clear choice of drafting alternatives before them, they rejected the language of trade or commerce, and chose more general language instead. But the argument does not depend on text alone; respected evidence of intent reinforces the textual inference. James Madison in The Federalist Papers implied that the privileges of trade and commerce were dropped because no one knew "what was meant by superadding" them to privileges and immunities of free citizens.\textsuperscript{90} Thus, the drafting history suggests that the Clause is of general scope, and that a further specification of trade and commerce was thought unnecessary, dangerously limiting, or both.

The policies of the Clause also require that it be general in scope. The Clause is first and foremost a national unity provision, eliminating a source of interstate divisiveness. Alexander Hamilton said that this Clause was "the basis of the Union."\textsuperscript{91} But the Clause also appears to be an individual liberty provision, protecting individual American citizens from discrimination by sister states.\textsuperscript{92} The equal rights of citizens

\textsuperscript{87} 436 U.S. 371 (1978) (holding that state can charge nonresident hunters more than resident hunters for license to hunt elk).

\textsuperscript{88} The earlier clause provided:

[T]he free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions, as the inhabitants thereof respectively . . . .

Articles of Confederation and Perpetual Union art. IV, § 1, 1 Stat. 4 (emphasis added).

\textsuperscript{89} For elaboration of the distinction between textual and intentionalist arguments, see, Richard H. Fallon, Jr., A Constructivist Coherence Theory of Constitutional Interpretation, 100 Harv. L. Rev. 1189, 1195–99 (1987).

\textsuperscript{90} The Federalist No. 42, at 270 (James Madison) (Clinton Rossiter ed., 1961).

\textsuperscript{91} Id., No. 80, at 478 (Alexander Hamilton); accord Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1868) ("no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this").

\textsuperscript{92} See Austin v. New Hampshire, 420 U.S. 656, 662 (1975) (Clause "implicates
of sister states is a special case of the "self evident" truth that "all men are created equal." The two policies were inextricably linked in an age when Alexander Hamilton could plausibly argue that foreign mistreatment of an individual citizen was "among the just causes of war."93

Any discrimination against visiting citizens of sister states harms the victim and strikes a small blow against national unity. Discrimination against citizens of sister states, justified only by a preference for locals or a view that the state has no interest in protecting outsiders, undermines our tendency to think of ourselves as a single people and leaves the victims with a legitimate sense of raw injustice.

If thinking of ourselves as a single people no longer seems a pressing goal, it is only because of the extent to which we have achieved it. That goal had not been achieved by 1787, nor yet by 1861, and strong sectional interests cause occasional regressions even today. In the mid-seventies, at the height of the oil shortage, a popular bumper sticker in the oil-producing states proposed to "Let the Yankee bastards freeze in the dark." Oil-importing states may have popularized equally offensive slogans when the tables were turned in the mid-eighties. Certainly both groups of states zealously pursued their self-interest through all the ups and downs of oil prices. Pork-barrel politics and buy-local advertising campaigns are widely accepted practices that elevate local over national interests. Canada's experience with Quebec shows that stable democracies with developed economies are not immune from separatist movements, and we too have a large language minority living on land acquired by conquest. It is critical to the Union that we continue to think of ourselves as a single people, and it is important that we not knowingly create legitimate interstate grievances.

Robert Sedler has suggested that there are not enough choice-of-law cases to have any real impact on national unity or interstate relations.94 I quite agree that discrimination in choice of law does not by itself and at this time threaten imminent disunion. But the Founders viewed the matter differently, and they were right. The impact of such cases depends not on their sheer numbers, but on how they are perceived and whether they interact with other grievances in reinforcing ways. There are many more choice-of-law cases than capital sentences,95 but discrimination in those few capital cases is a major

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93. The Federalist, supra note 90, No. 80, at 476 (Alexander Hamilton); accord Hugo Grotius, De Jure Belli Ac Pacis Libri Tres, Book II ch. 25 at 578 (James B. Scott & Francis W. Kelsey trans., Bobs Merrill 1925) (1646) (section entitled "War may rightfully be undertaken on behalf of subjects"); Emer de Vattel, The Law of Nations or the Principles of Natural Law § 71, at 136 (James B. Scott ed. & tran., 1916) (1758) ("The sovereign of the injured citizen must avenge the deed and, if possible, force the aggressor to give full satisfaction or punish him . . . .")

94. See Sedler, supra note 47, at 597-605.

95. Compare Kozyris & Symeonides, supra note 51, at 601 n.1 (noting at least 1098
source of racial division. The effect of discrimination in choice-of-law may be large or small, but it is never positive, and its negative effect could be amplified by interaction with some new source of interstate tension. In any case, Sedler's point is wholly irrelevant to the individual liberty policy of the Privileges and Immunities Clause. Each unjustified discrimination against a citizen of a sister state is a constitutional wrong to that citizen, regardless of the impact on national unity.

In light of the constitutional values of national unity and equal treatment of individual citizens, and the lack of any more specific referent, "Privileges and Immunities of Citizens" most plausibly refers to all the ways in which citizens are treated by the state. The scope of the Clause is co-extensive with the scope of interactions between states and citizens. One of these interactions is to decide lawsuits between citizens of different states, and to choose the law that governs such lawsuits. Choice-of-law rules that prefer local litigants prima facie violate the Privileges and Immunities Clause.

The Supreme Court has not held that "Privileges and Immunities" is a term of art limited to certain categories of rights. But it has limited the scope of the term by saying that it includes only those rights of citizens that are "fundamental." "Fundamental" in this context seems to mean merely "important," or perhaps "not insignificant." A right can be fundamental for privileges and immunities purposes even though it is far from a fundamental right in the sense that a compelling interest would be required to override it for citizens and non-citizens alike. Thus, all the rights of trade, commerce, and pursuit of a livelihood are fundamental rights for this purpose. These economic rights get strong interstate equality protection, even though the Constitution gives them almost no substantive protection.

It has been a mistake to limit the Clause to "fundamental" rights, even if the limitation is rarely invoked, but the mistake does not matter here. Both critics and supporters of interest analysis have agreed that
this limitation is irrelevant to choice of law.\textsuperscript{101} To receive equal justice in the courts, to be governed by equal application of equal laws, is at the core of our governmental system. And as we shall see, equal treatment in the courts was a central part of the Founders' understanding of privileges and immunities; the Privileges and Immunities Clause was closely linked to the diversity jurisdiction.\textsuperscript{102} The limitation to fundamental rights cannot explain the long neglect of the Privileges and Immunities Clause in choice-of-law cases.

There is one other possible interpretation of privileges and immunities. Perhaps in 1787 the term carried a sense of civil rights as distinguished from political rights. The Privileges and Immunities Clause does not mean that visitors from sister states can vote in local elections or hold local office.\textsuperscript{103} We may think of these rights as rights that are not privileges and immunities at all, or as implied exceptions from overbroad language. I briefly consider them below as exceptions.\textsuperscript{104}

2. The Standard of Review. — A second attempt to undermine the Privileges and Immunities Clause seeks to lower the standard of review. The standard of review is independent of the scope of the Clause. Within its scope—with respect to whatever "Privileges and Immunities" it applies to—the Clause is written in absolute terms. States are not merely to refrain from "irrational" or "inefficient"\textsuperscript{105} discrimination, or to treat citizens of sister states "reasonably equally," or equally except where there is some reason to discriminate, or even some "substantial" reason to discriminate.\textsuperscript{106} Rather, the Clause says without qualification that states are to treat citizens of sister states as citizens.

The narrow focus of the Privileges and Immunities Clause is also relevant to the standard of review, sharply distinguishing this clause from the general guarantee of equality in the Equal Protection Clause. Because the Equal Protection Clause literally applies to every distinction government makes, the only sensible interpretation is that some distinctions are more suspect than others. The difference between the two clauses is like the difference between the Equal Protection Clause and the rejected Equal Rights Amendment. Lawyers argued whether sex was a suspect classification under the Equal Protection Clause, but few doubted that sex would be a suspect classification if the Equal Rights Amendment were ratified.\textsuperscript{107} The Privileges and Immunities

\textsuperscript{102} See infra notes 167–195 and accompanying text.
\textsuperscript{104} See infra notes 131–138 and accompanying text.
\textsuperscript{105} For the claim that only inefficient discriminations are forbidden, see Gergen, supra note 79, at 1106–18.
\textsuperscript{106} For the substantial interest test, see infra note 112 and accompanying text.
\textsuperscript{107} Compare Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (plurality
Clause specifies its suspect class, absolutely forbids discrimination against that one class, and applies to nothing else.

Inevitably there will be exceptions even to this strong language. We have learned from the more familiar example of the First Amendment that even when a constitutional right is stated in absolute terms, courts must imply exceptions for sufficiently compelling reasons. But an implied exception to an expressly absolute constitutional right is an extraordinary thing. Courts cannot legitimately imply exceptions to absolute provisions in the same free way they construe rights that expressly depend on what is reasonable or what is due. All constitutional rights require balancing, but with respect to the textually absolute rights, balancing should be tilted heavily against the government.

Discrimination against citizens of sister states will sometimes be justified, but only (or almost only) when such discrimination serves federal interests and not merely the interests of the discriminating state. If a state's parochial interests can ever justify discrimination against citizens of sister states, it can only be to avoid intolerable harms. In conventional terms, the standard of review should be the compelling interest standard.

This view of the Clause derives in part from a belief that we should take the whole Constitution seriously. We cannot legitimately pick and choose the clauses we want enforced. But the Privileges and Immunities Clause is not an arguable constitutional mistake, nor is it an obsolete provision that modern Americans are stuck with; it fits neatly into modern conceptions of nondiscrimination. Discrimination against fellow Americans is intuitively unjust. Citizens of sister states are outsiders, subject to in-group/out-group bias, denied the right to vote, which is the key to power in the political process, and thus dependent on judicial protection. Faithful interpreters of the Constitution

opinion) (sex is inherently suspect classification) with id. at 692 (Powell, J., concurring) (Equal Rights Amendment would "resolve the substance of this precise question").


109. See generally Laycock, supra note 84 (arguing that every clause of the Constitution should be given effect, and that historical intent, political theory, and other extra-textual considerations must be subordinate to the text).


111. For the argument that exclusion from the political process requires more vigorous judicial protection for nonresidents, see United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 217 (1984); Austin v. New Hampshire, 420 U.S. 656, 662 (1975); South Carolina State Highway Dept. v. Barnwell Bros., 303 U.S. 177, 185 n.2 (1938); Ely, supra note 81, at 83. For criticism of that argument, see Brilmayer, Interstate Equality, supra note 19, at 402–09; Donald H. Regan, The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce
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should not be seeking ways to minimize the Privileges and Immunities Clause.

The Supreme Court has not treated all textually absolute constitutional rights equally. Nor has it applied the compelling interest test to the Privileges and Immunities Clause. But it has come close. It has held that only a "substantial" interest can justify discrimination against natural persons from sister states, and it has invalidated much local discrimination under that formulation.

Discrimination against sister-state corporations has been treated differently, because the Privileges and Immunities Clause protects only citizens. Corporations cannot be citizens, and the Court has so far been unwilling to look through the corporation and protect the sister-state investors. Instead, discrimination between local and sister-state corporations violates the Commerce Clause and the Equal Protection Clause. The Supreme Court’s enforcement of these prohibitions has gradually strengthened over the years. The Court once viewed incorporation as a privilege that could be granted or withheld for any reason or no reason, and thus states were free to exclude sister-state corporations or to condition their admittance on consent to discriminatory treatment. This view was wrong even in its own time, but it became profoundly obsolete after general incorporation statutes

Clause, 84 Mich. L. Rev. 1091, 1160–67 (1986). For a response to Brilmayer's argument (which is also one part of Regan's argument), see Laycock, supra note 103, at 440–45.


117. See Paul, 75 U.S. (8 Wall.) at 181.
made corporate status a right available for the asking.\textsuperscript{118}

Today the Court interprets the Commerce Clause to forbid all or nearly all discrimination against economic actors from sister states. It has said that discrimination against interstate commerce is "virtually per se invalid,"\textsuperscript{119} without hope of justification by further inquiry into state interests.\textsuperscript{120} In other cases, it has said that such discrimination is subject to the "strictest scrutiny,"\textsuperscript{121} or "more demanding scrutiny."\textsuperscript{122} This rule applies with equal force to discrimination against out-of-state persons and discrimination against out-of-state goods.\textsuperscript{123}

Discrimination against sister-state corporations violates the Equal Protection Clause as well unless it bears "a rational relation to a legitimate state purpose."\textsuperscript{124} This rule is not so weak as it appears, because it carries the important proviso that a mere desire "to favor domestic industry within the State" is not a legitimate state purpose.\textsuperscript{125} Rather, discrimination so motivated "constitutes the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent."\textsuperscript{126} Congress can authorize state regulation of interstate commerce that would otherwise be precluded by the Commerce Clause,\textsuperscript{127} but it presumably cannot authorize violations of the Equal Protection Clause.\textsuperscript{128}

Review of discrimination against natural persons or corporations from sister states should be equally stringent under any of these clauses. The objections to discrimination against citizens of sister states do not change when those citizens elect to do business in corporate form. The owners of a sister-state corporation are still fellow Americans exposed to the risk of local bias, and their right to do business throughout the country is still essential to national unity. The

\textsuperscript{118} For a review of the rise and fall of the doctrine, see \textit{Western & S. Life}, 451 U.S. at 659–68. For other scholars condemning the doctrine, see Julian N. Eule, \textit{Laying the Dormant Commerce Clause to Rest}, 91 Yale L.J. 425, 451 (1982); Gergen, supra note 79, at 1117–18; Martin H. Redish & Shane V. Nugent, \textit{The Dormant Commerce Clause and the Constitutional Balance of Federalism}, 1987 Duke L.J. 569, 611.


\textsuperscript{120} \textit{Bendix Autolite Corp. v. Midwesco Enters.}, 486 U.S. 888, 891 (1988); \textit{Brown–Forman}, 476 U.S. at 578–79.


\textsuperscript{126} Id.

\textsuperscript{127} \textit{See Western & S. Life}, 451 U.S. at 652–53.

\textsuperscript{128} Cf. \textit{Katzenbach v. Morgan}, 384 U.S. 641, 651 n.10 (1966) ("§ 5 grants Congress no power to restrict, abrogate, or dilute these guarantees" of the Fourteenth Amendment).
omission of corporations from the Privileges and Immunities Clause is not an element of the constitutional scheme; it is a relic from a time before general incorporation laws. The same constitutional policies of national unity and interstate equality are at work in all three clauses. The specific concerns that underlie the Privileges and Immunities Clause inform the more general right of equality in the Equal Protection Clause and the equality component of the Commerce Clause.\(^{129}\) The Court should be reluctant to imply exceptions to any of these protections.

### B. The Exceptions: Legitimate Discrimination Against Citizens of Sister States

Even so, the Privileges and Immunities Clause does have some legitimate implied exceptions. Californians do not vote or collect welfare in Texas, and they pay out-of-state tuition to attend Texas universities. It is important to identify the principle that explains these exceptions, and to examine what that principle implies for choice of law. Critics of any constitutional clause are prone to argue that the legitimacy of some exceptions implies the legitimacy of others.\(^{130}\) Such arguments are non-sequiturs unless it is shown that the proposed exception is implied by the same principle as the acknowledged exception. The essential feature of the uncontroversial exceptions to the Privileges and Immunities Clause is that they are implied by the needs of the federal structure. They serve the interests of the nation, and not merely the interest of a single state.

#### 1. Exercising Government Power. — The most fundamental exception to the rule of equal treatment is that each state can reserve the exercise of government power, including the vote, to its own citizens.\(^{131}\) This exception is consistent with, and required by, the Founders' dual purpose of achieving national unity and preserving the states as separate polities. It may seem odd to conclude that the principal exception to a rule requiring visitors to be treated as citizens is that they cannot exercise those ultimate political powers that we have come to think of as the quintessential rights of citizens. But oddities were inevitable once the Founders set out to unite thirteen states into a single nation and simultaneously to preserve the states.

The oddity here is not in the rule; no one thinks citizens of each state should vote in all fifty states. Residence requirements for voting

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129. Cf. Ely, supra note 81, at 82–87 (suggesting \textit{ejusdem generis} interpretation of Constitution's more general provisions, and noting equality protections of the Privileges and Immunities and Commerce Clauses).

130. See, e.g., Singer, supra note 17, at 65 (analogyizing preference for local litigant in choice of law to right to vote, receive welfare, and pay lower tuition to attend state university); Weinberg, supra note 33, at 76 & n.114 (citing voting rights case for general claim that "state must have power to make reasonable distinctions between residents and nonresidents.").

131. See Laycock, supra note 103, at 433–36.
have been thought "necessary to preserve the basic conception of a political community;" they protect local autonomy from meddling outsiders who will not have to live with the consequences of their votes. What seems odd to modern ears is to use the language of citizenship to describe a broad set of rights that does not include the right to vote. But this linguistic oddity is quite explicable.

The link between citizenship and voting was much less natural and apparent to the Founders than it is to us. Voting rights were left to positive law, and each state determined its own qualifications for voting. The Constitution has since been amended seven times to expand voting rights. Not all citizens are entitled to vote even today; children are excluded without controversy, and most felons with only modest controversy. In the eighteenth century, when women were also excluded and some men were still excluded by property qualifications, only a minority of citizens were entitled to vote. In the nineteenth century, when most female citizens were still excluded, many states allowed resident aliens to vote.

Whatever the Founders may have thought about the relation between citizenship and voting, they plainly did not think Virginians should vote in Massachusetts. Because no one in the 1780s was urging that citizens of one state be allowed to vote in any other, the Founders had no occasion to consider whether the Privileges and Immunities Clause might be misunderstood to apply to voting.

2. Subsidized Social Welfare Services. — The broadest exception to the Privileges and Immunities Clause covers subsidized social welfare services. States can generally restrict such services to their own residents, or account for the subsidy in a higher user fee for nonresidents. Otherwise, individuals could benefit from subsidies without

133. For different explanations of this shared judgment, see Brilmayer, Interstate Equality, supra note 19, at 403–09; Laycock, supra note 103, at 433–36.
135. See id. amend. XIV, § 2; id. amend. XV, XVII, XIX, XXIII, XXIV, XXVI.
being subject to the taxes that pay the subsidies.\textsuperscript{140} A claim to share benefits without sharing their cost does not flow easily from a right to equal treatment.

Of course, the assumption that subsidies are supported by taxes on residents is only approximately true. Only residents are subject to the state's full taxing power,\textsuperscript{141} but nonresidents pay some taxes and receive some government benefits. The argument that the state can confine subsidies to residents uses residence as a proxy for tax liability. Like all proxies, it is not entirely accurate.

But the need to confine subsidies to residents does not wholly depend on equity to individual taxpayers. The structural problem is more fundamental: If Americans were entitled to subsidized services in every state, whole states could be free riders. A state could decide there was no need to create a state university so long as its students could be educated at the expense of taxpayers elsewhere, and no need to pay welfare benefits so long as its citizens could claim benefits in any state they might choose. A small state like Rhode Island, where nearly the whole population lives within commuting distance of another state, could rely on its neighbors for a wide range of social services.

No body of taxpayers will support subsidized services for an unlimited number of visitors who do not help pay for the subsidy. Application of the Privileges and Immunities Clause to subsidized social services would create inexorable pressure to reduce or eliminate state subsidies for such services. Ultimately, most such services would have to be provided at the federal level, and a key feature of federalism—the voters' ability to choose different levels of government to perform different functions—would be eliminated. Interstate eligibility for social services would inevitably consolidate the provision of social services just as interstate voting would consolidate our separate polities. If we are to have separate states at all, then each of us must be constitutionally entitled to vote and receive subsidized services in one and only one of those states.\textsuperscript{142}

\textsuperscript{140} A similar argument is developed in Jonathan D. Varat, State "Citizenship" and Interstate Equality, 48 U. Chi. L. Rev. 487, 522–23 (1981).


\textsuperscript{142} Sanford Levinson has proposed that commuters and others who have contacts with more than one state be allowed to vote in more than one place, perhaps apportioning one vote over several jurisdictions. See Sanford V. Levinson, Suffrage and Community: Who Should Vote?, 41 Fla. L. Rev. 545, 551–54 (1989). I would object in principle to allowing some persons more than one full vote; I would object only on grounds of workability to allowing some persons to apportion a single vote among more than one jurisdiction.
There were few subsidized services in the Founders' time, and they probably did not think this exception all the way through. But they probably took for granted the basic point. America's rudimentary forms of relief for the poor made each poor person the responsibility of his or her local parish or town; there were rules and procedures, and sometimes litigation, for deciding which towns were responsible for which individuals.  

The exception for subsidized social services must contain at least some exceptions to the exception. Visitors from other states must be eligible for services that are essential to interstate travel and commerce, even if those services are subsidized. The precise borders of this category may require case-by-case determination, but visitors are at least entitled to use the roads, to police and fire protection, to emergency medical care, and to other emergency services. This conclusion is also derived from the needs of the Union. If visitors could not use these services as needed, no one could safely travel interstate. Because travelers' demand for necessary services is reciprocal—and because states collect substantial sums from travelers through neutral taxes on gasoline, hotels, and retail sales—this restriction on state power does not threaten the separate existence of the states or their ability to make policy choices and fund services.

3. Other Possible Exceptions. — Any other legitimate exceptions to the Privileges and Immunities Clause should be very narrow. It should never be enough that local citizens need the benefit of discrimination, because the need of similarly situated citizens of sister states is just as great. The state can draw its lines on the basis of need rather than citizenship, or it can subsidize its own needy and rely on the subsidized social services exception. Exceptions can never be based on hostility or indifference to citizens of sister states, or on a judgment that their interests are less important or less deserving of the state's attention than the interests of locals. Claims that citizens of sister states are the source of some special difficulty requiring discriminatory legislation should be subjected to strict scrutiny.


C. Implications for Choice of Law

1. The Original Interest Analysis. — Interest analysis in its original version obviously violated the principle of equal citizens. I take the original version to be the analysis of interests in Brainerd Currie's famous article on married women's contracts.\footnote{145} I want to begin with that analysis, deferring consideration of later qualifications. Currie's preference for local citizens remains deeply embedded in interest analysis; when it emerges to affect a result, it is unconstitutional.

Currie rang the changes on \textit{Milliken v. Pratt},\footnote{146} a suit by a Maine merchant against a Massachusetts wife who had guaranteed her husband's debts. Such guarantees were enforceable under the law of Maine, but unenforceable under the law of Massachusetts. To make sense of the example, we must accept the nineteenth century's assumption that married women benefitted from this protection.

Currie's first premise was that a state's only fully legitimate interest with respect to an interstate transaction is to enrich its own citizens. He recognized that states might take an "altruistic interest" in the welfare of nonresidents, but such interests were "of a quite different order from" nonaltruistic interests.\footnote{147} The interests of citizens of sister states quite literally did not count in Currie's primary analysis of state interests,\footnote{148} and he eventually decided that it is sometimes unconstitutional to take such interests into account.\footnote{149} For Currie, this definition of state interest appears to have been a postulate, beyond the need or possibility of proof. Substantially his whole argument on the point was one rhetorical question and answer: "The legislature decides in favor of protecting married women. \textit{What} married women? Why, those with whose welfare Massachusetts is concerned, of course—i.e., Massachusetts married women."\footnote{150} Contemporary interest analysts tend to agree.\footnote{151}

The claim that states have no interest in the welfare of nonresidents is not just a despairing response to intractable "true" conflicts.

\footnote{146} 125 Mass. 374 (1878).
\footnote{147} Currie & Schreter, Privileges and Immunities, supra note 40, at 1360–61, 1368.
\footnote{148} See Currie, supra note 145, at 237–44.
\footnote{149} See Currie & Schreter, Privileges and Immunities, supra note 40, at 1365–66 (arguing that forum may not apply its law to benefit of nonresident if application of forum law would interfere with nonaltruistic interest of another state).
\footnote{150} Currie, supra note 145, at 224.
Rather, Currie’s whole scheme of true conflicts, false conflicts, and un- provided for cases depends on his view that the interests of outsiders do not count. An example of a conflict Currie considered false would be a suit by a Massachusetts merchant against a Maine married woman. In Currie’s view, Massachusetts has no interest in protecting the Maine woman, because she is not from Massachusetts. Maine has no interest in protecting her either, having overridden her interest in its law of married women’s contracts. In Currie’s view, there is no conflict of laws in such a case. There is only a Massachusetts interest in helping its merchant collect.

This conflict is false only on the premise that the interests of Maine’s citizens are of no concern to Massachusetts. If Massachusetts must be as solicitous of Maine’s citizens as of its own, then no permutation of the parties’ domiciles makes the conflict false. Whatever choice-of-law rule might be adopted for such cases, it must be blind to the distribution of benefits across state lines.

If legislatures acted generally on Currie’s view that they owe nothing to the citizens of sister states, the Union would be destroyed. His argument fits murder laws as readily as married women’s contract laws. He could have said with equal logic: “The legislature decides in favor of protecting human beings. What human beings? Why, those with whose welfare Massachusetts is concerned, of course—i.e., Massachusetts human beings.” The nearest reported analogue in our jurisprudence is the story of Judge Roy Bean, who allegedly said he had looked all through the statute book and found no law against killing a Chinaman. Lest it be thought unfair to charge Currie with having no interest even in nonresidents’ right to life, note that he did in fact apply this reasoning to wrongful death actions.

A good way to illustrate the full implications of Currie’s approach is with another classic source of choice-of-law cases, the automobile guest statute. These statutes generally provided that an injured passenger could not sue his own driver, with certain exceptions that do not affect the analysis. The guest statute makes a simple illustration, but I could make the point with married women’s contracts or any other case where one state imposes liability and the other does not.

152. See Ely, supra note 22, at 176–78.
153. See id.
154. For a narrower version of this argument, which is more deferential to the state’s alleged justifications, see Neuman, supra note 25, at 319–26.
157. See Currie & Schreter, Equal Protection, supra note 40, at 12–13 & n.63. But most wrongful death cases would presumably fall within his constitutional exception, requiring states to provide a remedy despite their lack of interest in doing so. See infra notes 206–207 and accompanying text.
Suppose there are two acquaintances, Mary from Maryland and Del from Delaware. They go out together on occasion, and they take turns driving. One night, with Mary driving, they get into a wreck, and Del is hurt. Another night, with Del driving, they get into another wreck, and Mary is hurt. Del follows his lawyer's advice to stay out of Maryland, so Mary sues him in Delaware. Del files a permissive counterclaim for his own injuries in the other wreck. So we have a mirror-image claim and counterclaim. Finally, suppose that Delaware has a guest statute and Maryland does not. How would Currie decide this case?

On Mary's claim against Del, Del wins. He is protected by the guest statute; Delaware has an interest in applying the statute to protect him; and the Delaware court has no reason or even authority to subordinate Delaware's interest to Maryland's.

On Del's claim against Mary, Del also wins. Delaware has no interest in applying its guest statute to protect Mary, and Maryland has not attempted to protect her, so this is a false conflict. Delaware is free to pursue its interest in compensating Del.158 The bottom line is that Mary has to pay Del, but Del need not pay Mary. Currie thought that this was fair and non-discriminatory, and that any other system would be irrational.

I have highlighted the unfairness with the artificial device of putting the same individuals on both sides of the issue. Professor Brilmayer illustrated the point even more elegantly, with a contract that is void under the statute of frauds of one state but not of the other. Whether an interest analyst would enforce the contract turns on which party breaches the contract and which party seeks to enforce it.159

The discrimination is the same whether we have one lawsuit, or two lawsuits between the same litigants, or many lawsuits between many different pairs of litigants. Currie would have Delaware rule for its own guests, and also for its own drivers, in interstate cases. He would have Massachusetts rule for its own merchants and also for its own married women, in interstate cases. But the Privileges and Immunities Clause requires states to treat both litigants as citizens, and thus precludes any preference between them.160

Brilmayer generalized the point in an important way. Interest analysis is discriminatory because it effectively creates three sets of rules. There is the local rule, the other state's rule, and the local rule for outsiders, which is the least advantageous of the three.161 In terms of my guest statute example, there is Maryland's rule for Marylanders,

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158. See Robert Allen Sedler, Interstate Accidents and the Unprovided For Case: Reflections on Neumeier v. Kuehner, 1 Hofstra L. Rev. 125, 138 (1973) (applying this analysis to guest statute); see also Kramer, More Notes, supra note 31, at 270 (applying this analysis to survival of tort claims).
159. Brilmayer, Legislative Intent, supra note 19, at 408.
160. See supra notes 76-104 and accompanying text.
Delaware's for Delawareans, and Delaware's rule for Marylanders. Mary would win one of her two cases under the Maryland rule, and one of her two cases under the Delaware rule, but she loses both cases under Currie's proposed Delaware rule for Marylanders. Proliferate these results over all the disputes between citizens of states with different law on the point at issue, and you have a substantial body of discrimination against citizens of sister states.

It is also possible to get anomalous results with territorial rules, but it is not possible to get systematically self-interested results. Under the law of the place of injury, if Mary is hurt with Del driving in Delaware, the Delaware guest statute will bar her recovery. And if Del is hurt with Mary driving in Maryland, no guest statute will apply. Again, Mary loses both cases. But it could just as easily be the other way around: If Del is hurt in Delaware, and Mary is hurt in Maryland, Del will lose both cases. If both accidents occur in the same state, no matter which state it is, the same law will govern both, and Mary and Del will each win one and lose one.

If Mary and Del's relationship can be sensibly located in a single state, then it is possible to apply the law of the place of the relationship. No matter which state it is, and no matter where the accidents occur, Mary and Del will each win one and lose one. Under territorial rules, Mary and Del will each win half the possible cases. It is only the application of interest analysis that causes Delaware to systematically discriminate against Mary, and tempts Maryland to systematically discriminate against Del.162

2. The Central Issue: Two Concepts of Discrimination. — There is one other way to compare litigants on this fact pattern, sometimes offered as an argument against territorial rules. Suppose Mary somehow sued Del in Maryland for the injuries she suffered in Delaware, and the Maryland courts applied the Delaware guest statute to bar recovery. This would be a straightforward application of the law of the place of injury. But compare Mary to Marie, another citizen of Maryland, injured in an accident in Maryland. Marie can sue the driver of her car;
Mary cannot sue the driver of hers. Currie thought this discriminatory—indeed, irrationally and unconstitutionally discriminatory. He saw no basis to distinguish citizens whose claim arose in one state from citizens whose claim arose in another state with different law. Other interest analysts reach the same conclusion.

These contrasting accounts of discrimination bring us to the heart of the problem. As Mark Gergen pointed out, it is inevitable that we will have either the kind of discrimination to which I object, or the kind to which Currie objected. We must decide which discrimination is more consistent with the Constitution, or if the Constitution is indifferent, which discrimination we prefer.

For me, the constitutional choice is clear. I have already argued that the Privileges and Immunities Clause expressly forbids discrimination on the basis of citizenship. Nothing in the Constitution expressly forbids discrimination on the basis that the disputes arose in territory subject to the laws of different states. The opposite is true: I will argue that territorial discrimination is inherent in the decision to preserve the states as quasi-sovereign territorial entities.

For now, note the strange limitations on Currie's charge of discrimination. If Mary sues Del in Maryland and finds her claim barred by the Delaware guest statute, Currie thought she had been discriminated against. But if Mary sues Del in Delaware, Currie believed that her claim should be barred by the Delaware guest statute. Not to bar her claim would discriminate against Del, as compared to other Delaware drivers protected by the statute. Thus, neither Mary nor Del can have an entitlement to treatment that Currie would consider nondiscriminatory. Rather, his conception of discrimination is contingent on where the suit is brought. Maryland cannot discriminate against Mary, and Delaware cannot discriminate against Del.

Now this is very strange. No one has ever thought that states are unduly prone to discriminate against their own citizens. Currie would constitutionally prohibit the discrimination the Founders did not fear, and require the discrimination they prohibited.

3. Original Intent, Constitutional Structure, and Diversity Jurisdiction. — Another constitutional provision also implements the constitutional requirement of judicial neutrality between citizens of different states. This is the diversity jurisdiction, created because of the fear that state courts might prefer local litigants, and especially that they might...
prefer local debtors to sister-state creditors.\textsuperscript{168} Congress conferred broad diversity jurisdiction in 1789;\textsuperscript{169} general federal question jurisdiction did not follow until 1875.\textsuperscript{170} This chronology plainly reflects a congressional judgment about which jurisdiction was more essential to the Union. The basis of that judgment appears in \textit{The Federalist Papers}.

Hamilton defended diversity jurisdiction as necessary to implement the Privileges and Immunities Clause: "in order to [achieve] the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens."\textsuperscript{171} The plain implication of this passage is that the Privileges and Immunities Clause is at issue in every diversity case—that one of the privileges and immunities protected is equal treatment in the courts. His next sentence added that these cases should be in federal court "[t]o secure the full effect of so fundamental a provision against all evasion and subterfuge."\textsuperscript{172}

Hamilton is not making the specious argument that a young Henry Friendly attributed to him:\textsuperscript{173} Hamilton is not deducing the need for diversity jurisdiction from the need for federal question jurisdiction over cases arising under the Privileges and Immunities Clause. Rather, Hamilton's argument makes sense only if he means that in any litigation, arising under any law, discrimination in the administration of justice against a citizen of a sister state would violate the Privileges and Immunities Clause.

Diversity jurisdiction was also the occasion for Hamilton's remark about mistreatment of foreigners being a cause of war. His full statement was that "the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war . . . ."\textsuperscript{174} "Sentences" here refers not just to criminal sentences, but to "the judgment or decision of a court in any civil or criminal cause."\textsuperscript{175} Hamilton cited "a horrid picture of the dissensions and private wars which distracted and desolated Germany prior to the institution of the IMPERIAL CHAMBER by Maximilian towards the

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{168} See Baxter, supra note 34, at 34–41; Henry J. Friendly, The Historic Basis of Diversity Jurisdiction, 41 Harv. L. Rev. 483 (1928).
\item \textsuperscript{169} Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73, 78–79.
\item \textsuperscript{170} Act of March 3, 1875, ch. 137, § 1, 18 Stat., pt. 3, at 470 (codified as amended at 28 U.S.C. § 1331 (1988)).
\item \textsuperscript{171} The Federalist, supra note 90, No. 80, at 478 (Alexander Hamilton). The bracketed verb is missing from Hamilton's sentence, due either to a drafting error or to his sense that the verb was implicit in the word "maintenance."
\item \textsuperscript{172} Id.
\item \textsuperscript{173} See Friendly, supra note 168, at 492 n.44.
\item \textsuperscript{174} The Federalist, supra note 90, No. 80, at 476 (Alexander Hamilton).
\item \textsuperscript{175} 14 Oxford English Dictionary 990 (2d ed. 1989) [hereinafter OED] ("sentence", def. 5b, collecting examples from 1386 to 1857). It is clear from context that Hamilton meant to include civil cases.
\end{enumerate}
\end{footnotesize}
close of the fifteenth century, and . . . the vast influence of that institution in appeasing the disorders and establishing the tranquillity of the empire."176 He plainly intended that diversity jurisdiction and the Privileges and Immunities Clause should avoid such problems in the United States.177

It is astonishing but true that conflicts scholars have largely ignored these implications of diversity jurisdiction. I believe the only exception is William Baxter, who showed that the principal function of diversity jurisdiction was to ensure that federal courts would either choose or develop the law to govern interstate disputes.178 Baxter collected the Founders' complaints about state court treatment of citizens of sister states, complaints that indicate their expectation that federal courts in diversity cases would not apply discriminatory rules of state law.179 Noting that federal courts use local jurors and local judges, and that for their first hundred and fifty years they followed local procedures, Baxter concludes that nondiscriminatory rules of law were to be the principal means by which diversity jurisdiction protected out-of-state litigants.180 Henry Hart, the great federal courts scholar of Currie's generation, argued on similar grounds that the best single use of the diversity jurisdiction is to resolve choice-of-law issues between citizens of different states.181

Of course there is more than one way for federal courts in diversity

176. The Federalist, supra note 90, No. 80, at 477 (Alexander Hamilton).
177. See id. at 476–78. This intention does not depend on the historical accuracy of his German example, of which I have no knowledge.
179. See, e.g., the reported remarks of James Wilson, arguing for the diversity jurisdiction at the Pennsylvania ratifying convention:
[I]t is not necessary, if we mean to restore either public or private credit, that foreigners, as well as ourselves, have a just and impartial tribunal to which they may resort? I would ask how a merchant must feel to have his property lie at the mercy of the laws of Rhode Island. . . . [S]ecurity [for contracts] cannot be obtained, unless we give the power of deciding upon those contracts to the general government.

2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 491-92 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter Elliot]. Wilson's speeches at the Pennsylvania convention were apparently revised for publication for the source that was later incorporated into Elliot. See James H. Hutson, The Creation of the Constitution: The Integrity of the Documentary Record, 65 Tex. L. Rev. 1, 22–23 (1986). Thus, Elliot accurately reports the argument Wilson wanted to make to the public, although he may not reliably report what was said on the floor of the convention. Wilson's contribution to the Constitution has been called second only to Madison's. See Ralph A. Rossum, James Wilson, in 4 Encyclopedia of the American Constitution 2067, 2067 (Leonard W. Levy et al. eds., 1986) [hereinafter Levy].
180. See Baxter, supra note 34, at 39.
to avoid unjust state laws. The worst state abuses were made unconstitutional. The Constitution expressly forbids state laws that discriminate against citizens of sister states, or impair the obligation of contracts, or make debts payable in paper money or barter. Laws that were unjust but not unconstitutional could be avoided in some cases by federal choice-of-law rules that would choose some other state's law, or in all cases by federal enforcement of the general common law, which we associate with Swift v. Tyson.

Some of the Founders' remarks seem to contemplate the general common law; others plainly contemplated federal choice-of-law rules. In fact they believed in both. There was a domain of the general common law, and a domain of local law, with choice-of-law rules for choosing between general and local law, and other choice-of-law rules for choosing among the local law of different jurisdictions. But the increasing diversity of state law, the erosion of the line between local and general law in an integrated economy, and disagreement between state and federal courts about the location of that line eventually rendered the Swift v. Tyson solution inconsistent with the rest of the constitutional structure. Independent federal elaboration of general common law presented a dilemma. Either it would be binding on state courts and on all transactions, in which case it would wholly displace state law on matters reserved to the states by Article I and the Tenth Amendment, or left to the states by congressional deference; or it would not be binding on state courts and all transactions, in which case it would create two bodies of law within each state, each potentially applicable to many of the same transactions, with resulting uncertainty, forum shopping, and the related evils denounced in Erie Railroad v. Tompkins.
For reasons explored more fully in Parts III and IV, federal choice-of-law rules do not present this dilemma. One uniform set of federal choice-of-law rules can be binding on the states and applied to all transactions wherever they may be litigated. This leads to no general displacement of state authority across the whole range of the common law, but only to federal authority over one common law subject that is inherently interstate anyway. Choice-of-law rules are appropriately made at the federal level because they resolve conflicts between states, and neither state's attempt to resolve such a conflict unilaterally has any claim to legitimacy. Unwillingness to displace state authority even over choice-of-law rules largely defeats the policy of the diversity jurisdiction.

The Supreme Court missed this distinction in *Klaxon Co. v. Stentor Electric Manufacturing Co.*, treating choice of law like substantive common law generally. The result was to entirely eliminate the benefits of diversity jurisdiction in choice-of-law cases. Because *Klaxon* requires federal courts to follow state choice-of-law rules, federal courts must discriminate in exactly the same way a state court would. If Mary would lose both her cases in state court in Delaware, she will also lose both her cases in the United States District Court for the District of Delaware. Federal courts do indeed discriminate in this way. The diversity jurisdiction now protects against informal bias in state courts, but if the state court formally writes hostility to outsiders into its choice-of-law rules, the federal courts become equally hostile to outsiders.

The Court was right to conclude that choice-of-law rules could determine results, and that choice-of-law rules should therefore be the same in both state and federal court. Its error was not in either of these propositions, but rather in two propositions to which it gave less attention. It was an error to require the federal court to follow state choice-of-law rules instead of the other way around, and it was an error to legitimate discriminatory choice-of-law rules in either court.

The Constitution requires both state and federal courts to dispense even-handed justice to citizens of all states, and the diversity ju-

192. See Gottesman, supra note 17, at 30–32.
193. 313 U.S. 487 (1941).
194. See id. at 496–97.
195. See, e.g., Warner v. Auberge Gray Rocks Inn, Ltee., 827 F.2d 938, 942 (3d Cir. 1987) (applying New Jersey's longer statute of limitations solely because of "New Jersey's well-recognized interest in compensating its injured domiciliaries") (quoting Dent v. Cunningham, 786 F.2d 173, 177 (3d Cir. 1986)); Petrella v. Kashlan, 826 F.2d 1340, 1343 (3d Cir. 1987) (applying New Jersey law to reduce damages, in part because of New Jersey's interest in determining how much its defendants should pay); Ledesma v. Jack Stewart Produce, Inc., 816 F.2d 482, 485 (9th Cir. 1987) (applying Arizona statute of limitations to permit suit by California plaintiff, in part because California had no "interest in applying its statute of limitations in order to protect the [Arizona] defendants" but did have "interest in allowing its residents to recover").
risdiction is a prophylactic compliance mechanism. The first requirement of even-handed justice is uniform rules of law. Heads-we-win, tails-you-lose, one rule for our citizens and a different rule for yours, is inconsistent with equal justice, inconsistent with the core value of the Privileges and Immunities Clause, and inconsistent with the purposes of the diversity jurisdiction. The diversity jurisdiction reinforces the rigor of the inference we ought to draw from the Privileges and Immunities Clause alone: The Constitution forbids discrimination in the administration of justice against citizens of sister states.

4. Some Partial Responses. — No interest analyst has considered the mutually reinforcing structure of the Privileges and Immunities Clause, the diversity jurisdiction, and the other guarantees of interstate equality. But several have considered and responded to parts of the foregoing argument.

David Cavers offered the principle defense of the rule that federal courts should follow state choice-of-law rules. He feared that federal courts would tend to pursue "uniformity and certainty" and "a truly national system of choice-of-law rules," and thus interfere with states' pursuit of their own interests under the so-called modern approaches to choice of law. That is, he saw some of the same tension that I see between the diversity jurisdiction and contemporary choice-of-law theory. But he started with his preferred choice-of-law system and asked what that implied about the diversity jurisdiction. He did not start with the Constitution and ask what that implied about choice of law. Moreover, he considered the diversity jurisdiction in isolation, ignoring the Privileges and Immunities Clause to which it was so closely connected, and assuming that the rest of the constitutional structure had no relevance. He assumed that there were few constitutional limits on choice of law, so that federal choice-of-law decisions would not be binding on state courts. He expressly declined to consider any evidence of the original purposes even of the diversity jurisdiction. By ignoring most of the supporting elements of the constitutional argument, he made the Constitution conform to his choice-of-law approach.

Others have responded to the Privileges and Immunities Clause objection while ignoring the diversity jurisdiction objection. Larry Kramer argues that interest analysis does not discriminate against non-
residents. He insists that what looks like a “brazen desire to favor residents” is really deference to other states: “By applying its laws only where doing so directly advances a domestic state interest, a state leaves room for the laws of other states in cases affecting their domestic interests.”

This attempt to relabel discrimination as deference utterly fails to fit the facts. When Maryland holds that Del is liable to Mary, it applies its law to Del as much as to Mary, and in interest-analysis terms, it affects Delaware’s interests as much as Maryland’s. A state does not disprove its brazen desire to favor residents by deferring in cases where it has no opportunity to favor a resident. I will believe that one state is deferring to others when deference imposes costs as well as benefits.

Robert Sedler argues that from “a perspective of constitutional generalism,” minimal scrutiny of choice-of-law decisions makes sense as a specific case of post-1937 minimal scrutiny of social and economic regulation. The error here is to equate the express and specific provisions of the Privileges and Immunities Clause with the vague and wholly implied limits of economic substantive due process. The relevant constitutional category is not economic substantive due process, but interstate discrimination, where the Court has never withdrawn to minimal scrutiny. The Court continues to strike down discriminatory economic regulation under the Privileges and Immunities, Commerce, and Equal Protection Clauses. In a remarkable inconsistency, Sedler argues that “the negative commerce clause absolutely prohibits discrimination against interstate commerce or out-of-state interests.” If one wants to view choice of law from the perspective of constitutional generalism, the relevant general principle is this principle against interstate discrimination. The Court’s changing views on liberty of contract are not on point.

Brainerd Currie offered the most revealing analysis of the Privileges and Immunities Clause from an interest-analysis perspective. He said that where a state had a law of general applicability, and a second law that carved out an exception, the state could avoid discrimination by applying its exceptional law to citizens of states with the same exceptional law.

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202. Kramer, supra note 101, at 1067; see also Kramer, supra note 17, at 302 (arguing that pursuit of state interests is not parochial, but rather is a means of accommodating other states’ interests).

203. See Sedler, supra note 41, at 94.

204. See supra notes 112–129 and accompanying text.


206. See Currie, supra note 145, at 256–57; Currie & Schreter, Equal Protection, supra note 40, at 35–42 (“[D]ifferential treatment of nonresidents on the basis of their domiciliary laws cannot be justified unless the law of the forum expresses two policies, one of which sustains the judgment against the disadvantaged nonresident.”); Currie &
discriminate on the basis of the difference in the foreign litigant's home-state law, rather than the difference in citizenship. I doubt that a litigant's home-state law is meaningfully different from his home state as a basis for discrimination. But even if we accept that distinction, this alleged concession is wholly illusory. If the laws of both states are the same, there is no conflict of laws and no need for choice of law. If the laws of the two states are different, Currie would let the forum discriminate. Within this strangely defined set of cases, Currie effectively proposed that states discriminate only when there is opportunity to do so.

More generally, Currie considered the claim that a state's refusal to protect the citizens of sister states was based on a rational distinction between those that it did and did not have an interest in protecting. That argument assumes the conclusion; it would apply to any hostile discrimination. To his great credit, Currie rejected the argument and concluded that unrestrained pursuit of a state's interest in protecting its own residents was generally unconstitutional. That remarkable concession left interest analysis with few potential applications, but this part of his writings has been largely ignored. Other interest analysts continue to repeat, sometimes in italics, that a state can constitutionally refuse to protect those it has no interest in protecting.

The problem with interest analysis is not one of occasional tension with the Privileges and Immunities Clause, which might be accommodated by balancing or handled with exceptions. The problem is that the first principle of interest analysis is antithetical to the first principle of the Clause, and antithetical to the Union. Nothing can reconcile them. Interest analysis legitimates the temptation to prefer local litigants, the very temptation that the diversity jurisdiction and the Privileges and Immunities Clause were supposed to help us resist.

5. Contemporary Interest Analysis. — Fortunately for the Union, Currie's understanding of state interests was confined to choice of law, and even there it has been followed only in part. The theme of enriching domiciliaries still recurs, sometimes stated openly, sometimes Schreter, Privileges and Immunities, supra note 40, at 1374–76 ("Such a solution is not possible unless it can be reasonably maintained that the state has two relevant policies, e.g., a general policy of security of transactions and an exceptional policy of protecting local married women").

207. Currie & Schreter, Equal Protection, supra note 40, at 12 ("[A] classification in terms of residence or citizenship is not reasonable merely because it coincides with the limits of a state's interest in applying its law."); Currie & Schreter, Privileges and Immunities, supra note 40, at 1373–74, 1377 ("[W]hen the law of a state provides benefits for its residents generally, the same benefits should be extended to citizens of other states unless there is some substantial reason, in addition to the fact that the governmental interests of the state do not require extension of the benefit to foreigners, for limiting the benefit to residents.") (emphasis added).


209. See, e.g., Weintraub, supra note 11, § 6.13, at 307 ("The domicile of the plaintiff has an interest in providing compensation for him. . . . The plaintiff's domicile
veiled in the euphemism of applying the law of the state that will feel the consequences of the decision. It still affects the results of cases, and it is unconstitutional to that extent. But judges, scholars, and even Currie himself have found all sorts of interests beyond enriching local residents. Interest analysts have distinguished protective, compensatory, and deterrent interests; moral, liberty, and security interests; altruistic, restrained, and enlightened interests; and even an interest in attracting tourists by promising that they will incur little liability for accidents. The proliferation of interests contributes to a strong sense of ad hoc chaos, but it also ameliorates the discrimination at the core of interest analysis.

Equally important, territorialism continues to exercise its pervasive influence. The deterrent interest, sometimes called the regulatory

210. See Weintraub, supra note 11, § 6.10, at 301–02; Sedler, supra note 47, at 621. For a showing that this euphemism is either a restatement of the conclusion, or an unacknowledged reversion to territorialism, see Brilmayer, supra note 6, at 80.

211. See, e.g., Ledesma v. Jack Stewart Produce, Inc., 816 F.2d 482, 485–86 (9th Cir. 1987) (applying longer Arizona statute of limitations to preserve claim of California plaintiff, because California had interest in preserving plaintiff’s claim and no interest in protecting out-of-state defendant); Dent v. Cunningham, 786 F.2d 173, 176–77 (3d Cir. 1986) (applying longer New Jersey statute of limitations to preserve claim of New Jersey plaintiff injured in California, but remanding to decide if New Jersey had lost its interest in compensating second plaintiff, who had moved out of the state); Guillory ex rel. Guillory v. United States, 699 F.2d 781, 786–87 (5th Cir. 1983) (applying more generous Louisiana measure of damages for Louisiana plaintiffs alleging wrongful death in Texas); Wallis v. Mrs. Smith’s Pie Co., 550 S.W.2d 453, 458–59 (Ark. 1977) (applying Arkansas comparative fault rule to preserve claim of Arkansas plaintiff injured in Missouri); Hague v. Allstate Ins. Co., 289 N.W.2d 43, 44–50 (Minn. 1979) (applying Minnesota law to increase Minnesota plaintiff’s recovery on Wisconsin insurance policy issued to Wisconsin resident killed in Wisconsin), aff’d, 449 U.S. 302 (1981).

212. See Hurtado v. Superior Court, 522 P.2d 666, 672–73 (Cal. 1974); Kramer, More Notes, supra note 31, at 270.

213. See Singer, supra note 17, at 35–45.


217. See Brilmayer, supra note 6, at 139–40 (arguing that proliferation of interests and preference for forum law has protected interest analysis from invalidation on ground of discrimination against nonresidents).

218. For famous examples of choice-of-law revolutionaries drifting back into largely territorial rules, see, e.g., Neumeier v. Kuehner, 236 N.E.2d 454, 457–58 (N.Y. 1972) (announcing rules for guest-statute cases that would apply law of place of wrong to nearly all cases where host and guest have different domiciles); Cavers, supra note 11, at 139–80 (proposing five “principles of preference” for choice of law, each of which
interest, is a state’s interest in regulating events within its territory. It is
the interest-analysis label for a limited version of territorialism.219
Plaintiffs injured in a state with a generous compensation system can
often invoke either the deterrent interest or the law of the place of in-
jury, depending on the rhetoric prevailing in that state’s courts, and
receive compensation without discrimination based on citizenship.220
Far more often than one would infer from the academic literature,221
defendants are permitted to rely on the law of the place where some key
event occurred.222 The results in such cases are usually correct, but
they are territorial results.

Discrimination persists when plaintiffs injured in one state seek the
benefit of some other state’s more generous law. Suppose that
Maryland chooses to compensate its own citizens injured in Delaware,
but not Delawareans injured in Delaware. It is hard for even interest
analysts to rationalize application of Maryland law to compensate a
Delawarean injured in Delaware, although some have tried.223 But if
Maryland is not to rule the nation, it has only two choices: It must
either forgo the desire to apply its law to Marylanders who travel to
Delaware, or it must treat Marylanders more favorably than it treats
similarly situated Delawareans.224 The proliferation of recognized
would apply the law of either the place of wrongful conduct, the place of injury, or the
place of the relationship between the parties).

219. See Weintraub, supra note 11, § 6.10, at 303 ("[T]he place of impact has an
interest in shaping its tort rules so as to discourage conduct that will result in harmful
impacts within its borders."); Kramer, supra note 17, at 297 ("[T]he occurrence of the
accident in Wisconsin triggers Wisconsin's interest in regulating conduct").

220. See, e.g., Bader v. Purdom, 841 F.2d 38 (2d Cir. 1988) (applying Ontario law
to impose liability on New York residents for negligence in Ontario); Hurtado v.
Superior Court, 522 P.2d 666 (Cal. 1974) ( awarding more generous California measure
of damages to Mexican injured in California); Rosset v. Schatzman, 510 N.E.2d 968,
defendant for Illinois plaintiff's slip and fall in defendant's winter home).

221. For the academic view that modern choice-of-law cases embody a systemic bias
in favor of plaintiffs, see, e.g., Brilmayer, Legislative Intent, supra note 19, at 398-99;
Weinberg, supra note 33, at 65-67 & n.66.

222. See, e.g., Kaczmarek v. Allied Chem. Corp., 836 F.2d 1055, 1059 (7th Cir.
1987) (applying Indiana law to bar claim of Illinois plaintiff injured in Indiana); Blakesley v. Wolford, 789 F.2d 236, 241-43 (3d Cir. 1986) (applying less-protective
Texas law to claim of Pennsylvania plaintiff injured in Texas); Eger v. E.I. DuPont
DeNemours Co., 539 A.2d 1213, 1217-20 (N.J. 1988) (applying South Carolina law
to bar claim of New Jersey plaintiff injured in South Carolina). Each of these cases applied
either interest analysis or the Second Restatement.

(applying Kansas law to increase interest payable on suspense royalties owed to Texas,
Oklahoma, and Louisiana residents on oil leases in Texas, Oklahoma, and Louisiana),
rev'd, 472 U.S. 797 (1985); Bruce Posnak, Choice of Law: Interest Analysis and Its
generous New York law to compensate nonresidents injured in their home states and
not involved in any New York relationship).

224. See Gergen, supra note 165, at 902-09.
state interests has not changed the heart of the problem: any reliance on a state’s interest in benefitting its own citizens leads inevitably to discrimination between those citizens and citizens of sister states.

One final point on the principle of equal citizens: It is essential to distinguish the discriminatory desire to benefit the local litigant from neutral reliance on domicile as a locating factor. Traditional domiciliary choice-of-law rules, acceptable to territorialists, distinguish cases on the basis of the domicile of some person or entity that is the subject of regulation, but they do not distinguish on the basis of who benefits from the rule.\footnote{225} An example is the rule that estates are administered under the law of the decedent’s domicile.\footnote{226} Under that rule, domiciliary law is applied to the estate regardless of whether the estate or local heirs are advantaged or disadvantaged. Such a rule is consistent with the needs of the Union and with equality for citizens of sister states, and if it is justified as the most workable allocation of state authority. We may think of such a rule as outside the scope of the Privileges and Immunities Clause, or as a legitimate exception to the Clause; the important point is that it is wholly consistent with the policies of the Clause. Applying the rule that benefits the local litigant is not.

III. The Principle of Equal States

A. The General Equality of the States

The Constitution assumes, without ever quite saying so, that the several states are of equal authority. The Constitutional Convention refused to guarantee that all subsequent states would be admitted on “the same terms” as the original thirteen,\footnote{227} but there is no evidence that any of the thirteen were to be less than equal.\footnote{228} Every reference to state authority is to the states generically; no provision gives more authority to some states than to others. In all its provisions about the states, the Constitution draws only one distinction among them: states are listed by name in the initial allocation of representatives.\footnote{229} But even this was simply a means to achieve approximate equality of per capita representation pending the first census.

The general guarantee of equality to newly admitted states was left to another source of fundamental law: the laws that created new states and joined them to the Union. The Continental Congress was resolving this issue even as the Convention met. Virginia had relinquished its
land claims north and west of the River Ohio on condition that new states be created there "having the same rights of sovereignty, freedom, and independence, as the other states." 230 In July of 1787, the Continental Congress enacted the Northwest Ordinance, authorizing creation of three to five states in this territory, to be admitted "on an equal footing with the original states in all respects whatever." 231 The First Congress incorporated that guarantee in an act for governing territory south of the Ohio. 232 Vermont and Kentucky, the fourteenth and fifteenth states, were each admitted "as a new and entire member of the United States of America." 233 Beginning with Tennessee, the sixteenth state, every state admission act has provided that the new state is admitted "on an equal footing" with the original states. 234 The Supreme Court has long treated the equal footing doctrine as having constitutional significance: "[T]he constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized." 235

B. The Full Faith and Credit Clause

The Constitution itself expressly provides for the equality of states in the context most relevant here: it provides for the equal authority of each state's law. This is the meaning of the Full Faith and Credit Clause: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." 236

This clause is comprehensible only if one assumes a background set of choice-of-law rules. In the Full Faith and Credit Clause, and in the contemporaneous Rules of Decision Act, 237 the Founders directed state and federal courts to apply the applicable law of other American jurisdictions. They seem not to have seen the ambiguity entailed in that instruction. Both provisions assume that it is obvious when state law applies and which state's law applies. The Founders saw no ambiguity because they understood the instruction in light of the familiar

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231. An Ordinance for the Government of the Territory of the United States northwest of the river Ohio, art. V (1787) (reprinted at 1 Stat. 51 n.(a) (1789)).

232. Act of May 26, 1790, ch. 14 § 1, 1 Stat. 123.

233. Act of Feb. 18, 1791, ch. 7, 1 Stat. 191 (Vermont); Act of Feb. 4, 1791, ch. 4, § 2, 1 Stat. 189 (Kentucky).

234. See, e.g., Act of Mar. 18, 1959, Pub. L. No. 86-3, § 1, 73 Stat 4 (Hawaii); Act of June 1, 1796, ch. 47, 1 Stat. 491 (Tennessee). For the statement that there are no exceptions after Kentucky, see Coyle v. Smith, 221 U.S. 559, 567 (1911).


236. U.S. Const. art. IV, § 1.

choice-of-law rules then applied in English and American courts. They assumed that these rules would determine which state's law applied, and that the Constitution and the statute would require courts to apply the law of that state.

This is how the Full Faith and Credit Clause has always been understood with respect to judgments. Federally enforced conflict-of-law rules determine whether a state court had jurisdiction. If the first court had jurisdiction, its judgment is binding on all other states; if not, all other states are free to ignore it. As a simple matter of constitutional text, the Clause must have the same meaning with respect to rules of law. And that straightforward textual reading also makes policy sense of the Clause.

1. The Scope of the Clause. — The Full Faith and Credit Clause extends to all sources of state law. It is clear that "public Acts" means statutes. James Wilson and William Johnson said as much on the floor of the Convention, the First Congress so understood it, and the Supreme Court has so held. "Act of the legislature" was common usage in 1787 as well as today, and there is substantial consensus on the point.

It is only a little less clear that the Clause includes case law. Case law is most obviously included as "Judicial Proceedings," although some scholars have argued that case law is "Records" or even "public Acts." Ralph Whitten doubts that case law was within the original scope of the Clause, but even he agrees that the modern view that

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239. See 2 Farrand, supra note 227, at 447, 488.
240. See Act of May 26, 1790, ch. 11, 1 Stat. 122 (implementing Full Faith and Credit Clause and providing for authentication of records, judicial proceedings, and "acts of the legislatures of the several states").
242. See 1 OED, supra note 175, at 123 ("act," definition 5, collecting examples from 1458 to 1839). Federal statutes were called Acts of Congress from the very beginning. See, e.g., Act of June 1, 1789, ch. 1, 1 Stat. 23.
243. See Weintraub, supra note 11, § 9.3A at 553; Walter Wheeler Cook, The Powers of Congress Under the Full Faith and Credit Clause, 28 Yale L.J. 421, 433 (1919); Currie, supra note 39, at 15; Gottesman, supra note 17, at 23-25.
245. See 1 William W. Crosskey, Politics and the Constitution in the History of the United States 545-47 (1953); Martin, supra note 46, at 137 (following Crosskey).
247. See Whitten, supra note 42, at 56-60. This claim is wholly derivative from Whitten's more general claim that the Full Faith and Credit Clause is merely a rule of
common law is created rather than discovered may have brought case law within the policy of the Clause and within the legitimate range of originalist interpretation. As the Supreme Court recognized in *Erie Railroad v. Tompkins*, it is of no federal concern whether state law is embodied in statutes or cases; each is of equal authority. These interpretations of the Clause make sense. Together, they mean that each state must give full faith and credit to the law of every other state, and that the form of the sister state's law is irrelevant.

The principal dissent from these propositions is a 1957 article by Kurt Nadelmann. Nadelmann agrees that "public Acts" means statutes, but he insists that giving full faith and credit to statutes is such a bad idea that the Founders could not have meant what they said. But the language that he would reject did not slip in inadvertently; the issue was squarely considered in yes-or-no votes. As the clause emerged from committee, it required Congress to provide for the effect of sister-state judgments, but it appeared to be merely precatory with respect to acts:

Full faith and credit *ought to* be given in each State to the public acts, records, and Judicial proceedings of every other State, and the Legislature *shall* by general laws prescribe the manner in which such acts, Records, & proceedings shall be proved, and the effect which *judgments* obtained in one State, shall have in another.

Governor Morris moved to amend to delete the reference to judgments and substitute "thereof," so that the clause would read:

Full faith and credit *ought to* be given in each State to the public acts, records, and Judicial proceedings of every other State, and the Legislature *shall* by general laws prescribe the manner in which such acts, Records, & proceedings shall be proved, and the effect which *judgments* obtained in one State, shall have in another.

The amendment thus provided that Congress "shall" prescribe the effect of "acts, Records, and proceedings," and not merely the effect of
Judgments. The amendment was so understood by both supporters and opponents who spoke to it.

Mr. Wilson remarked, that if the Legislature were not allowed to declare the effect the provision would amount to nothing more than what now takes place among all Independent Nations. Docr. Johnson thought the amendment as worded would authorize the Genl. Legislature to declare the effect of Legislative acts of one State, in another State. Mr. Randolph... was for not going farther than the Report, which enables the Legislature to provide for the effect of Judgments.254

All three of these speakers had served on the committee that drafted the clause.255 The amendment then passed, six states to three.

Madison then moved to substitute “shall” for “ought to,” and “may” for the first “shall,” so that the revised clause would read:

Full faith and credit shall be given in each State to the public acts, records and Judicial proceedings of every other State, and the Legislature may by general laws prescribe the manner in which such acts records & proceedings shall be proved, and the effect thereof.256

Madison's amendment was agreed to without a count of states, and the Full Faith and Credit Clause as amended was then agreed to without a count of states. The effect of Madison’s amendment was to make the clause self-executing, commanding full faith and credit in the constitutional text and making congressional action discretionary, instead of commanding congressional action and leaving the clause dependent on implementation of the command to Congress. The Committee of Style subsequently broke the clause into two sentences and substituted “Congress” for “the Legislature,”257 and the final version of the clause was adopted in the final vote on the whole Constitution.258

On the question whether there exists a self-executing obligation to give full faith and credit to sister-state acts, this is about as clear a drafting record as one can hope to find. The amendment extending the effects of full faith and credit to legislative acts passed after Johnson's clear explanation and over Randolph's clear objection, presumably for something like the reason stated by Wilson. Nadelmann is simply

254. Id. at 488–89. George Mason is also recorded as speaking to the amendment, but his statement appears to have been garbled: “Col: Mason favored the motion, particularly if the 'effect' was to be restrained to judgments & Judicial proceedings.” Id. at 488. Perhaps he actually opposed the motion; Virginia voted no. Perhaps Mason misunderstood it, or perhaps Madison misunderstood him. But it is hard to see how the motion can be read as confining the effects to judgments and judicial proceedings, and none of the three speakers who followed Mason appear to have taken the possibility seriously.

255. Id. at 448.

256. Id. at 489 (emphasis added).

257. Id. at 601.

258. See id. at 633.
wrong to claim that there is no evidence the Founders meant what they said.

Even if the debate were less clear, Nadelmann's claim that there is no evidence of intention would depend on a mistaken approach to constitutional interpretation—that the ratified constitutional text does not count unless someone gave a speech elaborating its meaning. This approach elevates silence in secondary sources to priority over ratified provisions in operative legal texts. Reasoning from the appearance of silence is especially dangerous with respect to the Constitutional Convention, because we have a record of less than ten percent of what was said there.259

Nadelmann also cites the 1790 version of the Full Faith and Credit Act as secondary evidence of the original understanding. He argues that the First Congress refrained from requiring full faith and credit to statutes, and he infers that Congress must not have understood the Constitution to require such credit either.260 This argument depends on the dubious premise that congressional silence can override constitutional text. Such an argument would make sense only if the constitutional text were unusually ambiguous and the inference from silence unusually strong. But here the Constitution is not ambiguous, and the statute is. If the constitutional clause is self-executing and legislation is optional, which is what the constitutional text plainly says, then Congress was not obliged to speak and congressional silence means nothing. Congress might be expected to act if it felt capable of specifying further details, but whether to paraphrase the self-executing constitutional clause was a discretionary choice with little at stake. Even if the statute failed to specify the effect of statutes, nothing about the Constitution would follow from that.

Moreover, Nadelmann may misread the statute. He follows the conventional wisdom in asserting that the Act did not specify the effect of sister-state statutes before the recodification of 1948.261 But the conventional wisdom may be wrong, as the Supreme Court once held.262 An explanation requires a careful analysis of the original Act, which reads as follows:

An Act to prescribe the mode in which the public Acts, Records, and judicial Proceedings in each State, shall be authenticated so as to take effect in every other State.

259. See Hutson, supra note 179, at 33–35.
260. See Nadelmann, supra note 42, at 73 ("The First Congress, in using as it did the power to prescribe 'effects' with respect to records and proceedings, but not with respect to public acts, must have had this view" that the constitutional clause was not self-executing with respect to acts.).
261. See Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493, 502 (1939); Cramton et al., supra note 18, at 410; Nadelmann, supra note 42, at 61; Russell J. Weintraub, Due Process and Full Faith and Credit Limitations on a State's Choice of Law, 44 Iowa L. Rev. 449, 488 (1959); Whitten, supra note 42, at 53.
Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the acts of the legislatures of the several states shall be authenticated by having the seal of their respective states affixed thereto: That the records and judicial proceedings of the courts of any state, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken.\footnote{263}{Act of May 26, 1790, ch. 11, 1 Stat. 122 (last two emphases added).}

After the title and the enacting clause, this statute has three substantive clauses. For convenience, I shall refer to them as the legislative authentication clause, the judicial authentication clause, and the effects clause.

The interpretive question is whether the italicized reference to “the said records and judicial proceedings authenticated as aforesaid” in the effects clause includes only the prior reference to “the records and judicial proceedings of the courts” in the judicial authentication clause, or whether “the said records” also includes the prior reference to “acts of the legislature” in the legislative authentication clause. The effects clause refers only to the “said records and judicial proceedings” and does not mention “acts.” The “said records” is plausibly read as including only those records already referred to in the same terms, that is, to “the records and judicial proceedings of the courts.” This reading is further supported by Professor Crosskey’s demonstration that “records” was often used to refer to precedents—to the records of prior judicial decisions.\footnote{264}{See 1 Crosskey, supra note 245, at 545–47; 13 OED, supra note 175, at 359 (“record,” definition 4, collecting examples from 1455 to 1838).}

But “records” was also used, with equal technical accuracy, to refer to legislative records.\footnote{265}{See Thompson v. Musser, 1 Dall. 458, 466 (Pa. 1789) (Atlee, J., seriatim) (using “record” to refer to the relevant statutes of a sister state); Sir Geoffrey Gilbert, The Law of Evidence 5 (6th ed. 1801) (“And first of Records. Those are the Memorials of the Legislature, and of the Kings Courts of Justice”).} On this reading, the “records . . . authenticated as aforesaid” would refer to everything in either authentication clause—to the “acts of the legislature” as well as to the “records . . . of the courts.” The trouble with this reading is that it would have been easy to say “acts, records, and judicial proceedings” if that were what Congress meant.

Nadelmann’s reading is also problematic. If “records” meant only judicial records, then the phrase “of the courts” in the judicial authentication clause is wholly redundant. If “records” were used in its more
general sense, then "of the courts" confined it to judicial records in the authentication clauses, where the source of the record mattered, and the absence of that modifier let it have its full meaning in the effects clause, where legislative and judicial records were not distinguished. This reading is also consistent with the title of the act, which plainly suggests without distinction that "public Acts, Records, and judicial Proceedings" shall "take effect in every other State."

This reading also makes policy sense. It avoids an anomalous distinction between the scope of the implementing statute and the scope of the implemented clause. It avoids an anomalous statutory distinction between full faith and credit to rules of law in state judicial precedent and full faith and credit to rules of law in state statutes. *Swift v. Tyson* read such a distinction into the Rules of Decision Act, but *Swift* has been rejected as inconsistent with the constitutional structure.

For all these reasons, both textual and structural, I am inclined to believe that the Full Faith and Credit Act specified the effects of state statutes from the beginning. If I am right, then the implementing statute of the First Congress is wholly consistent with the self-executing constitutional clause. At worst, the statute is ambiguous; the First Congress might have left an odd but meaningless silence. Whatever the statute once said, the text of the Constitution requires full faith and credit to sister-state statutes. And since 1948, the Act has unambiguously included sister-state statutes in the effects clause as well as in the authentication clauses. Both the Constitution and the Act now require full faith and credit to statutes. I think the First Congress agreed, but whatever the First Congress thought, the scope of the Clause is clear.

2. The Meaning of Full Faith and Credit. — The principal argument is not over the scope of the Clause, but over the meaning of full faith and credit. What does it mean to give full faith and credit to a statute or a rule of law? The dominant view is that the phrase cannot be taken literally, and therefore, it need not be taken seriously at all. The Supreme Court once said, and many interest analysts claim to believe, that full faith and credit to acts means that in any case of conflicting laws, California must apply Texas law and Texas must apply California law. This reading would indeed be too absurd to impute to the Founders, but no one has ever argued for it. It was a straw man from

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266. 41 U.S. (16 Pet.) 1, 18–19 (1842).
268. See Weintraub, supra note 261, at 488 (if the Constitution is self-executing, "I find it difficult to see how anything important turned upon the absence of the word 'acts' from the federal statute.").
270. See Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532, 547 (1935); Simson, supra note 37, at 66; Singer, supra note 17, at 60; Louise Weinberg, On Departing from Forum Law, 35 Mercer L. Rev. 595, 618 (1984); see also Nadelmann,
its creation. The only reason to read the Clause in this absurd way is to escape the constitutional text altogether—to legitimate interpretations that are admittedly not based in the text.

To give full credit to a law most naturally means to treat it as law—as a judicially enforceable norm of human behavior with judicially enforceable consequences for breach. The additional requirement of "full faith and credit" appears to be simply a lawyers' redundancy; "faith and credit" was a phrase used in common law cases on recognition of judgments. But the "faith" requirement also suggests that states must act in good faith in determining the credit due to sister-state law.

The most important word in the Clause is "full." A state does not owe some credit, partial credit, or credit where it would be wholly unreasonable to deny credit, which seems to be the Supreme Court's current interpretation. Rather, each state owes full faith and credit to the law of sister states. Full faith and credit is what a state accords its own law. Full faith and credit is the maximum possible credit; it is conceptually impossible to give faith and credit that is more than full. Thus, the Clause is most plausibly read as requiring each state to give the law of every other state the same faith and credit it gives its own law—to treat the law of sister states as equal in authority to its own.

This requirement of equal credit to sister-state law was also the original congressional understanding of the Clause. The original implementing statute provided that state records and judicial proceedings "shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken." Without change of meaning, the current version requires "the same full faith and credit" as in the originating state. The statute makes the constitutional corollary explicit: sister-state law is to have the same full faith and credit in the courts of either state. If a California law would govern a controversy in a California court, then Congress says that law should govern the same controversy in a Texas court. And vice versa. This generally ignored statute says that each court should apply the same law. It is the policy of Erie and the diversity jurisdiction again; the case should come out the same way no matter where it is filed.

supra note 42, at 73 (same claim by a scholar not identified as an interest analyst); Whitten, supra note 42, at 61–62 (same).


272. See supra notes 55–61 and accompanying text; see also Weintraub, supra note 11, § 9.3, at 540–68 (collecting cases).

273. Act of May 26, 1790, ch. 11, 1 Stat. 122 (emphasis added).


275. See Simson, supra note 37, at 67–68; Sumner, supra note 38, at 246–49. But
To simultaneously apply the conflicting law of two states is impossible; to require each state to apply the law of the other is absurd; and to let each state apply its own law repeals the Clause. Sister-state law cannot be equal in any of these senses. The requirement that each state apply the same law is comprehensible only on the assumption that there are occasions when the law of a sister state applies and occasions when it does not. The Full Faith and Credit Clause thus assumes the existence of choice-of-law rules, but it does not specify what those rules are. The equality of sister-state law implies some limits on the content of those rules, but I have not yet explored those limits. At this point in the argument, we do not know anything about the content of choice-of-law rules, but we know that only a single determinate set of choice-of-law rules can implement the Full Faith and Credit Clause.

In this way, the Clause is like the contemporaneous Rules of Decision Act, which tells federal courts to apply state law in cases where it applies, but does not say when state law applies. The Rules of Decision Act was understood to codify existing choice-of-law rules and the duty of federal courts to determine which state's law applies.

In one early draft of the Full Faith and Credit Clause, the choice-of-law prerequisite was made explicit. Edmund Randolph moved the following clause, which was referred to committee along with several alternatives:

Whenever the Act of any State, whether Legislative[,] Executive[,] or Judiciary shall be attested & exemplified under the seal thereof, such attestation and exemplification, shall be deemed in other States as full proof of the existence of that act—and its operation shall be binding in every other State, in all cases to which it may relate, and which are within the cognizance and

see Simson, supra note 151, at 279 (proposing limited forum preference, apparently abandoning uniformity of result).

276. See Regan, supra note 27, at 1894 ("[T]he full faith and credit clause does not set down principles of legislative jurisdiction. Rather, it presupposes them."); Max Rheinstein, The Constitutional Bases of Jurisdiction, 22 U. Chi. L. Rev. 775, 788–89, 816 (1955) (arguing that Full Faith and Credit Clause is “meaningless” without “a full-fledged system of conflict of laws,” which the Founders believed was part of the Law of Nations).

277. See infra notes 363–390 and accompanying text.

278. The Act originally provided: “That the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United states in cases where they apply.” Act of Sept. 24, 1789, ch. 20, § 34, 1 Stat. 73, 92 (codified as amended at 28 U.S.C. § 1652 (1988)). For an earlier recognition of the Act’s significance in this context, see Baxter, supra note 34, at 41.

279. See, e.g., Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 48 (1825) (stating that the Act “is the recognition of a principle of universal law; the principle that in every forum a contract is governed by the law with a view to which it was made.”); Fletcher, supra note 188, at 1527–38 (collecting early cases and treatises). For similar modern analyses, see Baxter, supra note 34, at 40–41; Hart, supra note 181, at 515; Horowitz, supra note 36, at 1204–05; Whitten, supra note 42, at 36 n.172.
jurisdiction of the State, wherein the said act was done. 280

The committee apparently worked from a different draft, proposed by Governeur Morris, which omitted much of the detail in Randolph's draft and instead authorized Congress to enact further detail. The full Convention did not restore Randolph's detail when it amended the clause to make it self-executing.

It is usually dangerous to assume that an adopted provision means the same thing as some unadopted draft. But in this case, that seems by far the most plausible interpretation. Randolph's draft limited the application of sister-state law to cases "within the cognizance and jurisdiction" of the sister state. The omission of that limitation cannot possibly mean that sister-state law is to be applied without limitation, even to cases beyond the jurisdiction of the sister state. No one thinks that would be a sensible provision, and surely no one would have thought so in 1787. The omission of Randolph's choice-of-law language can only mean that the choice-of-law limitation was thought to be obvious, so obvious that it was not necessary to state it. The Clause presupposed choice-of-law rules and left detailed specifications of those rules to the courts or to Congress.

This conflict-of-law prerequisite to full faith and credit was also the original judicial understanding of the Clause. The issue arose frequently with respect to judgments, because some of the states indulged in dubious jurisdictional practices in the early national period. At least before 1795, 281 Massachusetts would enter judgments for large sums on the basis of an attachment of a trivial item, such as a blanket or a handkerchief. The statute required notice only to the third party found in possession of the attached property. 282 Sometimes a summons was served out of state, which gave notice but could not confer jurisdiction under the rules of the time. 283 Stranger still, the attached property did not even have to belong to defendant. There is evidence that "reputed property" would suffice, 284 and that the attached property could actually belong to plaintiff, "who would gratuitously bestow, in [defendant's] absence, an eagle, or a blanket, or a spoon, for the purpose of obtaining a judgment." 285 There was reason for Justice Johnson's fear that states might "pass the most absurd laws" on jurisdiction. 286

280. 2 Farrand, supra note 227, at 448 (emphasis added).
281. For the statement that the practice was reformed in 1795, see Bissell v. Briggs, 9 Mass. 461, 473 n.† (1813) (note apparently written by the reporter).
282. The Massachusetts statute is quoted in Ingersoll's argument for plaintiff in Phelps v. Holker, 1 Dall. 261, 263–64 (Pa. 1788).
283. See Kibbe v. Kibbe, 1 Kirby 119, 126 (Conn. 1786).
284. Phelps, 1 Dall. at 261, quoting the sheriff's return on the Massachusetts writ (emphasis added by reporter).
285. Rogers v. Coleman, 3 Ky. (Hard.) 422, 427 (1808) (reporting the practice with disapproval); see also Kibbe, 1 Kirby at 123 ("I attached a handkerchief, shown to me by the plaintiff's attorney").
Many early cases grappled with the problems raised by such judgments, and the modern rule emerged rather quickly. In *Mills v. Duryee*, decided in 1813, the Supreme Court held that sister-state judgments are conclusive;\(^{287}\) somewhat later, it accepted the lower courts' rule that the sister-state court must have a basis for jurisdiction that other courts are obliged to recognize.\(^{288}\) Until *Mills*, some judges simply said that sister-state judgments were conclusive, and reserved opinion or expressed no view on the effect of judgments entered without jurisdiction;\(^{289}\) some said that sister-state judgments were conclusive on the merits but not if entered without jurisdiction;\(^{290}\) some said that judgments entered without jurisdiction were not conclusive, and expressed no view on judgments entered with jurisdiction.\(^{291}\) Only a few judges had said that sister-state judgments were not conclusive on the merits, usually for fear that judgments entered without jurisdiction could not be distinguished from any other judgment,\(^{292}\) but occasionally because of a more general willingness to re-examine the merits.\(^{293}\) Even in New York, where a slim majority held that sister-state judgments were not

\(^{287}\) Id. at 483–85 (opinion of the Court).


\(^{289}\) See *Mills*, 11 U.S. (7 Cranch) at 483–85; Green v. Sarmiento, 10 F. Cas. 1117, 1119–20 (C.C.D. Pa. 1810) (No. 5,760) (decided under Full Faith and Credit Act, suggesting but not deciding on a jurisdictional exception); Jenkins v. Putnam, 1 S.C.L. (1 Bay) 8, 10 (1784) (decided under Articles of Confederation); see also Montford v. Hunt, 17 F. Cas. 616, 617 (C.C.D. Pa. 1811) (No. 9725) (holding federal judgments conclusive even though not covered by Full Faith and Credit Clause, because it would be anomalous to hold state judgments conclusive but not federal judgments).

\(^{290}\) See *Mills*, 11 U.S. (7 Cranch) at 486 (Johnson, J., dissenting); Banks v. Greenleaf, 2 F. Cas. 756, 759 (C.C.D. Va. 1799) (No. 959); Armstrong v. Carson's Ex'r, 1 F. Cas. 1140, 1140 (C.C.D. Pa. 1794) (No. 543); Smith v. Rhoades, 1 Day 168, 170 (Conn. 1803) (decided without reported reference to Full Faith and Credit Clause); Kibbe v. Kibbe, 1 Kirby 119, 126 (Conn. 1786) (subject to Articles of Confederation but decided without reported reference to them); Rogers v. Coleman, 3 Ky. (Hard.) 422, 424–26 (1808); Bissell v. Briggs, 9 Mass. 461, 466–67 (1813); Bartlet v. Knight, 1 Mass. 401, 409 (1805) (Sedgwick, J., seriatim); Curtis v. Gibbs, 2 N.J.L. 377, 378–85 (1805) (Pennington, J., seriatim); Hitchcock v. Aicken, 1 Cai. R. 460, 461–66 (N.Y. 1803) (Thompson, J., dissenting); id. at 466–74 (Livingston, J., dissenting).

\(^{291}\) See *Bartlet*, 1 Mass. at 404–05 (Thacher, J., seriatim); Curtis, 2 N.J.L. at 385 (Kirkpatrick & Russell, J., seriatim); Phelps v. Holker, 1 Dall. 261 (Pa. 1788); see also Betts v. Death, 1 Add. 265, 266 (Fayette County Ct., Pa., 1795) (covered neither by the Constitution nor the Full Faith and Credit Act as it then stood, because judgment came from a territorial court).

\(^{292}\) See *Bissell*, 9 Mass. at 472–79 (Sewall, J., dissenting); *Bartlet*, 1 Mass. at 405–07 (Sewall, J., seriatim); *Hitchcock*, 1 Cai. R. at 474–78 (Radcliffe, J., seriatim); id. at 478–83 (Kent, J., seriatim); Wright v. Tower, 1 Brown at Appendix i, viii–xviii (Luzerne County, Pa. C.P. 1801).

\(^{293}\) See *Peck v. Williamson*, 19 F. Cas. 85 (C.C.D.N.C. 1813) (No. 10,896) (defendant introduced "very strong testimony" to impeach judgment); *Hitchcock*, 1 Cai. R. at 483–84 (Lewis, J., seriatim) (fearing judgments obtained by fraud or without jurisdiction).
conclusive, the merits could not be re-examined "after the question has been once fairly litigated and decided."

The same issue arose in the smaller number of early cases over full faith and credit to sister-state acts. Several judges said that sister-state acts were controlling if the case were within the sister-state’s legislative jurisdiction. But one judge, after concluding that the sister-state’s law did not apply to the case before him, went on to say that the Articles of Confederation did not require him to give effect to sister-state laws anyway.

The Supreme Court did not squarely speak to this issue until much later. Then the Court held that choice of law is prerequisite to full faith and credit: Maryland owed no faith and credit to laws of New York, Ohio, and Pennsylvania exempting their securities from taxation, as applied to securities owned by a resident of Maryland. The Court said that “[n]o state can legislate except with reference to its own jurisdiction. One State cannot exempt property from taxation in another.”

The choice-of-law dispute was framed in terms of the “situs” of the debt, and determining that situs was “the only Federal question” in the case.

Six years later the Court said that “without doubt” the Full Faith and Credit Clause:

implies that the public acts of every state shall be given the same effect by the courts of another state that they have by law and usage at home. This is clearly the logical result of the principles announced as early as 1813 in Mills v. Duryee and steadily adhered to ever since.

These early judicial interpretations reinforce the drafting history and the structural logic of the Clause: It requires full faith and credit to

294. See Hitchcock, 1 Cai. R. 460.
296. See Bissell, 9 Mass. at 467 (“the public acts, records, and judicial proceedings, contemplated, and to which full faith and credit are to be given, are such as were within the jurisdiction of the state whence they shall be taken,” and Clause does not change “the jurisdiction of the legislatures, or of the courts”) (dictum as to acts); Millar v. Hall, 1 Dall. 229, 232 (Pa. 1788) (applying Maryland bankruptcy act under law of nations and full faith and credit clause of Articles of Confederation). Bissell also summarizes an apparently unreported decision in the United States Circuit Court for the District of New Hampshire, which refused to enforce a Massachusetts statute authorizing the sale of land in New Hampshire, because “the full faith and credit that were to be given to public acts of the legislature, were confined to those acts which a legislature had lawful authority to pass.” Bissell, 9 Mass. at 467–68.
297. See James v. Allen, 1 Dall. 188, 191–92 (Phila. C.P. 1788); see also Hitchcock, 1 Cai. R. at 481 (Kent, J., seriatim) (reasoning that full faith and credit must be merely an evidentiary rule because it applies to acts as well as judgments).
299. Id. at 595.
applicable law selected under choice-of-law rules that are presupposed but not codified. Where are these rules to come from? One possible source of choice-of-law rules is statute. The Constitution expressly grants Congress power to specify the "Effect" of sister-state law, and almost everyone agrees that that includes power to specify choice-of-law rules. But Congress has specified only that both states should apply the same law. Neither the Constitution nor the statute specifies which law applies to which cases.

Failing further congressional action under the Effects Clause, federal courts are obliged to specify choice-of-law rules under the constitutional clause and the statute. States must apply the law of sister states when it applies. Whether sister-state law applies is a federal question, and each state is obliged to give the same answer to that federal question. For the federal courts to answer that question, and to enable the state courts to answer it, they must elaborate a set of federal choice-of-law rules, just as they have elaborated jurisdictional rules to implement full faith and credit to judgments.

Failing further federal specification from either Court or Congress, what the Full Faith and Credit Clause requires of its own force is that each state apply sister-state law where it applies, and that each state act even handedly and in good faith in identifying such cases. Texas must apply California law when it applies, and Texas must treat California law as equal to its own in deciding whether it applies; California owes the same duties to Texas. If both states proceed in good faith, they should generally reach the same conclusion and apply the same law, although any human system will fall short of this ideal. If we take seriously the text of the Full Faith and Credit Clause, this is what it requires.

3. The Evidentiary Interpretation. — Ralph Whitten has offered the most serious argument for a minimalist interpretation of full faith and credit. He argues, with some support in eighteenth century usage, that the requirement of full faith and credit is merely a rule of evidence. In his view, the Clause requires states to admit sister-state acts and judgments in evidence, as proof that the act was enacted or that the judgment was entered—and nothing more. He argues that full faith and credit is not a rule of conclusiveness; that is, it never requires

301. U.S. Const. art. IV, § 1.
302. See Sun Oil Co. v. Wortman, 486 U.S. 717, 729 (1988); Cook, supra note 243, at 425–26; Currie, supra note 145, at 266–67; Gottesman, supra note 17, at 23–28; Nadelmann, supra note 42, at 80.
303. For similar conclusions, see 1 Crosskey, supra note 245, at 549–54; Baxter, supra note 34, at 40–42; Horowitz, supra note 36, at 1200–05; Rheinstein, supra note 276, at 816.
304. See Whitten, supra note 42, at 12–56; Whitten, supra note 271, at 503–78.
305. See Whitten, supra note 271, at 557, 600 ("[A] requirement of admissibility logically implies some effect as evidence, if only an effect as conclusive proof of existence and content.").
courts to give conclusive effect to an act or judgment once proved. Having admitted the act or judgment in evidence, the effect of the act or judgment is left to the common law as interpreted by the receiving court. Only Congress has power, under the Effects Clause, to require the receiving court to give some effect to the sister-state act or judgment.

Working out the implications of this proposition entangles Whitten in extraordinary difficulties. Whitten believes that Congress has never exercised its power under the Effects Clause—that because the language of the Full Faith and Credit Act tracks the Constitution, the statute could also be satisfied by admitting the sister-state act or judgment into evidence and then ignoring it. But the Supreme Court rejected this interpretation of the Act in Mills v. Duryee. Justice Story's opinion for the Court said that "we can perceive no rational interpretation of the act of congress, unless it declares a judgment conclusive." The Court has never since departed from that rule. I think that no other modern scholar has questioned it, and Whitten would accept it as stare decisis. Accepting Mills requires Whitten to argue that "full faith and credit" in the statute is about the effect of the judgment, but the same phrase in the Constitution is only about evidence of the judgment.

Whitten is also forced to say that "the statutory requirement of full faith and credit to public acts [of sister states] should be ignored," because it makes no sense. He finds the statute senseless because he subscribes to the straw man that it would require the forum always to apply the law of some other state. This effect follows, in his view, from acceptance of Mills. Mills involved full faith and credit to a judgment, but as Whitten appears to recognize, its reasoning is equally applicable to sister-state acts.

Whitten's insistence on ignoring the statute with respect to sister-state acts also requires acceptance of the view that the single statutory use of "full faith and credit" specifies the effect of judgments, but merely evidentiary admissibility—or perhaps nothing at all—with respect to acts. The Supreme Court has never suggested such a distinc-

306. See Whitten, supra note 42, at 52; Whitten, supra note 271, at 567.
307. 11 U.S. (7 Cranch) 481 (1813).
308. Id. at 485.
310. See Whitten, supra note 42, at 54 & n.268; Whitten, supra note 271, at 569 n.304.
311. See Whitten, supra note 42, at 54–56; Whitten, supra note 271, at 569–70.
312. Whitten, supra note 42, at 62.
313. See id. at 60–62.
tion. In recent times the Court has minimized the occasions on which sister-state acts are entitled to full faith and credit, but when the Clause applies, it is still a rule of conclusiveness.\textsuperscript{314}

One final contradictory premise is essential to Whitten's interpretation. He insists that full faith and credit cannot be read against the background of conflict-of-law rules. Thus, full faith and credit presents an unattractive all-or-nothing choice: either it makes sister-state law and judgments conclusive without regard to legislative or judicial jurisdiction, or it is satisfied by admitting sister-state law and judgments in evidence, without giving them any weight or effect. Full faith and credit means either far too much or far too little, but it cannot mean anything sensible between these extremes. Whitten's reason is that the words "faith" and "credit" were not used in the eighteenth century to describe conflict-of-law rules.\textsuperscript{315}

But as argued above, the Founders and early American courts assumed that unless a state had jurisdiction under conflict-of-law rules, its judgments and laws were not entitled to full faith and credit. Indeed, they had to assume this in order to make any sense of the Clause.\textsuperscript{316} From the very beginning, courts refused full faith and credit to judgments entered without jurisdiction.\textsuperscript{317} And, Whitten insists that this is how the Full Faith and Credit Act must be read once he accepts Mills v. Duryee.\textsuperscript{318} So Whitten's final position is that full faith and credit in the Constitution is merely a rule of evidence, because the phrase cannot be read in light of conflict-of-law rules; that full faith and credit in the statute, with respect to judgments, is a rule of conclusive effect that must be read in light of conflict-of-law rules; and that full faith and credit in the statute, with respect to acts, is a rule of conclusive effect that must be ignored because it cannot be read in light of conflict-of-law rules.

Only the most compelling evidence of original meaning should lead us to accept an argument that entails so many paradoxes and contradictions, and that culminates in an explicit appeal to ignore an act of Congress. Whitten's evidence of eighteenth century usage is not frivolous, but neither is it persuasive. He demonstrates that eighteenth century lawyers and judges used the terms "faith" and "credit" to discuss the weight of various items of evidence, including official records, but that they also used these terms to describe the effect of judgments and other records in subsequent proceedings.\textsuperscript{319} He also shows that eighteenth century lawyers were concerned with the problem of how to

\textsuperscript{315} See Whitten, supra note 271, at 526, 553--54, 568--69.
\textsuperscript{316} See supra notes 270--303 and accompanying text.
\textsuperscript{317} Whitten, supra note 271, at 571 n.307 (collecting cases); supra notes 288--291 and accompanying text.
\textsuperscript{318} See Whitten, supra note 271, at 599.
\textsuperscript{319} See id. at 508--35; Whitten, supra note 42, at 12--31.
prove foreign judgments or acts.\textsuperscript{320} It would not be surprising if they sometimes discussed this problem in terms of the faith or credit to be given to the proffered evidence of the judgment or act, but Whitten offers no clear example of that usage.

Most important here, Whitten shows that "faith" and "credit," especially with a strong modifier such as "full," "entire," or "implicit," were often used to describe the conclusive effect of a judgment or other legal record.\textsuperscript{321} Thus, he repeatedly concedes that "a conclusive effect on the merits, or res judicata effect, could be communicated by the command, 'full faith and credit shall be given.'"\textsuperscript{322} But he thinks that is not the most likely meaning. Nadelmann reviews much of the same evidence and finds it inconclusive.\textsuperscript{323}

Considered only in terms of eighteenth century usage, Whitten's interpretations of full faith and credit are at least possible. But considered in light of the constitutional structure, the case for conclusive effect subject to conflict-of-law rules is far stronger than either of Whitten's implausible readings.

Even the usage evidence tilts against Whitten's claim. The complete phrase "full faith and credit" appears not to have been used prior to the Articles of Confederation, and Whitten offers not a single example of a court using "full" or "entire" faith or credit to describe anything less than conclusive effect. The bulk of Whitten's evidence shows that foreign judgments were not conclusive in English courts in the late eighteenth century.\textsuperscript{324} But few of the cases he offers to illustrate this rule use the terms "faith" or "credit," so these cases cast no light on the question of usage. They prove the common law rule for French and Russian judgments, but they provide no reason to believe that the Full Faith and Credit Clause codified that rule for American states. As James Wilson's successful argument at the Constitutional Convention suggests, the Clause was designed to require "more than what now takes place among all Independent Nations."\textsuperscript{325} To formally admit the law as evidence but to give it little or no substantive effect is not to give it full credit; it is a clever way of giving little or no credit.

Even so, there was a sufficient kernel of plausibility to Whitten's argument that some American lawyers offered it, and a few judges accepted it, in early cases interpreting full faith and credit.\textsuperscript{326} For judges worried that a rule of conclusiveness would extend even to judgments

\begin{footnotes}
\item 320. See Whitten, supra note 42, at 12–31; Whitten, supra note 271, at 508–35.
\item 321. See Whitten, supra note 42, at 12–17; Whitten, supra note 271, at 511, 514–20.
\item 322. Whitten, supra note 42, at 26; Whitten, supra note 271, at 526, 533–34, 535, 541–42.
\item 323. See Nadelmann, supra note 42, at 34–53.
\item 324. See Whitten, supra note 271, at 509–20.
\item 325. 2 Farrand, supra note 227, at 489; see supra note 254 and accompanying text.
\item 326. See cases collected supra notes 292–293.
\end{footnotes}
CHOICE OF LAW

entered without jurisdiction, Whitten's evidentiary theory was at least colorable. But most judges rejected the evidentiary theory, some denouncing it as ridiculous.\textsuperscript{327}

Because Whitten himself refuses to distinguish lack of jurisdiction from any other error, he treats any willingness to reconsider jurisdiction as supporting his theory. But this misreads the cases. A majority of judges reads conflicts principles into the Clause from the beginning. These judges read “full faith and credit” to mean conclusive effect, but they insisted that a judgment entered without jurisdiction was not entitled to faith and credit.\textsuperscript{328}

Whitten also claims that Mills and many of the other cases requiring conclusive effect relied on the Full Faith and Credit Act rather than the Constitution. I think he exaggerates this; some lawyers and judges relied directly on the Constitution,\textsuperscript{329} and others assumed that the statute was merely a more explicit statement of what the Constitution already required.\textsuperscript{330} But in any event, reliance on the statute does not imply anything about the Constitution. Whitten fails to note that the Constitution probably did not apply to Mills or any other case filed in federal court. The constitutional clause applies “in each state,” which may plausibly be read as binding only state courts. But the statute applies in “every Court within the United States,” which was necessarily read as including federal courts.\textsuperscript{331} Even in state courts, there was no need to reach the constitutional issue if the statute sufficed.

Nothing in Whitten's evidence changes the apparent meaning of the constitutional text. Each state owes full credit, equal to the credit it gives its own law, to the law of sister states. This obligation is comprehensible if, and only if, a determinate set of federal choice-of-law rules identifies the applicable state law.


\textsuperscript{328} See supra notes 288–291 and accompanying text.

\textsuperscript{329} See, e.g., Montford v. Hunt, 17 F. Cas. 616, 617 (C.C.D. Pa. 1811) (No. 9,725) (counsel relying on Constitution); Bissell v. Briggs, 9 Mass. 461, 466 (1813) (relying on “the express words of the constitution”).

\textsuperscript{330} See, e.g., Armstrong v. Carson's Ex'rs, 1 F. Cas. 1140, 1140 (C.C.D. Pa. 1794) (No. 543) (“whatever doubts there might be on the words of the constitution, the act of congress effectually removes them”). Mills said that if the Act, as written, did not make judgments conclusive, then “this clause in the constitution would be utterly unimportant and illusory,” 11 U.S. (7 Cranch) at 485, an argument that makes sense only if the Act and Constitution meant the same thing.

\textsuperscript{331} Mills, 11 U.S. (7 Cranch) at 485 (quoting Act of May 26, 1790, ch. 11, 1 Stat. 122).
4. The Founders' Understanding of Choice of Law. — Robert Sedler offers a very different historical attack on this reading of the Clause. He says the Constitution cannot speak to choice of law because Anglo-American law had no concept of choice of law in the time of the Founders. On this point he is simply mistaken. His claim had been refuted before he ever made it, directly by Leonard Goodman and indirectly by Alexander Sack. And Goodman did not even marshal all the evidence. There are choice-of-law cases from before the Constitution on both sides of the Atlantic, and the Founders made explicit choice-of-law arguments in the drafting and ratification debates.

The clearest indication that the Founders thought about choice of law in connection with the Full Faith and Credit Clause is Randolph's draft, which contained an explicit choice-of-law provision. That draft was offered as a motion on the floor of the Convention, and referred to the committee charged with drafting the clause.

Hamilton invoked choice-of-law principles to explain why state courts would have concurrent jurisdiction over federal claims. State courts could apply federal law just as they already applied foreign law:

The judiciary power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe. Those of Japan, not less than of New York, may furnish the objects of legal discussion to our courts.

John Marshall appears to have made the point even more explicitly in the Virginia ratifying convention. In the course of a multi-point attack on the diversity jurisdiction, Patrick Henry apparently asked what law would apply in diversity cases. Marshall rose to answer:


333. See Goodman, supra note 188, at 339 ("[I]t appears to have been unquestioned by both those favoring and those opposing the Constitution that the document contemplated a federal conflict of laws in diversity cases.").


335. See supra note 280 and accompanying text.

336. See 2 Farrand, supra note 227, at 448.

337. The Federalist, supra note 90, No. 82, at 493 (Alexander Hamilton); see also id., No. 80, at 476–77 (Alexander Hamilton) (distinguishing cases "where the subject of controversy was wholly relative to the lex loci" from those subject to "treaty or the general law of nations"); id., No. 42 at 270 (James Madison) (attacking a defect in the Articles of Confederation on the ground that "the law of one State [might] be preposterously rendered paramount to the law of another, within the jurisdiction of the other").

338. See 3 Elliot, supra note 179, at 542.
By the laws of which state will it be determined? said he. By the laws of the state where the contract was made. According to those laws, and those only, can it be decided. Is this a novelty? No; it is a principle in the jurisprudence of this common-wealth. If a man contracted a debt in the East Indies, and it was sued for here, the decision must be consonant to the laws of that country. Suppose a contract made in Maryland, where the annual interest is at six per centum, and a suit instituted for it in Virginia; what interest would be given now, without any federal aid? The interest of Maryland most certainly; and if the contract had been made in Virginia, and suit brought in Maryland, the interest of Virginia must be given, without doubt. It is now to be governed by the laws of that state where the contract was made. The laws which governed the contract at its formation govern it in its decision.\(^3\)

There are choice-of-law decisions in the earliest American reports,\(^4\) some of which stated broad choice-of-law rules,\(^5\) and many

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\(^3\) Id. at 556-57. The Virginia convention was not reliably reported, due to the inadequacies of eighteenth-century shorthand and the partisanship of the reporter. See Hutson, supra note 179, at 23–24. Half a century later, Marshall reportedly complained that he would not have recognized his own speeches if his name were not attached to them. The statement appears in Thomas H. Bailey's memorandum of an 1832 conversation, quoted in 1 The Papers of John Marshall 256 n.7 (Herbert A. Johnson ed., 1974). But the detailed statement quoted here could not be a garbled version of a statement about something else altogether. The statement is reliable at least for the limited purpose of showing that the concept of choice-of-law was known in Virginia in 1788.

\(^4\) See Kissam v. Burrall, 1 Kirby 326 (Conn. 1787) (applying laws and customs of New York to a New York transaction); Phenix v. Prindle, 1 Kirby 207 (Conn. 1787) (same); Bromfield v. Little, (Mass. Super. 1764), in Reports of Cases Argued and Adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay, Between 1761 and 1772, at 108 (Josiah Quincy, Jr. ed., 1865) [hereinafter Quincy] (distinguishing custom of Mass. from custom of England, and applying Mass. rule to Mass. transaction); Jones v. Belcher, (Mass. Super. 1762), in id. at 9 (“as the Bond was given to a Person here, (not the Creditor in England,) and the Debt was become his, New England Interest ought to be granted”); Thompson v. Musser, 1 Dall. 458, 463 (Pa. 1789) (McKean, J., seriatim) (applying Va. statute and holding statute was adequately proved by uncertified copy in usual form for Virginia); Millar v. Hall, 1 Dall. 229 (Pa. 1788) (enforcing Md. bankruptcy law); Camp v. Lockwood, 1 Dall. 393, 403 (Phila. C.P. 1788) (applying confiscatory statute of Conn.); Winthrop v. Pepoon, Otis & Co., 1 S.C.L. (1 Bay) 468, 470 (1795) (applying law of place where bill of exchange was drawn); James & Shoemaker v. M'Credie & Co., 1 S.C.L. (1 Bay) 294, 295 (1793) (applying usage and custom of Philadelphia); Executors of Fowl v. Todd, 1 S.C.L. (1 Bay) 176, 177 (1791) (refusing to apply to out-of-state contracts a statute devaluing South Carolina currency); see also Steinmetz v. Currie, 1 Dall. 270, 270 (Pa. 1788) (applying the “universal and established usage of all countries ... and not the local regulations of Pennsylvania”); cf. Rutgers v. Waddington (N.Y. Mayor's Ct. 1784), in Select Cases of the Mayor's Court of New York City 1674-1784 at 302, 325–26 (Richard B. Morris ed., 1935) [hereinafter Morris, Cases] (construing New York statute as not intended to override the applicable law of nations).

\(^5\) In addition to the cases cited supra note 340, see McCullough v. Houston, 1 Dall. 441, 442 (Pa. 1789) (“the assignment of [bonds and promissory notes] as well as
of which were argued or decided by active participants in the debate over the Constitution in general and the Full Faith and Credit Clause in particular. Alexander Hamilton,\(^{342}\) Roger Sherman,\(^{343}\) Oliver Ellsworth,\(^{344}\) and John Rutledge\(^{345}\) were leading Founders who argued or decided one or more reported choice-of-law cases. Jared Ingersoll, a delegate to the federal convention from Pennsylvania, is almost certainly the Ingersoll who argued at least three reported choice-of-law cases in 1788 and 1789.\(^{346}\) Richard Law,\(^{347}\) Thomas McKean,\(^{348}\) and James Duane\(^{349}\) were each active delegates to their state ratifying conventions, and each had decided one or more reported choice-of-law cases. Law and Duane had served together on the committee that proposed the Full Faith and Credit Clause in the Articles of Confederation, the form, operation and effect of such assignment, depends entirely upon the municipal law of the place where it is made\(\)\).\(^{342}\)

342. Hamilton argued Rutgers v. Waddington (N.Y. Mayor's Ct. 1784), in Morris, Cases, supra note 340. He proposed the self-executing part of the Full Faith and Credit Clause, in substantially the language finally adopted. See 3 Farrand, supra note 227, at 629.

343. Sherman sat as a judge in the Connecticut cases, supra note 340. For his leading role at the federal convention and in ratification debates, see Dennis J. Mahoney, Roger Sherman, in 4 Levy, supra note 179, at 1678.

344. Ellsworth sat as a judge in the Connecticut cases, supra note 340. He was a leader at the federal convention and served on the Committee of Detail. See Richard E. Ellis, Oliver Ellsworth, in 2 Levy, supra note 179, at 625. For his role in ratification, see 2 Elliot, supra note 179, at 185–97.

345. Rutledge decided Executors of Fowl v. Todd, 1 S.C.L. (I Bay) 176 (1791), and served on the committee that drafted the Full Faith and Credit Clause. 2 Farrand, supra note 227, at 448. For his role in ratification, see 4 Elliot, supra note 179, at 267–68, 311–12.

346. "Ingersoll" argued each of the Pennsylvania cases described supra note 340. Dallas' Reports generally give no first name or initial for lawyers. But Dallas does give initials on occasion, presumably when there was more than one lawyer with the same surname. See, e.g., Cooper v. Coats, 1 Dall. 308, 309 (Phila. C.P. 1788) (argument by S. Levy); Morgan v. Eckart, 1 Dall. 295, 296 (Phila. C.P. 1788) (J.B. McKeane for plaintiffs); Lewis v. Maris, 1 Dall. 278, 279 (Pa. Ct. Err. & App. 1788) (W.M. Smith for appellants). The lack of an initial for Ingersoll implies that there was only one lawyer in Philadelphia by that name, so that the lawyer in these cases must have been Jared Ingersoll, the delegate. The delegate trained in London, was a great litigator and a specialist in commercial cases. See Horace Binney, The Leaders of the Old Bar of Philadelphia 81, 85, 99 (1859). Two of the choice-of-law cases argued by "Ingersoll" were commercial cases. The delegate was raised in Connecticut and apparently had no relative of the same generation in Philadelphia. See id. at 77–84.

347. Law sat as a judge in the Connecticut cases, supra note 340. For his role in ratification, see 2 Elliot, supra note 179, at 200–01.

348. McKean wrote the lead opinions in the Pennsylvania Supreme Court cases, supra note 340. For his role in ratification, see 2 Elliot, supra note 179, at 417–18, 529–42.

349. Duane wrote a long opinion in Rutgers v. Waddington (N.Y. Mayor's Ct. 1784), in Morris, Cases, supra note 340. For his role in ratification, see 2 Elliot, supra note 179, at 206, 327–29, 357–58, 360, 379–80, 411.
George Bryan, a leading Pennsylvania anti-Federalist, also decided choice-of-law cases. Early American cases cite Blackstone's matter-of-fact reference to choice of law, Lord Kames's lengthy treatment of choice of law in the 1767 edition of his equity treatise, and Ulrich Huber's influential Dutch treatise on choice of law. The reported cases, the literature cited, and the arguments of Hamilton, Madison, and Marshall all show that the new conflicts learning had crossed the Atlantic before the Constitution.

The Founders' ideas about choice of law came to America from England. American lawyers and judges of course used English books and English precedents. Slave owners and traders had business reasons to know about English decisions on choice of law in slave cases; American merchants had similar reasons to know about English decisions on choice of law in bankruptcy. Lords Hardwicke and Mansfield, whose overlapping judgeships ran continuously from 1733 to 1788, are properly credited with creating English choice-of-law rules. But English courts had grappled with choice-of-law problems in classic case-by-case method for more than a century before that. Alexander Sack found a prescient choice-of-law case decided in 1611 and, by the late seventeenth century, a settled practice of

351. Bryan filed a brief opinion in Thompson v. Musser, 1 Dall. 458 (Pa. 1789). For his role opposing ratification, see 2 Storing, Anti-Federalist, supra note 186, at 130, 135 nn.4-5; 2 Elliot, supra note 179, at 542-46.
352. In a passage showing similarities between law and equity, Blackstone said: "both follow the law of the proper forum and . . . if a question came before either, which was properly the object of a foreign municipal law, they would both receive information what is the rule of the country, and would both decide accordingly." 3 William Blackstone, Commentaries on the Laws of England 436 (1768) (footnote omitted), quoted in Thompson, 1 Dall. at 467 (Rush, J., seriatim); see also 2 Blackstone, supra, at 463-64 (interest governed by law of the place where the contract is made).
358. See, e.g., 2 James Kent, Commentaries on American Law *455 (1827).
359. Anonymous, 123 Eng. Rep. 789, 789 (K.B. 1611) ("And if at the common law one matter comes in question upon a conveyance, or other instrument made beyond sea: according to the course of the civil law, or other law of the nations where it was made; the Judges ought to consult with the civilians or others which are expert in the
choice of law in cases subject to conflicting laws of the many English colonies and dominions. Chief Justice Holt commented in 1705 that the law of Jamaica was consulted "every day... before committees of appeals from thence." Sack also reviews an increasing flow of eighteenth-century English cases applying law from foreign nations not subject to the English crown.

This widespread background of choice-of-law rules helps confirm the apparent meaning of the Full Faith and Credit Clause and the Rules of Decision Act. History is clear that the Founders' generation had a concept of choice of law, that they applied it in judicial decisions, and that they brought it to bear in arguments over ratification. Their confidence in the obvious applicability of a single state's law may have been the naive assumption of a generation that had thought only a little about choice of law. But not to see the difficulties of a subject is very different from never having heard of it. Even if they oversimplified, choice of law was part of what the Founders took for granted at the Convention.

C. Implications for Choice of Law

The Full Faith and Credit Clause contains both affirmative and negative implications for choice of law. The affirmative implication is that Congress or the federal courts should specify choice-of-law rules and that state courts should follow those rules, to the end that the same law will be applied no matter where a case is litigated. The negative implication is that no state may deny the equal status of sister-state law. The duty to treat sister-state law as equal in authority to the law of the forum does not depend on whether Congress or the federal courts specify a determinate set of choice-of-law rules. The equality of sister-state law should be enforced even if detailed choice-of-law rules are left to state courts. The equality of sister-state law eliminates several modern approaches to choice of law, and one traditional approach.

1. Forum Law. — Most obviously, any preference for forum law violates the Full Faith and Credit Clause. Brainerd Currie's original interest analysis proposed to apply forum law to all "true conflicts." This proposal rejected the core of the Full Faith and Credit Clause in the same fundamental way that his analysis of state interests rejected the core of the Privileges and Immunities Clause. Currie's bald preference for forum law meant that in so-called true conflicts, neither state gave any credit whatever to sister-state law. It also meant that two interested states would never apply the "same" law, because whichever
state acquired jurisdiction would apply its own law. This created substantial incentives for forum shopping. But most important, it meant that people could not know the law applicable to their conduct until a lawsuit was filed. Some modern interest analysts retain a rebuttable presumption in favor of forum law; some retain an apparently absolute preference for forum law in "true conflicts"; some would eliminate forum preference altogether.

Eliminating forum preference altogether is the only constitutional solution. The forum cannot apply its own law in all cases, or in all cases of true conflicts. The forum cannot apply its own law in all cases with which it has reasonable contacts, or in all cases in which it has an interest, or in all cases in which no one would be unfairly surprised. If an employer hired black applicants only when they were clearly superior to the white applicants, and hired whites whenever the comparison between applicants was fairly debatable, we would easily conclude that the employer discriminated. Similarly, when a forum prefers its own law in fairly debatable choice-of-law cases, it is discriminating against the law of sister states and denying the equal status of sister-state law. Whatever criteria are invoked to identify close or debatable cases, forum law cannot be the tiebreaker. Under the Full Faith and Credit Clause, the identity of the forum is irrelevant to choice of law.

The traditional rule that the law of the forum applies to issues of procedure may be conceived of as an exception to this rule, or as simply beyond the scope of the rule. Forum law applies to most procedural issues not because all ties go to the forum, or because the forum can apply its own law when it benefits from doing so, or because of any other general preference for forum law. Rather, forum law applies because that is the neutral consequence of a sensible territorial choice-of-law rule. Most procedural events occur within the territorial jurisdiction of the forum, litigants do not have to comply with procedural rules before the forum is known, and no other state has so plausible a claim to regulate those events. A general rule that the law of the forum governs procedure does not undermine the principle of equal states. Of course, all three constitutional principles apply to resolution of difficult cases at the borders of substance and procedure and to extraterritorial

364. See, e.g., Kay, supra note 47, at 587–88 ("local law is the normally applicable law in conflicts cases, as in other cases, and ... the burden of persuasion is placed on the party wishing to displace local law"); Singer, Facing, supra note 32, at 198–206; Singer, supra note 17, at 81–83, 90–92.
365. See Sedler, supra note 47, at 638; Weinberg, supra note 33, at 54–55, 81.
366. See Kramer, supra note 17, at 312–15.
368. Compare the similar case of domiciliary choice-of-law rules that do not undermine the principle of equal citizens, discussed supra note 225 and accompanying text.
procedural issues such as depositions in a jurisdiction other than the forum.

2. "Better Law" and Its Variations. — Another modern approach invalidated by the Full Faith and Credit Clause is to apply the "better law."369 Texas cannot constitutionally decide that its law is better than California's. To do so is to deny full faith and credit in a fundamental sense: it is to reject California's law as unworthy of credit. The law of California and the law of Texas are of equal status, both decreed by states with equal claims to limited sovereignty. Even some interest analysts agree that neither state would concede that the other's law is better.370 There is no higher authority, no lawgiver in the sky, empowered to decide which state's law is better. Nor can Congress or the Supreme Court decide which law is better on a matter committed to the states. Such a decision would violate the allocation of authority between the state and federal governments.371 A constitutional approach to choice of law can no more consider which law is better than it can consider which state's citizen will benefit.

Variations on "better law" are subject to the same objection. A court cannot reject sister-state law as "aberrational" or "anachronistic"372 or "archaic and isolated."373 To appeal to "widely adopted law"374 is to repeat the mistake corrected in Erie Railroad v. Tompkins375—to invoke a general common law not derived from any sovereign. If each state is equal in authority to the other forty-nine, then no state is required to conform its law to that of the others, or to follow the trend that other states find more in keeping with the times.

Finally, the principle of equal states forbids states to prefer the law under which plaintiff prevails,376 or for that matter, the law under which defendant prevails. Most such preferences are a special case of

369. This consideration is suggested in Weintraub, supra note 11, § 6.27, at 342–43; Robert A. Leflar, Conflicts Law: More on Choice-Influencing Considerations, 54 Cal. L. Rev. 1584, 1587–88 (1966); Singer, supra note 17, at 6, 80. For the argument that better law approaches are unconstitutional because they violate a duty of neutrality toward sister-states' conceptions of the good, see Terry S. Kogan, Toward a Jurisprudence of Choice of Law: The Priority of Fairness over Comity, 62 N.Y.U. L. Rev. 651, 698 (1987).
370. See Baxter, supra note 34, at 7–8; Kramer, supra note 17, at 316.
372. This approach is suggested in Conklin v. Horner, 157 N.W.2d 579, 586–87 (Wis. 1968) (rejecting application of Illinois guest statute as "anachronistic" vestige); Weintraub, supra note 11, § 6.6, at 287–90; id. § 6.32, at 359–60; id. § 7.4B, at 387–91.
373. This approach is suggested in Paul A. Freund, Chief Justice Stone and the Conflict of Laws, 59 Harv. L. Rev. 1210, 1216 (1946).
374. This approach is suggested in Weinberg, supra note 270, at 623.
375. 304 U.S. 64, 79 (1938).
376. Choice of pro-plaintiff law is proposed in Willis L.M. Reese, Products Liability and Choice of Law: The United States Proposals to the Hague Conference, 25 Vand. L. Rev. 29, 30–38 (1972); Weintraub, supra note 11, § 6.4, at 284–85; Weinberg, supra note 270, at 599–600. The pro-plaintiff proposals described by Professor Reese were rejected for international cases by the Hague Conference. See Reese, supra, at 38–39.
better-law rules, because they are motivated by a belief that the preferred law is better.\textsuperscript{377} But whatever the motivation, such preferences violate the principle of equal states. A court that prefers the pro-plaintiff rule gives more faith and credit to the law of pro-plaintiff states, and no faith and credit to the law of pro-defendant states. What the Constitution requires is full and equal faith and credit to the law of all sister states.

Traditional approaches to choice of law contain an even more offensive variation on better-law approaches. This is the rule that the forum can reject sister-state law on the ground that it too deeply offends the public policy of the forum.\textsuperscript{378} This is the extreme case of better-law rules. Texas would reject California law not just because Texas law is better, but because California law is so offensive that it cannot be tolerated in a Texas court. Texas can reject the law of Libya in this high-handed way, or even the law of Alberta, and it may occasionally need to do so. But it cannot so treat a sister state admitted to the Union on an equal footing with it. The public-policy exception is a relic carried over from international law without reflection on the changes in interstate relations wrought by the Constitution.\textsuperscript{379}

Larry Kramer would concede that states should not reject sister-state law on the ground that it is worse, aberrational, or anachronistic,\textsuperscript{380} although he finds it unnecessary to rely on the Constitution. However, he urges the closely related point that states can reject “obsolete” sister-state law.\textsuperscript{381} An obsolete law in his view is one that was enacted long ago and that is now out of step with the policy of the enacting state.\textsuperscript{382} He would let Texas courts reject “obsolete” California law even in cases where the “obsolete” law is embodied in a statute, so that California courts would have no authority to reject it, and in cases where the California courts had recently held themselves powerless to revise an “obsolete” common law policy.\textsuperscript{383} His rationale for letting Texas reject California law in these cases is that California would not seriously object, and that Texas would not seriously object if

\textsuperscript{377} See Weinberg, supra note 33, at 65–67 (arguing that forum law is better because plaintiff selects forum for its favorable law, and pro-plaintiff law is better).


\textsuperscript{379} See Jackson, supra note 1, at 27 (“It is hard to see how the faith and credit clause has any practical meaning as to statutes if the Court should adhere to” a public policy exception.); Simson, supra note 37, at 70 n.51 (public policy exception violates Full Faith and Credit Clause because it prevents uniform result). But see Simson, supra note 151, at 279 (proposing limited public policy exception).

\textsuperscript{380} See Kramer, supra note 17, at 316, 336.

\textsuperscript{381} See id. at 334–36.

\textsuperscript{382} See id. at 336.

\textsuperscript{383} See id.
California rejected "obsolete" Texas law in the same way. Kramer envisions this as a mutually beneficial trade, in which each state surrenders control of cases it cares about only a little in exchange for control of cases it cares about more.\(^{384}\)

Kramer's proposed rule is narrower than most better-law approaches, and to that extent less objectionable. But it is just as unconstitutional in the cases where it applies. Texas has no authority to change California law, and no authority to deny faith and credit to California law on the ground that California ought to change its own law, or on the ground that California would not seriously object.

Moreover, Kramer's vision of the states trading cases with each other wholly ignores the rights of the litigants. One need not make Beale's error of deducing choice-of-law rules from vested rights to believe that individual litigants do indeed acquire rights under applicable state law once choice-of-law rules have been created.\(^{385}\) If the generally applicable choice-of-law rule for a case selects California law, courts have no authority to trade one litigant's California rights in that case for some other litigant's Texas rights in a hypothetical future case with different issues and different litigants. I believe that this objection applies to any game-theory model that assumes the states could modify the choice-of-law rule in light of the content of the conflicting laws.\(^{386}\)

If a Texas court genuinely believes that a California court would change California law if the case were presented there, the best solution is to certify the legal question to the Supreme Court of California. It is familiar practice for federal courts to certify questions to state supreme courts,\(^{387}\) and some fifteen states authorize their supreme courts to answer such questions from courts of other states.\(^{388}\) If no certification procedure is available, and if a Texas court genuinely believes that a California court would decide the case in a way that departs from prior California precedent, then perhaps the Texas court should follow its prediction of California law and not the old California precedent. Federal courts have a limited power to do this in diversity cases,\(^{389}\) and when properly done it gives full faith and credit to a more accurate statement of California law. It reduces an incentive to forum shop when one side is relying on a vulnerable precedent due for overruling.

But this practice would likely be abused. Unlike a federal trial judge sitting in California, Texas judges have no realistic experience of

\(^{384}\) See id. at 315–16, 335–36.
\(^{386}\) For another game theory model, see Simson, supra note 151, at 280 n.4. Compare Brilmayer, supra note 6, at 145–89 (game theory model) with id. at 191–230 (recognizing rights of litigants).
\(^{388}\) See id. at 168 n.33.
\(^{389}\) See id. § 4507, at 87–103.
California law on which to base a judgment that a particular precedent is ripe for overruling. More important, Texas judges have a strong temptation to predict that California would now adopt the Texas rule that they consider more enlightened. This temptation may be especially strong if a Texas citizen would benefit. Even though the ideal is for a Texas court to decide the case as a California court would decide it, we may achieve that goal more often with a prophylactic rule that the courts of one state cannot predict change in the law of another state.390

3. Conclusion. — I have argued that the Constitution precludes choice-of-law rules that prefer local litigants or local law, the better law, the more common law, the more modern law, the law that reaches a particular result, or the law consistent with the public policy of the forum. I have also argued that the Full Faith and Credit Clause assumes the existence of some basis for recognizing which state's law applies—that it assumes the existence of choice-of-law rules. It remains to examine whether our fundamental law says or implies anything affirmative about the content of those rules.

IV. THE PRINCIPLE OF TERRITORIAL STATES

A. The Territorial Division of State Authority

Our constitutions create a federal government and fifty state governments. For such a scheme to work, governmental authority must be allocated among these governments both horizontally and vertically. There can be no gaps, and serious costs are imposed unless there are clear rules for resolving conflicts and overlaps.

Indeed, anti-Federalist critics of the Constitution argued that the scheme could not work. They believed it impossible for two sovereigns to exist in the same territory.391 The Federalist solution to the problem of multiple sovereigns lay in careful allocation of the authority of each. The Federalists did not claim that two sovereigns could govern the same issues in the same territory. Rather, they claimed that state and federal authority was defined as carefully as could be, so that the respective powers of each sovereign were workably clear.392 They argued

390. See Frederick Schauer, Rules and the Rule of Law, 14 Harv. J.L. & Pub. Pol'y 645, 685–86 (1991) (noting that choice between rule and case-by-case determination depends on empirical predictions of errors that will result from over- and under-inclusiveness of rule compared to errors that decision makers will make in case-by-case determinations).

391. For a summary and collection of sources, see 1 Storing, Anti-Federalist, supra note 186, at 12, 81 n.31. See, e.g., 2 id. at 166, 169 (Letter of Centinel, Nov. 30, 1787) (“It is a solecism in politics for two co-ordinate sovereignties to exist together, you must separate the sphere of their jurisdiction.”). The Letters of Centinel were written by Judge George Bryan and his son Samuel Bryan, both of Philadelphia; the division of labor between them remains uncertain. Id. at 130, 135 nn.4–5.

392. See, e.g., 1 id. at 34; 3 Elliot, supra note 179, at 95 (“the powers of the federal government are enumerated; it can only operate in certain cases; it has legislative...
that the few undeniably concurrent powers, such as taxation, did not conflict. They might have added, but chose not to emphasize, that the Supremacy Clause would clearly resolve any conflicts that emerged.

Both Federalists and anti-Federalists agreed that shared sovereignty within the same territory at least required careful allocation of authority; they disagreed on whether a sufficiently clear allocation had been achieved. This debate was focused on the allocation of authority between the states and the federal government, but its premises apply equally to the allocation of authority among states. Neither side complained about overlapping authority of the states; both sides must have believed that state authority was allocated with sufficient clarity. The states' overlapping territorial claims had been a central problem of the revolutionary and Confederation period, but the large western land claims had been resolved by 1787 and the Constitution gave the Supreme Court authority to resolve the remaining disputes between states.

Much of the federal Constitution is devoted to the allocation of authority between the states and the federal government. This allocation is based on subject matter, and in a sense, on interests. Some interest analysts are fond of analogies to federal-state choice of law. In fact, by illustrating the possibility of allocating authority according to interests, the federal-state allocation highlights the quite different allocation of authority among the states.

The allocation of authority among the states is territorial. Indeed, territory is part of the very definition of the state. Interest analysts prefer to emphasize that the state is a community of people, but that merely pushes the question back one step. What people are part of the community? Those who reside within a certain territory, and only those, are members of the political community. "State lines are all that distinguish one state from another and the people of one state from another." The territorial definition of state citizenship is stated explicitly in the Citizenship Clause, which provides that all persons born or naturalized in the United States are citizens of the state "wherein they reside."

There are other ways to organize, but we did not choose them. An
American state is not like a nomadic tribe, with membership based on kinship. Nor is it a voluntary association of like-minded people, like a social club or a civic league. I cannot join California, save by moving there, and if I do move there, California cannot deny me membership. The state may be created for the good of its people, but it is defined by its territory, and "its people" are defined by the territory in which they live.

The principle of equal citizens is consistent with these territorial definitions. If I visit California, it must treat me as a citizen. I become, temporarily and for limited but wide-ranging purposes, one of California's people. An exasperated interest-analyst once asked if I thought states enact laws for the benefit of their dirt. Of course not. But they do enact laws to even-handedly govern and benefit the people on their dirt, including visitors from sister states.

The Citizenship Clause is not the only constitutional provision that explicitly conceives of states in territorial terms. Consider also the restrictions on creation of new states: "no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more states, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress." Note especially the use of the word "Jurisdiction" as a synonym or metaphor for territory. A state's authority to govern—its jurisdiction—is a place that a new state could be formed "within." When the Constitution says that no new state shall be formed within the jurisdiction of any other, it does not mean within the reach of the interests of any other. It can only mean within the territory of any other.

The Constitution thus assumes that states are territorial, but it never quite says so. That function is left to other sources of fundamental law. The territorial definitions of states are specified in state organic acts, authorizing the people of a territory to form a government, and enabling acts, authorizing them to draft a constitution and apply for statehood, and for the older states, in treaties, territorial cessions,

399. U.S. Const. art. IV, § 3, cl. 1.
400. See, e.g., Act of April 18, 1818, ch. 67, § 2, 3 Stat. 428, 429, which begins: "And be it further enacted, That the said state shall consist of all the territory included within the following boundaries, to wit." The statute then sets out the boundaries by metes and bounds, requires the state to ratify those boundaries, and provides for concurrent jurisdiction with neighboring states on the Wabash and Mississippi but not on the Ohio. For ratification of these boundaries, see Ill. Const. of 1818, preamble; Ill. Const. of 1848, art. I, § 1; Ill. Const. of 1870, art. I.

The boundaries were not repeated in the Illinois Constitution of 1970, because it was thought that only Congress could specify the state's boundaries, and because it was thought impractical to include the accumulated specifications of detail. 2 Records of Proceedings: Sixth Illinois Constitutional Convention 1068-71 (1970) [hereinafter Illinois Convention] (Report of Gen'l Gov't Comm. on Proposal No. 10); 6 id. at 579-77.
and royal grants. About half the states restate their boundaries in their state constitutions, even though the federal specification is supreme. These boundaries are specified and marked on the ground by official surveys. Ambiguities in offshore waters and boundary rivers, and disputes arising from surveying errors, are gradually eliminated by litigation. State boundaries are not imaginary lines created by Rand McNally; they are allocations of power created by our fundamental law. As the Supreme Court held in an early boundary case, "Title, jurisdiction, sovereignty, are therefore dependent questions, necessarily settled when boundary is ascertained . . . ."

When I fly from Texas to California, I knowingly leave the territory that Texas is empowered to govern, enter the territory that California is empowered to govern, and submit myself to the authority of California. To deny that that matters, to find it an irrational basis for distinction, to compare it to a "streetgame," is simply to claim that the existence of fifty states is irrational. Whatever the merits of that argument as an original matter, it wholly ignores our constitutional scheme. The territorial allocation of state authority is a fundamental constitutional principle, even though that principle is not attributable to any particular constitutional clause.

The territorial allocation of authority is too deeply embedded in our law to require justification. If territorial states are a bad idea, our laws must be amended to change the definitions and conceptions of states. But there are sound reasons why American states, like nearly all other modern states, are defined territorially.

The most important of these reasons has been reviewed at length by Perry Dane. Territorial boundaries between states and their law support the role of law as enforcer of strongly held norms. Common

401. See, e.g., the sources of the western boundary of Tennessee in Cissna v. Tennessee, 246 U.S. 289, 294 (1918).
402. The survey of state constitutions is reported in 6 Illinois Convention, supra note 400, at 574 (Report of Gen'l Gov't Comm. on Proposal No. 10).
403. See Act of Mar. 2, 1831, ch. 86, § 3, 4 Stat. 479, 480 (providing for a commissioner appointed by the President and a commissioner appointed by Illinois to survey the state's northern border).
406. For the claim that boundaries do not matter, see Weintraub, supra note 11, § 9.4, at 574; Currie & Schreter, Equal Protection, supra note 40, at 42–51; Sedler, supra note 47, at 642.
408. For further argument in support of this position, see Regan, supra note 27, at 1887–95.
409. See Dane, supra note 29, at 1218–23; see also Brilmayer, supra note 6, at 173 (making same argument with special reference to regulation of primary conduct).
goals of predictability and uniformity of result are means to this end of enforcing norms. People cannot obey the law unless they know it; they cannot know the law unless they know which law to learn. If I am to know the law that governs an act or transaction, I must be able to identify, before I act, the one state empowered to govern. It is no answer to say that I can usually comply with the more restrictive rule because that eliminates the political authority of the more permissive state. Nor is it an answer to say that I do not need to know rules of compensation, loss allocation, and the like. I believe that one should generally obey the applicable law even if the sanctions for violation are light, but this view is not universally shared. If we give even a little credence to the insights of law and economics, my need to know the law extends to rules that specify the consequences of compliance and violation.

No set of choice-of-law rules has yet achieved a high degree of predictability in hard cases, but only territorial rules offer any hope. When the applicable law depends on the forum in which litigation is eventually conducted, it is impossible in principle to know which law will govern my conduct. It is only a little better for the applicable law to depend on the residence of strangers. I can know the residence of the few people with whom I have continuing relationships, but not of the thousands of people with whom I share highways or have casual interactions. So if the governing law may depend on the residence of the person with whom I come to have a dispute, it is impossible in principle to know which law governs my conduct.

By contrast, I can be in only one place at a time, and I can always know where I am. I can always know the people with whom I have longstanding relationships, and if those relationships have a clear principal location, I can know where that is. The presumptive rules of obeying the law of the place where I am, and with respect to particular relationships, of obeying the law of the place where that relationship is principally located, make the applicable law turn on facts within my knowledge. Unlike approaches based on forum or domicile, these territorial approaches make it possible in principle to identify the applicable law and obey it.

Many interest analysts seem to believe that few people know or

410. See, e.g., Kramer, supra note 17, at 313 & n.113; Restatement (Second), supra note 15, § 6(2)(f) & comment (i).
411. This answer is suggested in Ely, supra note 178, at 711-12.
412. See, e.g., the distinction between "rules of the road" and "award or limitation of damages" in Eischen v. Baumer, 557 N.E.2d 142, 144 (Ohio Ct. App. 1988).
414. See Gottesman, supra note 17, at 45-46.
415. The point is also made in Brilmayer, supra note 6, at 78.
416. Compare Lord Kames' introduction to what is probably the first scholarly treatment of choice of law written in English, arguing that societies shifted from
care about the law anyway.\textsuperscript{417} A variation on this point is to assert that even if they do know the law, all persons should anticipate that their conduct at any moment might be held subject to the law of any state.\textsuperscript{418} The extreme illustration of this tendency is Louise Weinberg's snow-clearing hypothetical.\textsuperscript{419} She posits an out-of-state traveler, stopping at a stranger's house to ask directions, slipping on a snowy sidewalk. She would allow the traveler to recover under his home state's law requiring property owners to clear the snow, even though the situs has no such law and the homeowner has consciously complied with local laws that did apply. I assume she would reach this extraordinary result even in cities where the occasional snows are so rare that no homeowner has a snow shovel. She lives in such a city (Austin, Texas), so the possibility should not have escaped her notice.

The reality is surely that people know some law but not all law, and that some people know much more law than others. I suspect that on average litigants know more law than interest analysts give them credit for. But the principal point is normative, not empirical. We feel strongly enough about some norms to enact them into positive law and back them with the coercive power of the state. We want people to learn those norms and obey them. We must therefore make it possible for them to do so and reward them for doing so.

Some interest analysts would give a defense to people unfairly surprised by an unexpected choice of law, although they almost never seem to find that this standard is met.\textsuperscript{420} Even if such a standard were fairly applied, it would leave all the litigation risk on the people we want to encourage—on the ones who actually learn and obey the law. Our fundamental law implies the opposite choice. State authority is in fact divided territorially. It is not divided some other way with an occasional territorial exception. State boundaries do not give rise to a mistake-of-law defense for those who think boundaries matter. State boundaries do what ordinary citizens think they do: divide the authority of separate sovereigns.

B. Authority to Adjudicate and Authority to Regulate

It is now possible to address one remaining question under the Full Faith and Credit Clause. I have urged the need for a single appl-
cable law, identifiable in advance, as part of the reason for territorial choice-of-law rules and as part of the full-faith-and-credit policy that each state should apply the same law. It is not similarly necessary that authority to adjudicate be vested in a single court that can be identified before the dispute arises. A case can be decided by any court that acquires jurisdiction over the defendant, whether by transient service, consent, or attachment of property in the Founders' time, or by broader notions of submission to judicial authority in our time. What made the unpredictability of the forum tolerable in the Founders' time was their belief in a determinate set of choice-of-law rules. If the same law will be applied anywhere, it matters much less where the case is tried.

This is why conflict-of-law rules can recognize jurisdiction in more than one state to adjudicate a case, but cannot, in my view, recognize jurisdiction in more than one state to prescribe the substantive law to govern a case or an issue in a case. This last point may be the source of much of my disagreement with the Supreme Court. The Court has agreed that the Full Faith and Credit Clause was to be "interpreted against the background of principles developed in international conflicts law." But, the Court said that "since the legislative jurisdictions of the states overlap," the Full Faith and Credit Clause frequently permits application of the law of any one of several states. It is this premise of overlapping jurisdiction that effectively reads full faith and credit to acts out of the Constitution.

The Court's notion of overlapping legislative jurisdiction seems parallel to overlapping adjudicative jurisdiction, but that parallel is misleading. Full faith and credit to judgments is interpreted as it should be: relatively simple federal rules identify a single judgment that controls in all states. Many states may have jurisdiction to adjudicate a matter, but once the first such state enters a judgment, all other states owe full faith and credit to that judgment. No other state is free to reason that it too had jurisdiction to adjudicate, and that therefore, it is free to ignore the other state's judgment and decide the case itself.

Full faith and credit to acts has been interpreted very differently. The Court says that many states may have jurisdiction to legislate on a matter, just as it says many states may have jurisdiction to adjudicate. But the Court has not developed any federal rule for selecting a single statute that controls in all states. It has not said that the first such statute controls, nor has it developed any more sensible rule. Rather, the Court has said that each of the other states may reason that it too has jurisdiction to legislate on the matter, and that therefore, it is free to ignore the other state's law and govern the matter itself.

Thus, overlapping jurisdiction has been a reason to require full faith

422. Id. at 727.
and credit to sister-state judgments; because the first court had jurisdictions, the second state owes full faith and credit. But the Court has offered overlapping jurisdiction as a reason to refuse faith and credit to sister-state acts; because the second state has jurisdiction, it owes no full faith and credit to the first. Sister-state acts rarely get any faith and credit until their application is reduced to judgment. And then, the faith and credit is given to the judgment, not to the act. The Court has recognized that the Full Faith and Credit Clause must be interpreted in light of conflict-of-law principles, but it has failed to give effect to that insight.

V. SOME PRELIMINARY THOUGHTS ON SPECIFIC TERRITORIAL RULES

A. The Content of Territorial Rules

The territorial allocation of authority among states provides a basis for answering the question that the Full Faith and Credit Clause assumes: when does each state’s law apply? What is required of choice of law is to work out the details of that allocation in a way that will work in a sophisticated legal system, but that is derived from and consistent with the territorial allocation of authority in our constitutional scheme.

The academic attack on territorialism has consisted largely of an attack on unsound territorial rules from the turn of the century. It is easy to make fun of the First Restatement, but that does not show the unworkability of territorialism. The problem with the Restatement is not territorialism, but mindless conceptualism. In a world with thriving interstate commerce, and with complex relationships, intangible property, and other things that are subject to regulation but hard to locate, a simple-minded Bealean approach will not work. But that obvious truth does not change the fundamentally territorial allocation of state authority. Beale’s rules were crude, but territoriality did not make them so. They were crude because they tried to derive the solution to every choice-of-law controversy from the single premise that rights vested at the place of the last act necessary to the right. Critics of the Restatement appear to have assumed that all of Beale’s mistakes were inherent in territorialism, and they diverted a generation of conflicts scholars from the task of developing more sensible and sophisticated territorial rules.

Developing such rules is a major task; my views on any particular territorial rule are much more tentative than my view that territorialism is the only approach consistent with the federal structure. But it is necessary to sketch possible solutions to a few recurring problems, including some hard ones, to illustrate the claim that territorial rules can transcend the First Restatement.423 Subsequent scholarship may do

423. See Posnak, supra note 223, at 689–90 (complaining that most new territorialists have failed to provide specific rules that can be attacked); Kramer, supra note 17, at 279 (same).
better, and will certainly proceed further; I merely offer some initial suggestions.

By a territorial choice-of-law rule, I mean a rule that defines a class of cases and designates a controlling contact, the location of which will supply the governing law for all cases within the class. When the subject of the states' disagreement is unambiguously located in one state or the other, that should be the end of the matter. But location is sometimes ambiguous, or even fictional. In those cases, it is important to identify precisely what it is that the two states disagree about, and then to consider which state will generally have the greatest interest in the subject of the disagreement. At the margins, it is useful to consider the federal system's need for a clear rule that will unambiguously resolve recurring cases, and the likely territorial conceptions of the average citizen. These considerations are listed in approximate order of importance. I need to work through some examples to show how they relate. The ultimate goal is to decide which state has the strongest territorial claim to govern each issue in each class of cases.

A sophisticated territorialism would recognize that often the law's purpose is to regulate a relationship among a group of people, and that the particular event that caused a dispute within the relationship is incidental to the larger relationship and the regulatory scheme that governs it. A continuing relationship requires stable regulation under a single law, even if there is an element of legal fiction in locating the relationship. Most obviously, the relationship of a husband and wife is sensibly located in their common home state, and that law should govern even when they travel abroad or invest in property abroad. The common home state has by far the greatest interest in regulating relationships formed there; such domicile-based choice of law rules impose no disadvantage on citizens of sister states; and it is perfectly sound to reify the relationship and locate it at home. If one spouse moves to a new state, that unilateral act cannot change the law governing the relationship; the law of the original common home state should continue to govern until and unless both spouses move elsewhere.

Similar reasoning applies to relationships between business partners, to investors in a corporation, and to the relationship between a citizen and his state. Often the same reasoning can apply to contractual relationships and to short-term relationships such as that between

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424. See Singer, supra note 17, at 26–31 (arguing that territorial rules require analysis of interests to choose the controlling territorial contacts).
428. See, e.g., New York ex rel. Cohn v. Graves, 300 U.S. 308 (1937) (holding that state can tax its residents on income earned elsewhere); supra notes 131–143 and

430. Ely, supra note 22, at 217.

431. Cramton et al., supra note 18, at 337; Twerski, Enlightened Territorialism, supra note 13, at 389.


433. The example is based on Tooker v. Lopez, 249 N.E.2d 394 (N.Y. 1969), which ignored the location of the relationship and applied the law of the common domicile. For an analysis of the case similar to mine, see Twerski, On Territoriality, supra note 13, at 161–62.

434. For further analysis, see Twerski, On Territoriality, supra note 13, at 160–67.
of the place where a relationship is located is a territorial approach. When there is no relationship, nothing is located in the common domicile, and there is no basis to anticipate the law of the common domicile. Wisconsin drivers in Minnesota cannot look out for other Wisconsin license plates, moving back and forth between Minnesota and Wisconsin law depending on what other cars are approaching. Applying the law of the relationship also avoids or reduces some other practical difficulties. Close cases will rarely arise from the legal technicalities of domicile or from post-event changes in domicile, and local residents will not be able to avoid local law by pointing to a technical domicile somewhere else.\textsuperscript{435} The outcome of lawsuits will not depend on a state of incorporation selected by one of the parties.\textsuperscript{436}

Instead, close cases will arise when citizens of different states see each other in both states and the relevant relationship cannot be confidently located in either. An example is \textit{Blakesley v. Wolford},\textsuperscript{437} where a Pennsylvania patient's local doctors arranged a consultation with a Texas surgeon who was in Pennsylvania to give a speech. He agreed to operate, but only in his own facilities in Texas. In the ensuing malpractice action, the patient claimed they had formed the doctor-patient relationship in Pennsylvania, and that Pennsylvania law applied throughout the relationship. The court disagreed, finding it far more significant that the patient had voluntarily traveled to Texas for the operation, and that the surgeon's allegedly inadequate warnings were given there.\textsuperscript{438}

The court got it right. There was never a local relationship in Pennsylvania. There was only a first meeting in Pennsylvania to discuss the possibility of further interaction in Texas. If the relationship cannot be confidently located in a single jurisdiction, and if the parties have not agreed on a jurisdiction to govern their relationship, then no jurisdiction has power to govern the relationship wherever the parties may go. The only alternative is to apply the law of the place of the events giving rise to the dispute. Once the court rejects the claim of a Pennsylvania relationship, \textit{Blakesley} is an example of the common case of disputes between local residents and travelers. When there is no pre-existing relationship in either state, there is no basis to override the plain fact that the plaintiff submitted to the authority of Texas when she entered that state, and that the legally significant events occurred there.

Some variations on \textit{Milliken v. Pratt}\textsuperscript{439} also serve to illustrate disputes between local residents and travelers. If a door-to-door salesman had sold goods to the Pratts at their Massachusetts home,

\textsuperscript{435} These criticisms of domiciliary rules appear in Posnak, supra note 223, at 703–04.

\textsuperscript{436} See Brilmayer, supra note 6, at 88–89 (arguing that interest analysis cannot deal with corporations because they have multiple and artificial domiciles).

\textsuperscript{437} 789 F.2d 236 (3d Cir. 1986).

\textsuperscript{438} See id. at 243.

\textsuperscript{439} 125 Mass. 374 (1878), discussed supra text accompanying notes 146–154.
Massachusetts law should apply. If the Pratts had purchased goods off the rack at Milliken's store in Maine, Maine law should apply. The law of the place where the contract was made would achieve these results, but that is not the rationale. The rationale is simply that the entire transaction occurred in only one state. The same reasoning would apply if their automobiles collided in one state or the other. Neither party can carry her own law with her like a Roman citizen visiting the barbarians. If one party could insist on her own law, so could the other, and disputes between them would have no determinate solution. The full-faith-and-credit goal of uniform results would be defeated. "The position that a citizen carries with him, into every State into which he may go, the legal institutions of the one in which he was born, cannot be supported."

Some of the most difficult cases are interstate transactions conducted by phone or mail, where neither party leaves his home state. These cases are difficult precisely because there is no good basis to say that the transaction occurred in one state or the other or that the relationship was located in one state or the other. Milliken v. Pratt was such a case, and Currie used this especially difficult case in his attempt to show the perversity of territorial rules. He had great fun with Beale's suggestion that we apply the law of the state where the offer was accepted, but that only proves that Beale failed to solve a hard problem. If the fundamental allocation of authority among states is territorial, we should look to the implications of that allocation in hard cases as well as easy ones. If I can identify a sensible territorial rule for interstate contracts by mail or phone, that would go far towards showing that territorial solutions are possible and that further efforts to develop such rules are justified.

One possible solution is to identify the party who initiated the interstate transaction, and treat him like the traveler, consciously submitting to some other state's law. Such a standard can be applied quite generally, is relatively immune to manipulation by the parties, and is supported by some lower court precedent in jurisdiction cases.

440. See Brilmayer, supra note 6, at 216; Ely, supra note 22, at 192; Note, Products Liability and the Choice of Law, 78 Harv. L. Rev. 1452, 1465–66 (1965).
441. Lemmon v. People, 20 N.Y. 562, 608–09 (1860) (Denio, J., seriatim). For similar reasoning in the eighteenth century, see Banks v. Greenleaf, 2 F. Cas. 756, 757 (C.C.D. Va. 1799) (No. 959) ("[I]f the citizens go abroad and submit to their laws, as temporary subjects, they must be bound .... [I]f a foreigner came into our country, and there enter a contract, the laws of his nor any other foreign country can be received to control, alter, or discharge it.").
442. See, e.g., Currie, supra note 145, at 235–36.
443. See Conn v. Whitmore, 342 P.2d 871, 874 (Utah 1959); see also Scullin Steel Co. v. National Ry. Utilization Corp., 676 F.2d 309 (8th Cir. 1982) (holding that Missouri lacked jurisdiction over Pennsylvania defendant, where an agent of the plaintiff went to Pennsylvania and defendant's only contacts with Missouri were by phone and mail); cf. McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957) (stating that California could assert jurisdiction over party to "a contract which had substantial
also has considerable intuitive appeal in clear cases. If the Pratts call
Milliken in Maine, where he does only local business, and ask him to
send a specialty item that they heard about from a friend, it hardly
seems fair to expect that Massachusetts law will apply. They would
have sought out a transaction with a Maine merchant who did not seek
Massachusetts business. They would be responsible for the interstate
nature of the case, just as if they had traveled to Maine. Conversely, if
Milliken advertises his goods in the Massachusetts press and the Pratts
respond to his ad, he has initiated business in Massachusetts and is
fairly subject to Massachusetts law with respect to the resulting transac-
tions. Some cases would be factually close under such a rule, but that is
true of any rule. This rule lends itself to operational rules of thumb; for
example, in contracts concluded by mail or phone, apply the law of
seller’s state unless seller has solicited or advertised in buyer’s state.

Identifying the party responsible for the interstate nature of the
case has potential application in tort as well as in contract. When a New
York seller ships a product to Oklahoma, where the product causes an
injury, I would apply Oklahoma law. That case is very different from
the case where a New Yorker sells to a buyer in New York who then
takes the product to Oklahoma. In neither case did the New York
seller literally act in Oklahoma. But in the first case, the seller deliber-
ately caused consequences in Oklahoma; in the second case, the
Oklahoma consequences were foreseeable only in the sense that any-
thing might happen. In the first case, the seller is responsible for the
product’s presence in Oklahoma; in the second case, the buyer is re-
sponsible. The party responsible for the interstate nature of the case is
roughly analogous to the traveler who goes to the other state.

A harder variation on these facts is the case where the New York
seller sells in New York, the buyer takes the product to Oklahoma, and
the defective product injures a third party in Oklahoma. In a suit by the
Oklahoma victim against the New York seller, neither litigant has mean-
ful responsibility for the interstate nature of the case. Neither liti-
gant has done anything with foreseeable consequences in the other
state; neither state has any plausible territorial claim to govern the
rights and liabilities of the other state’s citizen. Yet such cases cannot
be left in a state of anarchy. If Congress will not govern them under

connection with that state,” not explicitly relying on fact that defendant had assumed
liability on California insurance policy without any request or initiative by plaintiff).

444. On the advantages of rules in the choice-of-law context, see, e.g., William C.
Powers, Formalism and Nonformalism in Choice of Law Methodology, 52 Wash. L. Rev.
27, 28–57 (1976); Willis L.M. Reese, Choice of Law: Rules or Approach, 57 Cornell L.
Rev. 315 (1972). For interest analysts’ traditional opposition to rules, and for their
more recent conclusion that at least some rules would be helpful, see the books and

(holding that Oklahoma court lacked personal jurisdiction over seller on these facts).
the commerce power, Congress or the federal courts must decide which state will be permitted to govern them.

We might plausibly break this tie by asking which litigant had the closest relationship to the party who is responsible for the interstate nature of the case. If the plaintiff is a family member, an employee, a co-worker, or even a friend of the buyer, we might impute the buyer's travel to the plaintiff and apply New York law. But if the plaintiff is a mere bystander, or another driver on the highway, with no relationship to the buyer, then we might impute the buyer's travel to the seller and apply Oklahoma law. The seller at least entered into a sales transaction with the party who took the product to Oklahoma, which is more than the plaintiff did.

Alternatively, we might simply apply the law of the place of injury to most issues in all products liability cases. That has the great virtue of simplicity, at the cost of some unfairness to local retailers and regional manufacturers. Or we might apply the law of the place where the product was last sold, making it much easier for sellers to know the law that will apply to their conduct, at the cost of some unfairness in the rare case involving injury to bystanders unconnected to anyone who owned or transported the product. These sorts of tradeoffs between equity and simplicity are common, and the Supreme Court or Congress creating uniform choice-of-law rules could plausibly decide either way.

In some of the hard cases, careful categorical analysis of particular laws may generate more specific rules. For example, one might plausibly conclude that the consumer's home-state consumer protection laws should apply to interstate consumer transactions conducted by mail or phone. This is not because the consumer's state has the greater interest in applying its consumer protection statutes. That assertion has a surface plausibility, but on reflection it is indefensible. Consumer protection statutes balance the interests of consumers and merchants, and each state has an equal interest in applying its balance of the competing interests to a transaction that occurs partially within its borders.

The argument for a territorial rule focused on the location of the consumer depends on prosaic functional considerations. First, the consumer's expectations about the applicable law in interstate transactions are likely to be less sophisticated than the merchant's. Second, mail order merchants can amortize the cost of learning sister-state law over many transactions. Consumers cannot, and in the great bulk of cases, the cost of learning sister-state law in anticipation of a single consumer transaction is prohibitive. Third, applying the law of the merchant's state would tempt some states to create a Delaware for mail order

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446. See McConnell, supra note 24, at 98-99 (arguing that "place of sale" rule would discourage extreme liability rules and enhance ability of manufacturers to respond to different states' product liabilities laws by differential pricing).

447. Cf. Singer, supra note 17, at 45-47 (arguing that all laws are compromises, protecting the interests of potential defendants as well as potential plaintiffs).
merchants. Fourth, applying the consumer’s law is a simpler rule, with fewer ambiguous cases, than applying the law of the person who did not initiate the transaction. At this level of detail, the rule’s clarity may be more important than its content.

But if a rule applying the consumer’s law were adopted, it would have to be applied uniformly to all mail and phone cases, even when the local consumer is disadvantaged. The waiver provisions of his home state law would apply along with the protective provisions. Any more generous protection of the merchant’s state would be unavailable. Moreover, such a rule is defensible only in phone or mail cases. If the consumer actually travels to another state and engages in a transaction there, he could no more carry his law with him than the merchant could. The state where he travels must protect him just as it protects its resident consumers.

It will often be helpful to identify precisely the point of disagreement between the two laws. Suppose a husband and wife from New Jersey, where the speed limit on interstate highways is 55 miles per hour, have a wreck in Texas where the speed limit is 65. Surely no one would suggest applying the New Jersey speed limit to determine whether the driver was per se negligent.448 We would apply the New Jersey rule on spousal immunity to the relationship wherever they go, but we would apply the traffic rules of each state through which they pass. We should also apply the negligence standard of each state through which they pass. Different spousal immunity rules reflect a disagreement about the marital relationship, which can be sensibly located in the home state. But different negligence rules reflect a disagreement about safe driving, which can be located only in the place where one drives.

This analysis can also be helpful in more difficult cases. Consider Schultz v. Boy Scouts of America, Inc.,449 where a New Jersey scout leader sexually molested two members of his troop while on a camping trip in New York. The scout troop was sponsored by a church. The victims sued both the Boy Scouts and the religious order that ran the church. New Jersey retained charitable immunity; New York did not. Plainly the two states did not disagree about the wrongfulness of child molesting—they disagreed about the rules to govern relationships between charitable enterprises and their clients. The relationship between the victims and the Boy Scouts, and between the victims and their church, were unambiguously New Jersey relationships. The New Jersey victims joined a New Jersey scout troop and a New Jersey church in New Jersey, and the great bulk of their activities with the troop and

448. But cf. Louise Weinberg’s sidewalk-clearing hypothetical, described supra text accompanying note 419. If I must obey another state’s more cautious rules for clearing snow, I suppose a fortiori I must obey its more cautious speed limit. The potential harm of disobedience is so much greater.

the church occurred in New Jersey. If you join a charitable organization in New Jersey, you enter into a relationship with an immune organization. New Jersey's immunity law should apply to torts within the relationship, wherever they occur. \footnote{Cf. Singer, supra note 17, at 94–101 (reaching same result from an interest analysis perspective).} Note that the states of incorporation of the Boy Scouts, and of the religious order that ran the church, are irrelevant to this analysis. The state of incorporation might be relevant to identifying a state with an interest in protecting defendants, but it is not relevant to locating the relationship with the victims.

Identifying the precise point of disagreement will sometimes result in depecage, or applying the law of different states to different issues in the same case. \footnote{For a review of the unfortunately named concept of depecage, see, e.g., Weintraub, supra note 11, §§ 3.4–3.4A, at 71–78.} The case of the married couple driving in a state other than their domicile is an obvious example. Identifying the point on which the states disagree bears some resemblance to characterization, and in the hands of a determined court, it may be subject to similar abuses. \footnote{On characterization, see, e.g., Cramton et al., supra note 18, at 70–94.} But the potential for abuse and manipulation is less, because I would ask a factual and functional question: What is it in the real world that these states disagree about. I would not ask a pleading question, so that the result might depend on whether the plaintiff emphasized a tort theory or a contract theory.

Russell Weintraub said of an earlier draft of this section that I am engaged in "sophisticated interest analysis." If he wants to adopt my proposals and call them interest analysis, he is welcome to do so. I will not quibble over labels, and I would be delighted to help forge a new synthesis of territorial rules acceptable to interest analysts. But there are fundamental differences between the analysis I propose and all that has previously been done under the label of interest analysis.

I would consider each state's interest in regulating potential disputes. But I would consider state interests only as a step to selecting a particular person, thing, relationship, act, or event that will be controlling in locating the dispute within a territory. The goal is to specify a choice-of-law rule that will then be applied to all cases that fall within the rule, without regard to any state's interest in a particular case. This choice-of-law rule will select a jurisdiction to govern, without regard to the content of that jurisdiction's substantive rule. The choice-of-law rules I am proposing in this section are thus "jurisdiction-selecting rules," in David Cavers' famous phrase. \footnote{Cavers, supra note 9, at 173.} Unless a court errs in applying the rule, the controlling law will be the same in either state, and costs and benefits will fall where they may among the litigants. Such rules are territorial choice-of-law rules, but formulated with an eye to state and multi-state interests. Territorialism is not equivalent to mind-
less conceptualism, and just because it seems sensible does not make it interest analysis.

B. The Power to Specify Choice-of-Law Rules

I have argued that our fundamental law allocates state authority territorially and that this allocation should drive choice of law. It is also plain that the development of sound territorial rules requires judgment: their details are not an indisputable natural law apparent to all. But if different states make different judgments, the goals of uniformity and predictability cannot be fully met, the law's role as a source of enforceable norms is weakened, and the three constitutional principles outlined above are undermined.

Thus, the constitutional scheme for allocating authority among the states is not complete without an allocation of authority to specify choice-of-law rules. That authority cannot reside in the states, because each state is equal to all the others and no state's view can control. And states tend to be biased in favor of their own citizens and their own law; that is why we needed the Privileges and Immunities and Full Faith and Credit Clauses in the first place. Thus, the authority to make choice-of-law rules is put in the only place the Founders could plausibly put it: in Congress or the Supreme Court under the Full Faith and Credit Clause. Recall that the Full Faith and Credit Clause includes an Effects Clause: "Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." It is common ground that Congress can designate the authoritative state law under the Effects Clause, specifying which state's law gets full effect in each class of cases, and concomitantly, that no other state's law gets any effect in that class of cases. Failing congressional action, the Court can designate the authoritative state law in deciding cases under the Full Faith and Credit Clause and under the implementing statute. Federal specification of applicable law is binding; all states owe full faith and credit to that one law. The failure of Congress and the Court to deal with choice-of-law problems is a major abdication of responsibility.

On reading an earlier draft of this article, Larry Kramer argued that Congress has exclusive power to specify choice-of-law rules under the Effects Clause, and thus, the Effects Clause preempts independent judicial power to enforce the Full Faith and Credit Clause. If this were so, it would seem to follow a fortiori that the Effects Clause preempts state choice-of-law rules. But no one is claiming that. No one, certainly not Kramer, really believes the Effects Clause is an exclusive power.

454. U.S. Const. art. IV, § 1 (emphasis added).
455. See supra notes 301-302 and accompanying text.
456. See supra note 303 and accompanying text.
If the Effects Clause were really exclusive, the Supreme Court could not reject any state choice-of-law decision, however outlandish. The Court and almost all commentators agree that a state denies full faith and credit when it applies its law to a dispute that is wholly local to some other state. 457 That is a Court-made choice-of-law rule to implement the Full Faith and Credit Clause. The issue is not whether the Court will devise choice-of-law rules, but whether it will devise determinate rules that implement the purpose of the Clause, or toothless rules that reverse an occasional erratic state court decision but make no contribution to the federal structure.

The Effects Clause is not plausibly read as preempting anything. The Effects Clause authorizes but does not require congressional action. Whether or not Congress acts, the Full Faith and Credit Clause is self-executing, 458 and therefore judicially enforceable under Marbury v. Madison. 459 Judicial enforcement is impossible without choice-of-law rules, so the possibility of judicial enforcement without congressional action necessarily entails the possibility of judicially specified choice-of-law rules. If Congress someday specifies more detailed choice-of-law rules, those rules will preempt any inconsistent judicial rules. But the preemptive effect will come from the statute, not from the Effects Clause.

Even if the unexercised Effects Clause were preemptive, the Clause is not unexercised. Congress has exercised its power under the Effects Clause by referring the problem back to the federal courts. Even more explicitly than the Constitution alone, the Full Faith and Credit Act's requirement that each state apply the "same" law requires more detailed choice-of-law rules if it is to make any sense. 460 There is no reason to doubt that Congress expected courts to enforce the Full Faith and Credit Act like any other statute. Congress has not specified the detailed choice-of-law rules necessary to that enforcement; it must therefore expect the courts to specify them. And there is no provision analogous to the Effects Clause that even arguably preempts judicial power to specify choice-of-law rules to implement the statute.

It is not at all surprising that the Constitutional Convention and the Congress would rely on courts to specify detailed choice-of-law rules. Choice-of-law rules were judge-made in the time of the Founders, and they are mostly judge-made today. Congress has left choice of law to the federal courts, and nothing in the Constitution precludes Congress from making that choice.

Federal choice-of-law rules may readily be conceived as constitutional law—as the implied commands of the Full Faith and Credit Clause. But I think they are better conceived as federal common law if

458. See supra notes 256–258 and accompanying text.
459. 5 U.S. (1 Cranch) 137 (1809).
made by the Court, and obviously as statutory law if made by Congress. Thinking of these rules as common law removes any sense of anomaly about Congressional power to change rules announced by the Court, and the common law label may be more conducive to the period of flexibility and experimentation that would be necessary to develop a workable set of rules. Whichever label is chosen, the essential characteristics of these rules are the same. These choice-of-law rules are created to implement the Full Faith and Credit Clause, they are binding on states under the Supremacy Clause, and court-made rules are subject to revision by Congress under the Effects Clause.

There is nothing anomalous about such a set of court-made rules. In suits between private parties as well as in suits between states, the Court has created federal common law to resolve interstate disputes over boundaries, water rights, and conflicting claims of escheat. Early on the Court applied common law principles to such cases and rejected the argument that it had to wait for Congress to enact implementing legislation. The Court has commented that an interstate boundary dispute is "in its nature a federal question." Disputes over the boundary of authority between conflicting state laws are similarly federal in nature, and in default of legislation, the Court must create federal common law to resolve such disputes.

A federal common law of choice of law to implement the Full Faith and Credit Clause and Act would also parallel the federal common law implementing other statutes and constitutional clauses. The Court frequently makes federal common law to implement federal statutes, sometimes explicitly, as in the enforcement of labor contracts, sometimes without acknowledgement, as in the law of federal injunctions against state judicial proceedings, and sometimes in the guise of in-


464. See, e.g., Delaware v. New York, No. 111 Orig., (pending in the Supreme Court); Western Union Tel. Co. v. Pennsylvania, 368 U.S. 71 (1961). The analogy to these interstate disputes is also noted in Friedrich K. Juenger, Governmental Interests—Real and Spurious—in Multistate Disputes, 21 U.C. Davis L. Rev. 515, 529 (1988).


terpreting a silent statute, as in the law of damages and immunities under section 1983. Section 1983 presupposes rules about remedies in the same way that the Full Faith and Credit Act presupposes rules about choice of law. Similarly, the Court has necessarily created a common law of constitutional remedies, including injunctions, monetary compensation, and exclusionary rules. In suits against federal officials and in cases arising before 1871, this power was based directly on the Constitution, without even a general legislative authorization of the sort found in section 1983. These remedies were necessary to implement the Constitution, just as choice-of-law rules are necessary to implement the Full Faith and Credit Clause. For the Court to refuse to develop implementing choice-of-law rules is to ignore an act of Congress and a clause of the Constitution, rendering both dead letters.

This authority granted to the Court is no delegation of unbounded discretion. Rather, the Court is to implement the territorial division of authority among the states, drawing on the territorial principles of choice of law that have been developed at common law and that already existed in rudimentary form in the time of the Founders. The Court must make choices with respect to details, but the choices are guided by concrete principles set forth in the Constitution and the federal structure.

Congress may be expected to leave the problem to common law because there are no votes to be gained by resolving it. The victims of discriminatory choice-of-law decisions are a dispersed and anonymous minority, many of them victimized only once, incapable of organizing as a political force. The victims who could organize, such as insur-

474. See, e.g., Harlow, 457 U.S. 800; Carlson, 446 U.S. 14; Bivens, 403 U.S. 388; Bolling, 347 U.S. 497; Silverthorne Lumber, 251 U.S. 385; see also Brown, 349 U.S. 294 (ordering remedies in Bolling without distinction from suits against state defendants).
476. See Bruce Ackerman, Beyond Carolene Products, 98 Harv. L. Rev. 713 (1985) (arguing that dispersed and anonymous minorities lack the ability to organize as an
choice companies and product manufacturers, are more concerned with other political agendas, although Michael Gottesman persuasively argues that they have strong reason to turn their efforts to choice of law.  

The Supreme Court has also tended to ignore dispersed and anonymous minorities, finding it easier to empathize with the well-organized minorities it calls discrete and insular. But the lack of any well-organized minority group is not a sufficient explanation. The Supreme Court has enforced constitutional limitations on the jurisdictional reach of state courts; why not the more important constitutional limitations on the authoritative reach of state law?

One argument against the federal courts making binding choice-of-law rules is that they may make bad rules. That is not a reason to take the issue away from the only institution that might conceivably be able to resolve it. All courts make mistakes, but where uniformity and non-discrimination are the goals, one neutral, ultimate authority is better than fifty biased, ultimate authorities. Nor is there any reason to believe that we will be stuck forever with the Supreme Court's mistakes. If the Supreme Court creates an unworkable choice-of-law rule, litigants and lower courts are quite capable of telling it so, and if a bad rule imposes real social costs, even Congress might be motivated to act under the Effects Clause.

The argument that the Supreme Court makes mistakes is an argument against judicial review generally. It is not an argument against judicial review of choice of law in particular. Indeed, I see less to fear here than in most areas of constitutional law. If the Supreme Court once accepted the three principles I have reviewed, the development of specific territorial rules would be largely a matter of detail. Some rules would be better than others, and I can imagine some that would be awful, but on many issues, the content of the rule would matter far less than the fact of a rule. Almost any rule would do as long as it was clear, settled, and binding throughout the land. Even if the Supreme Court erred seriously and often, it is hard to imagine it making a worse mess than the chaos of the last thirty years.

Another institutional advantage of federalizing the area would be

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479. See Cavers, supra note 196, at 737–38 (arguing that historical "record of the federal judiciary as umpires in cases of conflicting state law was far from distinguished").
480. See also Monaghan, supra note 461, at 1–32 (arguing that Congress has general authority to modify common-law implementation of constitutional rules). Monaghan's argument is unnecessary here, because the Effects Clause explicitly gives Congress that authority with respect to Full Faith and Credit.
481. Cf. Benjamin N. Cardozo, The Paradoxes of Legal Science 67 (1928) (arguing that in choice of law, "the finality of the rule is in itself a jural end").
to bring the talents of the lower federal courts more fully to bear on the problem. This resource is now largely wasted, because the lower federal courts are bound by the choice-of-law rules of the state where the district court sits. The waste is large, because a large portion of choice-of-law cases are diversity cases. Those cases provide the vehicle for more than seven hundred federal judges to help develop a body of federal choice-of-law rules, without placing the whole federal burden on the Supreme Court. Only that Court can force state courts to follow federal precedent, but the lower federal courts can do much of the work of elaborating the principles announced by the Supreme Court. As we have seen, this is the most important purpose of the diversity jurisdiction. If Congress ever acts on proposals to abolish diversity jurisdiction, it should consider retaining diversity jurisdiction solely to resolve choice-of-law issues. Federal courts might be authorized only to choose the applicable state law and remand the case to state court.

VI. Conclusion

Choice-of-law methods that prefer local litigants, local law, or better law are unconstitutional. These unconstitutional preferences are central to some so-called modern choice-of-law methods, and infect most other methods to some extent. The choice-of-law revolution has proceeded in disregard of the Constitution.

This conclusion breaks sharply with current law and scholarship on constitutional limits to choice of law. Yet my methods of constitutional interpretation are entirely conventional. I have emphasized the constitutional text, the constitutional structure, and secondary evidence of intent.

Nor have I relied on original intentions that have become anachronistic. It is not controversial to say that all Americans are entitled to equal treatment, that the states are of equal status and authority, or that states are divided territorially. It should not be controversial to draw the choice-of-law corollaries of these propositions: that courts owe equal concern and respect to citizens of sister states, that courts owe equal respect to sister-state law, and that the boundaries separating governmental authorities are the basis for rules separating the reach of conflicting laws.

The secondary evidence of original intent supports my thesis, but the most important arguments are structural. The three constitutional

482. For the argument that the Supreme Court is too busy to handle choice of law, see Cavers, supra note 196, at 738–39 (the "Court is confronted by demands upon its limited time and attention that are far too important to be set aside for the perplexing choice-of-law problems . . ."); Gottesman, supra note 17, at 20. Gottesman believes that the federal courts can enforce uniform interpretation of determinate statutory choice-of-law rules. See id. at 37–41. I believe they could also manage determinate judge-made rules.

483. See supra notes 178–181 and accompanying text.
principles I have identified are essential and mutually reinforcing elements of the federal structure. These three principles give simultaneous and consistent effect to the Privileges and Immunities Clause, the Full Faith and Credit Clause, and the territorial definitions of states, and they eliminate any tension with the Equal Protection Clause. Choice-of-law decisions may not be based on the forum, or on the better law, or on benefit to one litigant or the other, but they may be based on the location of the person, thing, relationship, act, or event to be regulated.

Full implementation of these constitutional provisions requires Congress or the Supreme Court to develop a determinate set of territorial choice-of-law rules. Federal responsibility for developing and enforcing these principles provides a neutral referee for interstate disputes, without displacing state authority on a single domestic issue. By contrast, leaving these matters to the states is inconsistent with the rule of law, because no person can know the law that governs his conduct until after his case has been decided.

Partial implementation requires only that the Court enforce the negative prohibitions of the Privileges and Immunities and Full Faith and Credit Clauses. The Court should reverse any choice-of-law judgment in which preference for local litigants, or a preference for forum law or better law or local public policy, played a role in the decision. States would be left free to develop their own choice-of-law rules within these restrictions. That would fall far short of the constitutional plan, but it would be a vast improvement over the status quo.

Forced to abandon the unconstitutional preferences that have dominated choice-of-law debates for a generation, courts and scholars might turn to territorial rules for lack of an alternative. We could then pursue the real task, never seriously attempted in the post-realist era, of developing determinate territorial choice-of-law rules for a modern society.