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Conflicts Law—State or Federal?†

GENE R. SHREVE*

I am delighted to join my colleagues in observing through this symposium the sesquicentennial anniversary of the Indiana University School of Law—Bloomington. The editors have asked us to select topics that look well into the future. This paper considers possibilities that state law, which currently dominates the subject of conflicts, might be displaced by federal law.

Should federal law come to dominate, the change would matter for several reasons. It would require a substantial expenditure of resources to make and enforce federal conflicts law. Growth of federal conflicts law would curtail state judges' authority to sort out the conflicts problems in their cases. In addition, the shift would necessarily alter the content of conflicts law. How much change will occur is an interesting source for speculation. How much should occur is a different and complicated question. This Article considers both.

I. THE SETTING

The purpose of conflicts law is to provide an intelligible and principled basis for choosing a substantive rule (perhaps tort or contract) over the competing rule of another place.1 Rules compete when their application would lead to conflicting results and when the relation of each place to the controversy is such that it is plausible for the rule of either place to govern. Conflicts law must legitimize the choice. It must explain why rejection of one law in favor of another is right.

This is sometimes called a horizontal conflicts model. Rules are on the same plane in the sense that neither must apply merely because it is applicable. The terms "conflict of laws" and "choice of law" most often apply to this situation. The horizontal model, however, does not describe conflicts between

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* Professor of Law, Indiana University School of Law—Bloomington. I wish to thank those who made helpful comments on the manuscript: Patrick Borchers, John Kozyris, Larry Kramer, William Reynolds, and William Richman. I take sole credit, of course, for any aspect of the Article that troubles the reader. Thanks finally to Michael Greene, Class of 1994, for his research assistance.
1. For the sake of simplicity, this paper takes as its model the conflicts case where choice is between forum law and that of one other place. The great majority of cases fit this model, but of course there are cases where forum law is but one of three or more possible choices, or where forum law is not a contending choice at all.
state and federal law. The latter are sometimes called vertical conflicts, although to think of them as conflicts at all may be confusing. The mere applicability of valid federal law resolves the conflict at once, because the Supremacy Clause of the Constitution displaces state law. Choice between conflicting laws poses no difficulty in the vertical realm; however, as this paper illustrates, significant questions arise there concerning the legitimate bounds of federal law-making authority and the policy wisdom of displacing state with federal law when authority to make the latter exists.

II. Why State Law Dominates the Subject

Business and leisure activities have become more interstate or international in character throughout this century. Conflicts issues in civil litigation have increased accordingly. Even so, American legal institutions have never rushed to make conflicts law. State law dominates due only to the forbearance of the Supreme Court and Congress.

The United States Supreme Court could have greatly influenced the development and content of conflicts law through constitutional adjudication. The Court did just that in cases on personal jurisdiction, a field with important similarities to conflicts. Most significant personal jurisdiction questions today revolve around the Due Process Clause of the Fourteenth Amendment. Similarly, much of the sphere of conflicts law could be filled


4. Naturally, laws do not always conflict. However, despite the efforts of groups like the Commissioners on Uniform State Law and the American Law Institute, states within our federal system (not to mention sovereigns elsewhere) often rest their substantive rules on different and conflicting judgments about how justice should be served. Cf. Richard A. Epstein, The Consolidation of Complex Litigation: A Critical Evaluation of the ALI Proposal, 10 J.L. & COM. 1, 23 (1990) ("The conflict of laws question has become even more pressing in recent years, for as states have passed tort reform statutes, the divergence in substantive law among them has increased accordingly.").


by more aggressive readings of the Full Faith and Credit, Due Process, Commerce, Equal Protection, and Privileges and Immunities Clauses.

Alternatively, the Supreme Court could use these clauses and other federal law-making inspirations to lead a federal common-law movement that would nationalize conflicts law. Or, Congress could take over matters by codifying some or all of conflicts law.

Law-making initiatives are perceptible at each of these levels, but barely so. The Supreme Court and Congress have largely foregone opportunities to

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7. On possibilities under full faith and credit, see, for example, Robert H. Jackson, Full Faith and Credit—The Lawyer’s Clause of the Constitution, 45 COLUM. L. REV. 1 (1945); James A. Martin, Constitutional Limitations on Choice of Law, 61 CORNELL L. REV. 185 (1976); James R. Pielemeier, Why We Should Worry About Full Faith and Credit to Laws, 60 S. CAL. L. REV. 1299 (1987).


14. Thus the Supreme Court periodically invokes the constitutional law of full faith and credit or due process to constrain choice of law. E.g., Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) (invoking both). A small amount of federal conflicts doctrine has materialized through the exercise of federal question and admiralty jurisdiction. E.g., United States v. Little Lake Misere Land Co., 412 U.S. 580 (1973); Kossick v. United Fruit Co., 365 U.S. 731 (1961); Siegelman v. Cunard White Star, Ltd., 221 F.2d 189 (2d Cir. 1955). In addition, Congress has lately demonstrated interest in codifying conflicts rules for a few specific areas. See infra notes 48-49 and accompanying text.
shape conflicts law, leaving the task to the states. State legislatures usually enjoy law-making supremacy over their state courts comparable to that which Congress enjoys over the federal courts. Therefore, the task of making state conflicts law passes first to them. Yet state judges usually receive little or no statutory guidance in grappling with conflicts problems. By default then, state judges decide most of the conflicts issues in their cases by administering state common law.

Most federal decisions are grounded in state common law as well. Federal cases that have an interstate dimension sufficient to present conflicts issues usually rest on diversity jurisdiction, and the *Erie* doctrine treats conflicts law as part of the state law that federal diversity judges must apply.


16. "In the division of responsibilities represented by the constitutional separation of powers, the legislature calls the main policy turns and the courts must respect its pronouncements." REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 67 (1975); see also P.S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW 8-9 (1987); G. ALAN TARR & MARY C. PORTER, STATE SUPREME COURTS IN STATE AND NATION 52-53 (1988).

17. For example, in *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 (1981), the Supreme Court announced that the "paramount authority of Congress" nullified federal common law that the Court had announced only a year before.

18. "A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law." 1 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(1) (1971).


III. THE CONTROVERSY SURROUNDING CONFLICTS LAW

It scarcely adds to the lustre of conflicts law to realize that state courts contribute most of its content because they alone cannot avoid the task. Matters are even worse. Those of us who study conflicts must regret that it is law frequently unpopular with lawyers, judges, law students, and even law professors.21 It is not entirely clear why this is so,22 but chief among the reasons must be the daunting nature of the subject:23 difficulties in framing issues, in deciding between complex and, at times, contradictory approaches to a solution, and in applying the approach selected to the facts of the case.24 These difficulties erode consensus about what conflicts law is or ought to be. Moreover, because the forum state for the conflicts decision usually is also a contending law source, choice of local law in close cases often fosters cynicism.

It might be best to elaborate on this rather charitable view of modern conflicts law, since it accounts for some of the skepticism with which I discuss reform initiatives over the rest of this Article.

Conflicts law is far from perfect. However, particular flaws have less to do with its unpopularity than one might think. Rather, it is the innate difficulties of analysis that have made conflicts controversial and have kept it that way. It may be a sad fact of human nature that the difficulty of a legal question is demonstrated less by agreement on that score among judges and commentators...

21. William Prosser spoke for many academic lawyers, then and now, when he called the subject “a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon.” William L. Prosser, Interstate Publication, 51 Mich. L. Rev. 959, 971 (1953).

22. For an attempt to describe the related difficulties of conflicts teaching, see Gene R. Shreve, Teaching Conflicts, Improving the Odds, 90 Mich. L. Rev. 1672 (1992).

23. Difficulties associated with conflicts analysis have long been recognized. E.g., BENJAMIN N. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 67 (1928) (noting that conflicts is “one of the most baffling subjects of legal science”); FRIEDRICH K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE 1 (1993) (“Alas, in spite of all the valiant intellectual efforts lavished on it, and the voluminous literature that has built up over the ages, the law of conflicts remains mired in mystery and confusion.”); Max Rheinstein, How to Review a Festschrift, 11 Am. J. Comp. L. 632, 655 (1962) (reviewing TWENTIETH CENTURY COMPARATIVE AND CONFLICTS LAW (Kurt Nadelmann et al. eds., 1961) (deeming conflicts the “most difficult and most confused of all branches of the law”). But see Larry Kramer, More Notes on Methods and Objectives in the Conflict of Laws, 24 Cornell Int’l L.J. 245, 247 (1991) (suggesting a need to “reorient choice-of-law analysis by viewing it in its ordinary procedural context,” where it is merely part of “the process of defining the elements of a claim or defense”).

24. Shreve, supra note 22, at 1673-77; cf. Arthur T. von Mehren, Choice of Law and the Problem of Justice, Law & Contemp. Probs. 27, 27 (1977) (“Those who work in the field of choice of law are, at times, discouraged by the apparently intractable nature of the problems with which they must grapple. Intricate and subtle analyses are undertaken; ambiguities and uncertainties are painfully resolved. Ultimately, a result is reached, yet the solution is too frequently neither entirely satisfying nor fully convincing.”).
than by the rising decibel level of arguments over who is obviously right and obviously wrong. The prevailing approach to resolving conflicts—whatever that approach then happens to be—will always be under attack.

Curiously little of the conflicts debate concerns what basic choice-of-law values should be. That appears largely settled. Policies guiding modern theory embrace the same core concerns that exerted an unacknowledged influence under old theory, which always should have mattered—that we should consider the purpose and intended reach of rules vying for application; try to avoid choices that unfairly surprise a litigant; and be sensitive to the needs of interstate federalism and international cooperation. What conflicts debates often do concern is whether courts are (or can be made to be) true to those values—matters of jurisprudence and judicial process. Specifically, reactions to modern conflicts theory vary according to one's attitude toward judicial realism. Those of us more sympathetic to judicial realism are

25. Under the old approach, doctrine had usually been indifferent to the purposes of laws or to particular needs of litigants. It rested instead upon an increasingly unconvincing jurisprudence, a vested-rights formalism similar in its way to jurisdictional doctrine most often associated with Pennoyer v. Neff [95 U.S. 714 (1877)]. Geographical inquiries dominated both fields. For Pennoyer the question was whether service of process was completed (as it had to be) in the forum state. Under traditional conflicts doctrine, the choice of law was governed by such facts as the location of physical injury or the place of contracting. Shrve, supra note 22, at 1673-74 (citation omitted). Evolution to modern theory completed the parallel: Pennoyer's dominance ended when the Supreme Court began permitting personal jurisdiction in forums where service of process could not be completed. [International Shoe Co. v. Washington, 326 U.S. 310 (1945.)] The conflicts revolution came only a short time later, when a significant number of courts decided that geographical indicators such as place of injury or place of contracting would not necessarily dictate the source of governing law. As with the modification of personal jurisdiction rules, changes in choice of law doctrine reflected a shift from hard-and-fast rules to approaches that were far-ranging, supple, and policy-based.

26. "Without taking the content of the conflicting laws into account, how could one know what would satisfy the demands of justice or the requirements of policy?" DAVID F. CAVERS, THE CHOICE-OF-LAW PROCESS 9 (1965).

27. See Rheinstein, supra note 23, at 656.

28. For two good inventories of modern conflicts policies, including those summarized in the text, see 1 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) (1971) and ROBERT A. LEFLAR ET AL., AMERICAN CONFLICTS LAW 290-300 (4th ed. 1986).

inclined to approve of the tendency of modern theory to deny judges sanctuary in territorial or other mechanical rules and to force them instead to grapple with choice-of-law values out in the open. Conclusions are not always reached with eclat. Opposing results in close cases may each in their turn be defensible. But to condemn modern conflicts theory for this is to yearn for intellectual anesthesia.

IV. ARGUMENTS SUPPORTING BOTH THE REFORM AND THE ELIMINATION OF STATE CONFLICTS LAW

The present climate has produced a variety of attacks on state conflicts law When critics argue them to an audience general enough to include state judges and legislators, they may be urging that state law reform itself: Less obvious, and a focus of this Article, is the realization that most of these attacks are also suited for an entirely different purpose. A particular argument for reforming state conflicts law can also underpin a federal law alternative. Critics have in this sense a second means of venting their displeasure: to argue that, if state courts are unwilling to mend their ways, either Congress or the Supreme Court should use its power under the Constitution to trump state conflicts law

Thus, it is useful to preface closer examination of possibilities for federal conflicts law with a look at the controversy surrounding state law reform.

Critics frequently target interest analysis, the pivot upon which conflicts decisions often turn. Briefly, interest analysis works the following way When the facts of the controversy clearly implicate the concerns (policies) responsible for the creation of a substantive rule of law, a result in the case that is incompatible with the substantive rule frustrates those policies. The doctrine appears in DAVID H. VERNON ET AL., CONFLICT OF LAWS 296-98 (1990). On Cook's place in the realist movement, see Karl N. Llewellyn, Some Realism About Realism: Responding to Dean Pound, 44 HARV. L. REV. 1222, 1230, 1234, 1257 (1931); Robert S. Summers, Pragmatic Instrumentalism in Twentieth Century American Legal Thought—A Synthesis and Critique of Our Dominant General Theory About Law and Its Use, 66 CORNELL L. REV. 861, 864 (1981). 30. Cf. Joseph W. Singer, Real Conflicts, 69 B.U. L. REV. 1, 127 (1989) (“Conflicts cases present us with real conflicts among competing norms and interests, and among the social visions of separate normative and political communities.”). These complications can throw judges and observers off balance, and “one who expects to achieve results in multistate cases that are as satisfying in terms of standards of justice and of party acceptibility as those reached in purely domestic cases is doomed to disappointment.” von Mehren, supra note 24, at 42. 31. One expert, while not enamored with interest analysis, described it as “the methodology which, in all its permutations, has dominated the conflicts agenda for the last quarter century and deconstructed traditional conflicts in most states.” P. John Kozyns, Foreward—Symposium on Interest Analysis in Conflict of Laws, 46 OHIO ST. L.J. 457, 457 (1985).
sovereign creating the rule is then interested in the outcome; interested in having its substantive rule applied.

A number of critics appear to distrust interest analysis in general, and two of its manifestations have drawn particular fire. First, courts have used interest analysis to choose forum law over that of another more interested place. These decisions deny life to stronger policies implicated by nonforum law.

The California Supreme Court took this approach in *Nevada v. Hall*, choosing its own law over Nevada’s to facilitate recovery for California tort plaintiffs in an accident case. The California Supreme Court’s conclusion that the state was interested in applying its pro-recovery law was not difficult to reach, since plaintiffs were Californians, and since the accident occurred there.

Yet Nevada seemed more interested in the application of its sovereign immunity law defeating liability. Respect for the sovereignty of a law source always supports an interest-based argument in conflict cases, but that argument is usually proffered by private litigants for private gain. Nevada’s position was quite different. The defendant was not merely a beneficiary of the policy behind Nevada’s antirecovery law, it was the sovereign responsible

32. This may be one of the fifty states or a foreign government. If the latter, it may be the foreign government as a whole or a federated unit within that government.


35. At times, such results also appear to be out of line with the reasonable expectations of the losing party. For discussion of how these two factors may combine, see Gene R. Shreve, *Interest Analysis as Constitutional Law*, 48 OHIO ST. L.J. 51 (1987).


37. The plaintiffs’ position in *Hall* was typical in this respect. They sought private gain (increased net worth through damage recovery) by demonstrating that the policies accounting for California’s pro-recovery law were implicated by the facts of the case. Therefore, they were appropriate beneficiaries of that law.
for that law. This made Nevada acutely interested, about as interested a law source as one could imagine. 38

Second, interest analysis also draws heavy fire where it causes forum state litigants to win cases that out-of-state litigants might have lost. Such cases raise the awkward prospect that forum citizenship confers upon the litigants different and better substantive rights.

The New York case, Tooker v. Lopez, 39 is a well-known example. The case arose from an automobile accident in Michigan that took the lives of the driver and one passenger in the car, both New Yorkers. Susan Silk, the other passenger and a citizen of Michigan, was seriously injured but survived. The administrator of the passenger-decedent brought a wrongful death action in New York state court against the estate of the driver-decedent. The question in the case was whether Michigan’s guest statute, insulating drivers from negligence claims by their passenger guests, was available to the defendant. New York law imposed no disability on negligence recovery 40

Rejecting the Michigan statute in favor of its own law, the New York Court of Appeals placed considerable weight on the New York citizenship of the decedent and her family “New York’s ‘grave concern’ in affording recovery for the injuries suffered by Catharina Tooker, a New York domiciliary, and the loss suffered by her family as a result of her wrongful death, is evident” Had Susan Silk next filed suit, the New York Court might have applied the Michigan statute to deny her negligence claim. Because she was not a New Yorker, she could not make the interest argument for New York law based on citizenship that was so instrumental to the decision in Tooker.

These two applications of interest analysis are not the same, 42 but they can coalesce. That is, a court will discount the greater interest of a nonforum law

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40. Id. at 398.
41. Id. (citation omitted).
42. It is possible for the first of the two targets for criticism to occur without the second. That is, the forum may choose its own law over that of another more interested place when the beneficiary of that law is not a citizen of the forum. This is because factors other than citizenship may generate state interest. E.g., Fells v. Bowman, 274 So. 2d 109 (Miss. 1973) (noting Louisiana's interest in having its safety regulations apply regarding an accident there, although all the parties were from Mississippi). Forum interest of this sort comes from the fact that events underlying the controversy occurred in the forum state. See John B. Corr, Interest Analysis and Choice of Law: The Dubious Dominance of Domicile, 1983 Utah L. Rev. 651, 673-74; Shreve, supra note 35, at 67; Weinberg, supra note 29, at 67.
source in order to secure for a local litigant the benefits of local law \textit{Nevada v Hall} was such a case.

Other attacks on modern theory are not aimed as directly at interest analysis. Critics chafe at the open-ended, methodological approach whereby many state conflicts jurisdictions administer modern choice-of-law principles\textsuperscript{43} unaided by many hard-and-fast rules.\textsuperscript{44} Critics also contend that, so long as the power to forge conflicts doctrine is scattered among so many sovereigns, conflicts law will remain a hopeless patchwork.\textsuperscript{45} American courts do not respond uniformly to conflicts issues. The result, they say, is that current law promotes uncertainty, forum shopping, and procedural redundancies.\textsuperscript{46} Critics find these conditions especially hard to bear in complex litigation\textsuperscript{47} where a multitude of individual cases stem from the same mass tort.\textsuperscript{48}

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\begin{itemize}
\item \textsuperscript{43} See supra notes 26-30 and accompanying text.
\item \textsuperscript{44} Reintroduction of rules in conflicts analysis invites the prospect of automatic or mechanical decision. Conflicts rules tend to be territorial rules. That is, the rule asks the judge to locate geographically a certain fact about the controversy or the parties. The geographical whereabouts of that fact answers (or goes a long way toward answering) the question of what law to apply. For examples of territorial rules, see supra note 25.
\item See Gottesman, supra note 13, at 9.
\item Id. ("Any of the modern [conflicts] approaches would have produced indeterminacy and party bias even if it had been adopted in identical terms by all fifty states. But the problem was compounded, for different states adopted different theories of choice of law.").
\item The most definitive attempt to describe special problems posed in complex litigation is the American Law Institute’s work in progress, \textit{Complex Litigation Project}. As elaborated in chapters 1 and 2 of the preliminary draft of the Project document, the goal is to give consolidated and uniform treatment for claims currently addressed by multiparty, multiforum litigation. Prime examples are cases arising from a single mass disaster, e.g., Mark W. Harris, \textit{The Propriety of Class Actions in Mass Aviation Disaster Litigation}, 56 J. AIR L. & COM. 559 (1990); Andreas F. Lowenfeld, \textit{Mass Torts and the Conflict of Laws: The Airline Disaster}, 1989 U. ILL. L. REV. 157, and those directed at toxic torts, e.g., Arthur R. Miller & Price Amsworth, \textit{Resolving the Asbestos Personal-Injury Litigation Crisis}, 10 REV. LITIG. 419 (1991); David Rosenberg, \textit{The Dusting of America: A Story of Asbestos—Carnage, Cover-up, and Litigation}, 99 HARV. L. REV. 1693 (1986) (reviewing PAUL BRODEUR, \textit{OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL} (1985)).
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V. SCHEMES FOR NATIONALIZING CONFLICTS LAW

A. Federal Conflicts Law for Complex Litigation

It is in the area of complex litigation that change in the balance between state and federal law appears most likely to occur. Congress recently came close to enacting choice-of-law provisions for mass tort cases, and a successor bill is pending at this writing. In the preliminary draft of a statute it is preparing for Congress, the American Law Institute would regulate choice of law in complex litigation to a much greater extent. Others have urged that, unless or until Congress acts, the Supreme Court address conflicts problems posed in complex litigation through federal common law.

Those who would streamline choice of law in complex litigation have their critics, but the reforms they urge might not produce the shock of more sweeping approaches to nationalize conflicts law. The forms of litigation addressed by the former, while significant, represent but a fraction of conflicts cases. Further, the choice-of-law incongruity the reforms eliminate—inconsistent conflicts results on precisely the same issues—is especially irritating in mass tort settings, where inconsistencies occur within a single controversy.

Two approaches divest state courts of their conflicts power on a much broader scale. They occupy the rest of this Article.


51. COMPLEX LITIGATION PROJECT ch. 6 (ALI Tentative Draft No. 3, 1992). Chapter 6 was approved by the ALI membership in May, 1992, subject to final consideration of the entire Project document in May, 1993. The House bills, supra notes 49-50, free federal courts from state conflicts law and authorize them to choose law with reference to a list of general criteria. Chapter 6 rejects this approach, Kane, supra note 48, at 316-17, opting instead for a web of rules for choosing law in complex cases that pressures (perhaps dictates) particular results.


54. See, e.g., Juenger, supra note 48; Kane, supra note 48; Lowenfeld, supra note 47.
B. Federal Conflicts Law that Would Compliment Modern Theory

The first approach seeks to improve the quality of conflicts decisions without working any fundamental changes in choice-of-law theory. The scale of the project could run from incremental to broad-spectrum replacement of state law with a federal common law of conflicts. This is a means of addressing the court bias in favor of local interests already noted under state conflicts law. To pursue its goal of neutrality, this approach would not require elimination of interest analysis or any other component of modern theory. Weight could still be given to policies that might make the forum interested in applying local law, but not disproportionate weight.

If close conflicts cases are capable of clearly correct results, neutral courts might best be able to find them. Unfortunately, it is not easy to assume that close cases can ever yield clearly right results. Recall the position set out earlier in this Article, that modern conflicts policies are exasperating in application not because they are forum favoring (they are ostensibly neutral) but because resolution of close cases through application of these policies requires exceedingly difficult forms of legal analysis. If this is correct, a uniform principle of forum neutrality may not address the main cause of dissatisfaction with conflicts law.

Assuming, for the sake of discussion, that decision under a rule of neutrality would significantly reduce controversy surrounding conflicts, a federal common law of conflicts might prove an efficient means for imposing that rule. This would be true so long as the United States Supreme Court played a leadership role in developing doctrine and lent sufficient muscle to enforce it. Again, however, we have encountered a difficult assumption. Given the

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55. E.g., Trautman, supra note 53, at 1727 (observing that "a federal common law of choice of law might simply provide a vehicle for incremental modulation of state choice-of-law thinking").
56. "To a large extent, the only significant contribution of federal common law to this process would be to free state-court judges from any compulsions they might otherwise find in local law to prefer local law or local residents" Trautman, supra note 12, at 128.
57. See supra note 28 and accompanying text (modern conflicts policies).
58. The object under federal common law would be "to provide [judges] with the intellectual equipment needed to justify assessment of the strength of local policy and of the policy of other concerned jurisdictions." Trautman, supra note 12, at 128.
60. See supra notes 21-29 and accompanying text.
61. The Supremacy Clause would require state courts to join lower federal courts in deciding conflicts cases under a federal law standard of forum neutrality. Alternatively, the Supreme Court could take a smaller step by merely relieving diversity courts of the obligation under the Klaxon rule, see discussion supra text accompanying note 20, to administer state conflicts doctrine. However, it is
many important demands on the Supreme Court's resources, it might not be desirable or even possible for the Court to take on such a commitment. Perhaps aware of this, the Supreme Court has carefully steered clear of the nonconstitutional aspects of the subject.

As an alternative to federal common law, the Supreme Court could promote neutrality by giving more life to the Full Faith and Credit and Due Process Clauses of the Constitution in conflicts review. Current doctrine does not entirely delineate the separate contribution each clause makes, but together they come the closest, of any part of the Constitution, to regulating choice of law. The Supreme Court could, for example, promote neutrality by requiring under the Full Faith and Credit Clause that the forum could not apply local state law when another state was clearly more interested in having its law applied.

The Court played with this idea at one point but eventually discarded it. Before it reintroduces interest balancing as a feature of constitutional law, the Supreme Court would have to give serious thought to the possibility that (as with conflicts as federal common law) it might become flooded with probably easier to nationalize the entire conflicts field than to disentangle choice of law from the Erie doctrine. See Trautman, supra note 53, at 1727-28.

62. For elaboration of the point that to make conflicts a form of federal common law would place an unwarranted demand on scarce Supreme Court resources, see Shreve, supra note 20, at 344-45. It would pose to the Supreme Court "the dilemma of either undertaking a debilitating amount of superintendence through judicial review or presiding over only the illusion of neutrality in the choice-of-law process." Id. at 344.

63. Thus, in Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981), Justice Brennan, writing for the plurality, refused to criticize Minnesota's conflicts ruling or to indicate whether the Court "would make the same choice-of-law decision if sitting as the Minnesota Supreme Court." Id. at 307. Justice Stevens was even more to the point, concurring: "It is not this Court's function to establish and impose upon state courts a federal choice-of-law rule." Id. at 332 (Stevens, J., concurring).


65. For a history of the two clauses in conflicts cases, see SCOLES & HAY, supra note 10, at 73-103.


67. The Court indicated then that the Full Faith and Credit Clause permitted a forum to apply its own law because the forum's interest was not less than that of the nonforum state. Alaska Packers Assoc. v. Industrial Accident Comm'n of Cal., 294 U.S. 532, 549 (1935); Watson v. Employers Liab. Assurance Corp., 348 U.S. 66, 73 (1954). Commenting on Watson, one source observed: "The clear implication is that the full faith and credit clause would come into play if the forum state's interests were outweighed by the other state's interests." WILLIS L.M. REESE ET AL., CONFLICT OF LAWS 354 (9th ed. 1990).

state and lower federal court cases. Such is the imprecision of interest analysis that whenever both places are interested in the application of their rules, "the losing side could frame the federal constitutional issue that its rule came from a more interested place."69

C. Federal Conflicts Law that Would Overhaul Modern Theory

Nationalization of conflicts law might also be part of a second, more radical approach to reform. Like the federal law proposals just discussed, a more radical approach would displace a good deal of state law and attempt a substantial measure of uniformity in conflicts decision making. However, while the earlier approach aimed at enhancing the qualities of contemporary conflicts law, the second would eradicate much of that law by attacking its theoretical foundations. The latter is inclined to reflect a deep distrust of the emphasis in current doctrine of method over firm rules, and of interest analysis—particularly applications of interest analysis that appear to disadvantage nonlocal litigants.

State courts or legislatures could implement changes responsive to these criticisms. It is not clear, however, when or whether this would occur. Convinced that current law should be overhauled, and perhaps irritated by delay in state law reform, radical critics see a more direct route to change. They would use the U.S. Constitution as a kind of scouring pad to remove the stains of uncertainty and local bias that they find on American conflicts law.70

Professor Douglas Laycock has offered one of the newest of such attacks. He rejects the conventional wisdom of modern conflicts theory, announcing that "[w]e have handled the problem badly; indeed, we have not even looked to the right sources of law"71 Laycock deplores the "chaotic" arrangement by which states are left largely free of federal regulation in choice of law, and he contends that "[c]hoice-of-law methods that prefer local litigants, local law, or better law are unconstitutional."73 While the centerpiece for Laycock's

69. Shreve, supra note 35, at 68 (suggesting why the "problem the Court would make for itself would be the same as if it created a strictly neutral federal common law of conflicts. The number of cases encompassed by the new standard would be overwhelming") (footnotes omitted).

70. Critics in this mold include Laycock, supra note 11, Ely, supra note 11. Cf. Gottesman, supra note 13, at 19-23 (expressing dissatisfaction with modern conflicts theory but advocating a congressional solution).

71. Laycock, supra note 11, at 250.

72. Id. at 259.

73. Id. at 336. The two probably should be seen as separate challenges. The work of many writers suggests that a rules approach is not invariably antithetical to interest analysis. E.g., Larry Kramer, On the Need for a Uniform Choice of Law Code, 89 Mich. L. Rev. 2134 (1991); Russell Weintraub, Commentary on the Conflict of Laws 362-411 (3rd ed. 1986).
argument is the Privileges and Immunities Clause, 74 a proposal to unify conflicts law while eliminating preferential treatment of local litigants might also draw from the Commerce 75 and Equal Protection 76 Clauses.

Is the cure worse than the disease? Like proposals in the first category, 77 a regime of national conflicts law under this approach places upon the U.S. Supreme Court responsibility for an extensive (perhaps debilitating) amount of superintendence. The approach also requires a fair amount of tinkering with what is now understood to be the meaning of these clauses. 78 Perhaps most important, the validity of propositions upon which such national conflicts law rests—that rules are better than method and that locals should win only if nonlocals would—remains open to question.

Regarding alleged forum bias, two features of this radical critique warrant further attention. First, critics often seem to forget that domicile-based interest analysis works both ways. Thus, while it is true that it permits forum citizens to win cases nonresidents would have lost, it is equally true that domicile-based interest analysis permits nonresidents to win cases citizens would have lost. Thus, when a nonresident defendant can summon anti-recovery law from his own state and demonstrate that his state would be interested in having that law applied to protect him, he may win a conflicts case when a defendant residing in the forum (hence stuck with the forum’s pro-recovery law) would have lost an otherwise identical case. 79 Second, critics take too little account of state courts’ capacity for principled forbearance. There are now numerous decisions where judges regarded the forum as interested in availing a local litigant of forum law yet applied nonforum law out of respect for concerns of party fairness or the interests of another sovereign. 80

To pursue greater deference through the imposition of firm conflicts rules may cut too much against the grain of our legal experience to succeed. Much of the history of American conflicts law in this century can be told in the

74. U.S. CONST. art. IV, § 2, cl. 1. Professor Ely also features the clause in his analysis. Ely, supra note 11.
75. U.S. CONST. art. I, § 8, cl. 3; see supra note 9.
76. U.S. CONST. amend. XIV; see supra note 10.
77. See supra note 62 and accompanying text.
78. For example, corporations are at least as likely as natural persons to be victimized by forum favoritism in choice of law; yet the Privilege and Immunities Clause currently does not protect corporations (or resident aliens). RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 12.7 at 107 (2d ed. 1992).
79. For demonstration of this principle, see Offshore Rental Co. v. Continental Oil Co., 583 P.2d 721 (Cal. 1978).
80. For case examples, see Weinberg, supra note 29, at 59 and Weintraub, supra note 34, at 499-501.
growing rejection of hard rules in favor of method, and the growing distaste of lawyers, judges, and the public with conflicts law that was mechanical and thus blind to the aims of local law and policy. Much as radical critics might try to distance themselves from the thoroughly discredited approach that modern theory replaced, similarities of disfunction are difficult to ignore. If rules ordered judges to ignore important local policies at stake in conflicts cases, would judges be more submissive than they were fifty years ago when old theory made the same demand?

It will come as no surprise that proponents of modem theory are skeptical. However, so too are at least some of those with less charitable views toward current law. For example, Professor Friedrich Juenger, hardly a supporter of the modern approach, observed:

Alas, it is probably too late to turn the choice-of-law clock back. Mechanical conflicts rules, like mechanical rules in any field of law, cause covert resistance. An attempt to return to territorial choice-of-law rules would undoubtedly invite, on a greatly accelerated basis, the avoidance techniques used in the past, such as overuse of the procedural category to apply forum law, substantive labels that we make up as we go along—it is not a "tort," it's a "contract", it is not a "tort," it's a "family law" problem—and, of course, our old friend waiting there to snatch us from the jaws of death, public policy. Attempts to simplify choice-of-law analysis with rigid territorial rules have not worked before, and will not work again, unless we elect or appoint to courts people who have room temperature IQs.

The status of territorial conflicts rules as commands under federal law might reduce judicial insubordination, but the past record of compliance with U.S. Supreme Court precedents is not entirely reassuring. The greatest threat to

81. On the rules approach in conflicts law, see supra note 44.
82. See, e.g., Laycock, supra note 11, at 322 (arguing differences between his territorial rules and the territorial rules of early twentieth-century conflicts theory).
83. See supra note 25 (describing the old theory and its demise).
84. E.g., Brainerd Currie, Notes on Methods and Objectives in the Conflict of Laws, 1959 Duke L.J. 171, 175 ("The courts simply will not remain always oblivious to the true operation of a system which, though speaking the language of metaphysics, strikes down the legitimate application of the policy of a state, especially when that state is the forum."); Trautman, supra note 53, at 1738 ("The history of conflict of laws in the twentieth century comes to nothing if it has not been to demonstrate the futility of mechanical tests that judges will not stomach.").
85. See Juenger, supra note 23; Juenger, supra note 34.
86. Juenger, supra note 48, at 133 (citations omitted).
the success of radical reform comes, however, from subtler possibilities of evasion that Professor Juenger's observations suggest. Whether the strong medicine of these proposals is desirable, and whether the Supreme Court could succeed in forcing American judges and others to swallow that medicine, remains to be seen.

EPILOGUE

The various possibilities for federal conflicts law could justify much more discussion than space has permitted here. I have sketched only one part of the subject: the curious extent to which arguments for reforming state conflicts law also support its displacement with federal conflicts law. Beyond that, my purpose is conjectural—to explore aspects of these schemes without attempting to settle matters for or against them. The rest of the project lies ahead and should occupy the conflicts community for some time.