Respecting a State’s Tort Law, While Confining its Reach to that State

John S. Baker, Jr.*

The current national debate about tort law is hopelessly partisan. Its implications, however, far transcend the self-interested viewpoints of the tort lawyer and insurance company lobbies.1 As with criminal law, political forces characterized as conservative are striving to nationalize state tort law. In this political contest, the interests of the states in their own legal regimes are not well represented. Nevertheless, federal tort legislation has not succeeded because unlike federal criminal legislation, where no lobby is committed to opposing the process,2 the movement to federalize tort law faces formidable opposition. The political stalemate resulting from the year 2000 congressional election results does not bode well for the attempts legislatively to federalize tort law. The circumstances may, therefore, be favorable for considering an approach to the issues raised that is consistent with the Constitution’s territorial principle of federalism.

This paper is divided into two parts: The conflict over torts and the conflict over laws. The first probes the arguments over tort law and litigation and the urge to change the situation through federalization. It begins with the general themes of the debate and follows with consideration of the particular phenomenon of nationwide class actions. The second part of the paper briefly sketches the relevance of conflicts of law, exploring the changes in the constitutional jurisprudence affecting personal jurisdiction and choice of law, which have shaped the landscape

* Dale E. Bennett Professor of Law, Paul M. Herbert Law Center, Louisiana State University. B.A., University of Dallas; J.D., University of Michigan. I thank John Simpson for his assistance with this article.

1 Characterizing the opponents as tort lawyers and insurance companies is an oversimplification, but a convenient one. Not all lawyers who represent personal injury victims are part of the “tort lawyer lobby.” The opposing side includes a range of corporations other than insurance companies.

2 The American Civil Liberties Union (ACLU) lobbies on matters of constitutional criminal procedure and the death penalty, but not generally on substantive criminal law. The American Bar Association (ABA) has issued a Task Force Report, The Federalization of Criminal Law (1998), which is critical of the trend to federalize criminal law. Nevertheless, the ABA’s lobbying efforts are not generally directed to this issue.

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of tort litigation. This paper argues that the nature of territorial federalism calls for Congress, pursuant to the Full Faith and Credit Clause, to legislate a national set of choice of law rules.

I. THE CONFLICT OVER TORTS

A basic premise of this paper is that the so-called “abuses” of the tort system must be understood in terms of federalism. Most of the abuses are strictly matters of state law. The federal government, however, does have a role to play if a state’s abuses extend beyond its borders. This implicates the horizontal dimension of federalism. Unfortunately, Supreme Court decisions regarding personal jurisdiction and choice of law, premised on the Due Process Clause rather than the territorial structure of federalism, have had the unforeseen effect of allowing some states to impose their laws and costs on other states. The current state of affairs undermines the equality to which each state and its law is entitled. Proposals to correct these abuses by federalizing substantive tort law or expanding federal court jurisdiction fail to consider a very different type of federal solution, one that reinvigorates federalism. Congress can apply its largely unexercised power under the Full Faith and Credit Clause to establish a single set of choice of law rules, consistent with the territorial principle of federalism.

The proposed solution can be stated simply enough, but the details of choice of law can be quite devilish. This paper presents an overview for an interdisciplinary audience of policy experts, with the technical matters kept to a minimum. But even for academic lawyers, the area of choice of law is a quagmire. The field has been reshaped by Legal Realists, for whom “logic” is a pejorative term. Moreover, as stated in Justice Story’s land mark treatise on the subject, the field of conflicts of law (of which choice of law is a part) has developed not much from the Common Law, but rather from Civil Law jurists. Its development has occurred as a part of the Law of Nations, since renamed International Law.

The issues of choice of law, or private international law, inherent in legal relations between sovereign States, affect legal relations even more so in a federal state. Indeed, federalism originates as an international compact, covenant, or agreement between independent nations; the U.S. Constitution transforms what was a (con)federal compact among individually sovereign states into a federal State. As Justice Scalia has observed, American lawyers bring a Common Law mentality to their interpretation of the Constitution, which is drafted more in accord with the

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3 JOSEPH STORY, COMMENTARIES ON THE CONFLICTS OF LAWS 12-13 (1834).
4 Id. at 12.
5 The Constitution is not a “compact” among the states. See M’Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 402-03 (1819).
Civil Law tradition. Understanding the Constitution and federalism as a structural whole conflicts with the inductive methodology of common-law lawyers.

The age of the Internet and globalization is driving some to understand the need to provide a logic to support the exercise of personal jurisdiction and the determination of choice of law. The arguments used by large corporations, based on interstate commerce, to justify nationalizing tort and other local laws can apply equally well to the internationalization of laws that are national. In matters of global commerce, however, uniformity requires a multi-lateral treaty such as the one creating as the World Trade Organization. The demands of national and global commerce cannot be ignored, but they can be met with either of two fundamentally different responses. The knee-jerk response usually involves a uniform substantive law imposed from above on the differing states, e.g., most regulation passed under the Commerce Clause. The other approach—while requiring conceptualization from above—seeks harmonization among the existing legal regimes of the different states, e.g., the Uniform Commercial Code.

A. The Policy Debate

Before crafting any solution, it is necessary to identify accurately the problem and its causes. The insurance companies and a range of businesses complain about a set of particular problems, as reflected in the agenda of the national lobbying organization seeking changes in tort law, the American Tort Reform Association (ATRA). That agenda focuses on changing the law on six major issues, four of which apply to all tort claims; the others apply to medical and product liability. The causes of these problems, according to the “reformers,” are pro-plaintiff state laws, judges, and juries. If these are problems, they call for state solutions, because all are issues and institutions of state law. That is to say, the “cause” of these “problems” is federalism.

8 See generally George A. Bermann, Constitutional Implications of U.S. Participation in Regional Integration, 46 Am. J. Comp. L. 463 (1998).
9 See Agenda: American Tort Reform Association, at http://www.atra.org/issues (last visited Dec. 20, 2000). The Agenda of the American Tort Reform Association states that:

[T]he American Tort Reform Association’s core agenda for substantive tort reform addresses six issues. Four are generic, applying to all tort claims: the rule of joint and several liability, the collateral source rule, punitive damages and damages for non-economic losses. Two address specific kinds of tort claims: medical liability and product liability.
Frustrated that state judiciaries have invalidated tort reform under their state constitutions, the reformers are seeking a national, uniform solution. Although the political realities in Congress are not favorable, the tort reform movement would—if it could—nationalize substantive tort law, at least as to punitive damages. Failing that, they seek greater access for corporate defendants to remove cases to federal court. But what is the “national problem,” as distinct from a national solution to a state problem? Insurance companies and a range of large corporations tell members of Congress that the problem is forum-shopping for states favorable to plaintiffs.

The corporate lobby is actually complaining about what it considers to be anti-corporation bias, rather than simply pro-plaintiff bias. Corporations are also plaintiffs; they sue other corporations and even sue individuals in tort. So changes in tort law that negatively affect individual plaintiffs may also have a negative impact on corporate plaintiffs. The relative insignificance of corporate-plaintiff tort cases, however, is such that most corporations would probably trade the right to file such lawsuits for a decrease in their exposure in the many cases in which they are defendants. The point, however, is simply that a pro-plaintiff bias is an overly broad characterization or a mischaracterization of what, more accurately, ATRA members perceive to be anti-corporate bias.

When considering bias, it is appropriate to recall the Fourteenth Amendment caselaw regarding discriminatory intent, which distinguishes between an “effects” test and proof of discriminatory intent or purpose. At least some of what corporations perceive as an anti-corporate bias derives simply from the effects of America’s pluralism of economic interests. The rhetoric of plaintiffs’ tort lawyers is one thing; it often seems to offer good evidence from which to infer anti-corporate bias of certain lawyers. It does not follow, however, that state legislatures, judges, and juries actually have such bias. They can have different views of what constitutes good policy without being biased. That these different interests seem to have an anti-corporate bias simply confirms the observations of political philosophers from the Ancients to the Framers about democracies favoring “the many,” e.g., voters, as against “the few,” e.g., corporations. Generally portraying plaintiffs, judges, and juries as having anti-corporate
bias rhetorically assists plaintiffs' tort lawyers. They are as eager in the public forum, as they are in the courtroom, to champion the democratic cause of "the many."

Diversity jurisdiction does respond to the Framers' concern about bias against the "outsider," but that does not necessarily include corporations. The Constitution protects out-of-state citizens through the Privileges and Immunities Clause and the Full Faith and Credit Clause as well as diversity jurisdiction. These constitutional protections do not fully extend to corporations, which after all are creatures of particular states. While individuals owe their citizenship for purposes of diversity to particular states, they are not creatures of any state. The Privileges and Immunities Clause protects individual citizens of states but not corporations. Although out-of-state corporations may suffer bias, the extent of their access to diversity jurisdiction depends entirely on federal legislation.

The implementation of diversity jurisdiction was left to Congress. That meant, first of all, that Congress had to create lower federal courts, which was one of its first orders of business. At the time of the Founding private corporations were few, and business was conducted by individuals, partnerships, public corporations, and joint stock companies. The corporation was very much treated as a "public entity." It would be several decades into the nineteenth century before private corporations would become relatively common; it was after the Civil War that large private corporations emerged. Nevertheless, when it first considered the

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15 See Bank of United States v. Deveaux, 9 U.S. (5 Cranch) 61, 96 (1809) (describing the corporation as "[t]hat invisible, intangible, and artificial being, that mere legal entity," and concluding that "a corporation aggregate, is certainly not a citizen"); see also Henry J. Friendly, Note, The Historic Basis of Diversity Jurisdiction, 41 Harv. L. Rev. 483, 500-04 (1927).
19 Herbert Hovenkamp, Enterprise and American Law 1836-1937, at 13-14 (Harvard Univ. Press 1991). Hovenkamp noted that: Under mercantilism the unique thing about the corporation was not its structure or its ability to assemble capital. Rather, the mercantile corporation was the result of a special contract (charter) with the state, permitting the incorporators to do something that no one else could do.
citizenship of corporations, the Supreme Court determined its citizenship according to the citizenship of all shareholders.\textsuperscript{21} That meant corporations found it difficult to invoke the diversity jurisdiction of the federal courts. Later the Supreme Court changed its view and treated a corporation’s members as presumptively citizens of the state of incorporation.\textsuperscript{22} Federal legislation has since given corporations the status of “citizens” for purposes of diversity jurisdiction.\textsuperscript{23} That status reflects an advantage not statutorily available to unincorporated associations such as labor unions.\textsuperscript{24}

To the extent that anti-corporate bias exists, it reflects a general problem in democratic government. The conflict of “the individual versus the big corporation” is just one example of actual or perceived bias based on differences in wealth. Economic inequality has been and will always be a source of political conflict regardless of the form of wealth or business enterprise.\textsuperscript{25} In the newly democratic states, the majority of voters who were debtors favored their own interests, often at the expense of justice. Whether it was seizing property from those who had sided with the British, or siding with debtors versus creditors, local majorities often did not respect the property rights of those in the minority. Elected officials (including judges), legislatures, and juries were subject to the passions of local majorities. The rule of law was precarious, reflected by the fact that some legislatures went so far as to overturn judgments of courts.\textsuperscript{26} Despite the Framers’ concerns about discrimination against out-of-state economic interests, they did not fashion federal jurisdiction principally as a means to cure actual or perceived bias related to trade, as seems to be the argument of some.\textsuperscript{27} Rather, their prescription for various forms of discrimination was a well-structured government, characterized as “federal.”

\textsuperscript{21} Deveaux, 9 U.S. at 66.
\textsuperscript{24} United Steelworkers of America, AFL-CIO v. R.H. Bouligny, Inc., 382 U.S. 145, 150-53 (1965) ("[I]n 1958 Congress thought it necessary to enact legislation providing that corporations are citizens both of the state of incorporation and of the state in which their principle place of business is located.").
\textsuperscript{25} See The Federalist No. 10, at 56 (James Madison) (Clinton Rossiter ed., 1961). Madison wrote that:

\begin{quote}
[T]he most common and durable source of factions has been the various and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination.
\end{quote}

\textit{Id.}
\textsuperscript{26} Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 219-23 (1995).
\textsuperscript{27} See Schwartz, Fair Federal Forums, supra note 11, at 2118-19 ("Having fair federal forums decide diversity cases promotes effective interstate commerce and helps assure that out-of-state defendants receive fair and objective trials . . . Multistate class actions implicate interstate commerce and invite discrimination against out-of-state defendants.”).
B. The Effects of Federalism

Federalism itself promotes a certain "bias" against corporations and businesses that operate interstate. As compared a confederation, federalism does facilitate trade; but compared to a unitary state, federalism can present obstacles to the efficiency of trade. State laws regularly raise transaction costs for corporations because the laws of one state differ from the laws of other states. Indeed, when national corporations challenge particular state laws under the "dormant" Commerce Clause, they claim a particular law "discriminates" either in purpose or effect against or has too great an impact on interstate commerce. 28 Large interstate corporations tend not to favor federalism because they think it reduces the size of their potential profit. They seem to forget that without federalism they might not be able to operate at all. Corporations favor uniformity because it reduces (or in the short term appears to reduce) transaction costs. Even though corporations are creatures of the laws of particular states, large corporations operate with a national or international consciousness. They disfavor the provincialism of the states—except of course when they receive favorable treatment, such as tax incentives or special state anti-takeover legislation. 29

As long as the United States continues as a federal republic, large areas of law will be non-uniform, which means that the law of some states will be better than that of others—depending, of course, on one's viewpoint. Whether the tort system of a particular state is good or bad is not a federal problem. That is not to say that Congress cannot govern certain aspects or areas of tort law under the Commerce Clause. The Supreme Court has upheld congressional legislation over certain tort law issues, including pre-empting state tort law. 30 Nevertheless, Congress' powers under the Commerce Clause face reinvigorated limits. 31 Congress should respond when the law of one state, whether it is good or bad, imposes itself on the citizens of other states who have no connection with and who have not invoked the law of that state. A federal problem arises then when some states apply their laws beyond their own borders, resulting in increased costs in other states.

By failing to frame the problem in terms of federalism, the "reformers" have missed the constitutional argument, which counters the American Trial Lawyers Association (ATLA) and its state affiliates which have positioned themselves as defenders not only of the right to jury trial,

but of "states' rights." Despite ATLA's defense of states' rights, of course, both ATLA and ATRA seem more concerned with the financial pie, than with federalism. Still, both sides are forced by the Constitution to operate within the framework of federalism. So even if few are committed federalists, they would benefit from a better understanding of federalism.

Somewhat like presidential candidates, tort lawyers and insurance companies are captives of the political map of the United States, which is a state-by-state map. The tort lawyers benefit organizationally from federalism. While both sides have been battling in Washington, D.C. and the fifty states, the trial lawyers are better organized on a state-by-state basis. The reformers must first prevail in state legislatures, and afterward defend those gains against state constitutional challenges. ATLA and the state tort-lawyer organizations, with considerable legal talent, have been very successful in overturning state tort-law changes. The victories of each side reflect their organizational strengths. The state trial-lawyer organizations and ATLA have built a (con)federal organization from the bottom up. Although ATRA, a coalition of 400 businesses and other groups, has state organizations, the corporate membership produces top-down direction. Each side prefers that level and branch of government wherein its strength lies. Tort lawyers do best before the state courts and some legislatures. The insurance companies have succeeded in some state legislatures, but they still prefer a national solution from Congress and/or the federal courts.

A detached observer should recognize that both sides have legitimate concerns. Insurance companies need predictability in order to set premium rates, while the plaintiffs' trial bar is concerned with the ability to try jury cases in state courts under state law. Despite such legitimate concerns, a myopic focus blinds each side to the neutral possibilities arising from the methodology of constitutional federalism. Viewed through the prism of federalism, the problem at the federal level has little to do with state tort reform. The two sides can and should contest the substantive and procedural issues of state tort law, without, for the most part, implicating federal constitutional law. Whether or not Congress has general authority to enact substantive tort law, a proposition that is debatable, it certainly

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33 See Richard H. Middleton, Jr., *Constitutional Challenges: An Antidote to Tort Reform*, at http://atla.org/courts/victory/antidote.ht (last visited May 17, 2001) ("When the Ohio Supreme Court struck down the most radical tort 'reform' law in the nation, the event marked the fourth straight constitutional victory won by the Association of Trial Lawyers of America.").
35 *Compare* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) ("Congress has no
has a role in protecting one state from another. A constitutionally based solution—one that both provides the predictability desired by the insurance companies, while preserving the primary role of state law and state courts—is unlikely to satisfy either side completely. Such a solution, however, is possible if Congress legislates within the horizontal dimension of federalism.

C. The Vertical and Horizontal Dimensions of Federalism

Federalism has two dimensions, one vertical and one horizontal. Discussions of federalism usually focus on the vertical dimension of federalism, i.e., federal versus state law, often inaccurately referred to in terms of “states’ rights.” Horizontal federalism, on the other hand, involves the relationship between and among states. Tort law presents issues of horizontal federalism more so than, for example, criminal law. In criminal law, the main issue is that of the federal government’s usurping areas of state law. Other than the Extradition Clause in the Constitution, state-to-state harmony is not much of an issue in criminal law because a state’s criminal law does not apply beyond its own boundaries. On the other hand, in the absence of significant nationalization of substantive tort law, the fundamental federalism problem involves the law of one state encroaching on other states. Such encroachments conflict with the Constitution’s equal treatment of states and their citizens.

The obvious constitutional provisions related to horizontal federalism are the Privileges and Immunities Clause, the Full Faith and Credit Clause, and the Extradition Clause, which are discussed in Part II. Even the Commerce Clause, the main power involved in vertical federalism, however, can be exercised in such a way that emphasizes horizontal federalism. Indeed, Congress’ early use of the Commerce Clause demonstrates how to protect states from each other by isolating or quarantining one state.37

When Congress exercised its power under the Commerce Clause in the 1895 Anti-Lottery Act,38 it led to the important case of Champion v.

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36 U.S. CONST. art. IV, § 2.
In relying on the Commerce Clause, Congress did not displace state law, but only limited its reach to its own borders. Unfortunately, the Supreme Court’s opinion in Champion interpreted what Congress had done much more broadly than what the statute actually provided. Champion posited a general, national police power when it upheld the constitutionality of the Lottery Act. The Supreme Court was divided over the question of whether regulation of the movement of lottery tickets was within congressional power or within state police power. In upholding the prohibition, the Court recognized a general police power in Congress to eliminate evils that threatened the general welfare.

Despite the broad language of the opinion, the Lottery Act itself neither interfered with the police powers of any state, nor represented a general and national police power. The Act did not prevent lotteries in states, which chose to legalize them. What the Act did was to prevent a state in which lotteries were legal from undermining the laws of those states in which lotteries were illegal. After Leisy v. Hardin, a case involving alcohol, a state on its own authority could not prohibit the movement of items of commerce across its borders, even though sale of the item was prohibited in that state. As a result of a debatable decision under the “dormant” Commerce Clause, communities could not effectively control local “evils,” such as alcohol and lotteries, without national legislation. Thus, regardless of the congressional motive or the broad dicta in the Champion opinion, the Lottery Act simply prohibited an article of commerce from crossing state lines. The federal legislature regulated a

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39 188 U.S. 321 (1903).
40 The premise of a national police power is rejected by Morrison, 120 S. Ct. at 1740 and Lopez, 514 U.S. at 549.
41 Although the Act is still in effect, 18 U.S.C. §§ 1301-07 (2000), it does not prohibit state-controlled lotteries where the lottery tickets are transported solely within the state, id. at § 1307, and many states in recent years have legalized lotteries.
42 135 U.S. 100 (1890).
43 In a message to Congress in 1890, President Harrison cited the inability of states to defend themselves against lotteries in other states. Special Message from President Benjamin Harrison to Congress (July 29, 1890), reprinted in 9 Messages and Papers of the Presidents: 1789-1897, at 80 (J. Richardson ed., 1898).
44 Leisy had a nationalizing effect since no state could effectively outlaw a commodity without national legislation to stop its flow. Congress reacted swiftly in the same year by passing the Wilson Act which allowed the states to regulate the importation of liquor. Act of Aug. 8, 1890, ch. 728, 26 Stat. 313. This act was upheld as constitutional by the Court the following year in In re Rahrer, 140 U.S. 545, 562 (1891). The Court, in Champion cited Rahrer as “a recognition of the principle that the power of Congress to regulate interstate commerce may sometimes be exerted with the effect of excluding particular articles from such commerce.” 188 U.S. at 362.
matter that the Court’s interpretation of the Commerce Clause had put beyond the power of the states to prevent coming into the state line.\textsuperscript{45}

It was the Supreme Court’s distortion of the Commerce Clause, beginning during the second half of the nineteenth century,\textsuperscript{46} which obscures the Framers’ design of federalism. The design was explained through much of James Madison’s discussion in The Federalist, which concerned the power of Congress to limit state power, without displacing state law. Madison explained that the federal system is designed with the recognition that states have and will continue to enact some unjust laws. The Federalist solution, however, was not to displace state law; rather the Constitution’s new form of federalism made it possible to isolate “problems” to a particular state. Madison observed how:

The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States . . . . A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it; in the same proportion as such a malady is more likely to taint a particular county or district, than an entire State. In the extent and proper structure of the Union, therefore, we behold a republican remedy for the diseases mostincident to republican government.\textsuperscript{47}

While the post-Civil War Amendments to the Constitution altered vertical federalism, those changes did not eliminate vertical federalism and they did nothing to change horizontal federalism. As Chief Justice Salmon Chase stated in Texas v. White,\textsuperscript{48} affirming the vitality of federalism, after the Civil War: “The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.”\textsuperscript{49}

\textbf{D. Class Actions in the Federal System}

The connection between horizontal federalism and the field of torts is best understood in the context of class actions. Generally, federalism has not been identified as a key issue in the class-action context. Debate over class actions is multi-dimensional, with the practical problems predominating over any federalism concerns. A great deal of attention has

\textsuperscript{45} Chief Justice Fuller would have avoided this conclusion by analogizing lottery tickets to insurance contracts which were not considered to be articles of commerce. \textit{Champion}, 188 U.S. at 367-68 (Fuller, C.J., dissenting); \textit{see also} Hooper v. California, 155 U.S. 648 (1895); Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868).


\textsuperscript{47} \textit{The Federalist} No. 10, at 61-62 (James Madison) (Clinton Rossiter ed., 1961).

\textsuperscript{48} 74 U.S. 700 (1868).

\textsuperscript{49} \textit{Id.} at 725.
been devoted to mass-tort litigation in the federal courts.\textsuperscript{50} The Supreme Court has issued a plea for help.\textsuperscript{51} As federal courts struggle with immensely complicated issues, a growing percentage of class-action filings have been in state courts.\textsuperscript{52} With the Supreme Court's decisions in \textit{Amchem Products, Inc. v. Windsor},\textsuperscript{53} and \textit{Ortiz v. Fibreboard Corp.}, both reversing class certification for failure to comply with Federal Rule of Civil Procedure 23, plaintiffs' tort lawyers have further incentive to avoid federal court. This struggle between the tort litigation warriors over their preferences for state or federal court offers a relatively non-complex point at which to penetrate the issues of federalism.

Currently, there is a debate over where nationwide class actions belong in federal or state courts. Within recent months, representatives of the two sides have offered opposing views in \textit{U.S. Law Week}\textsuperscript{54} concerning legislation pending in Congress which would nationalize much of the class action litigation. Each side identifies a kernel of truth as it focuses on the defects in the position of the other; however, the positions of both are fundamentally defective in terms of federalism. A federalist approach is not only more consistent with the Constitution, but could produce legislation which would effectively answer the major arguments of both sides.

The top priority for ATRA in Congress is passage of what has been labeled "Class Action Fairness" legislation.\textsuperscript{55} If enacted, the legislation would facilitate removal of large class actions to federal court on the basis of "minimal diversity."\textsuperscript{56} In effect, it would allow for transfer of all significant class actions to federal court. It would do so by permitting more parties to remove a case to federal court. Currently, only defendants are able to remove, and then only if all defendants consent. Under the proposed legislation, any defendant, and even plaintiffs who are unnamed but who are part of the designated class, would be able to remove to federal court.\textsuperscript{57}

\textsuperscript{50} See, \textit{e.g.}, \textbf{ADVISORY COMMITTEE ON CIVIL RULES AND THE WORKING GROUP ON MASS TORTS, REPORT ON MASS TORT LITIGATION} (1999).

\textsuperscript{51} \textit{Ortiz v. Fibreboard Corp.}, 527 U.S. 815, 821 (1999) (concluding "the elephantine mass of asbestos cases . . . defies customary judicial administration and calls for national legislation").


\textsuperscript{53} 521 U.S. 591 (1997).

\textsuperscript{54} See Schwartz, \textit{Fair Federal Forums, supra} note 11; Baron, \textit{supra} note 32.

\textsuperscript{55} See S. 353, 106th Cong. (1999).

\textsuperscript{56} See \textit{id.}

\textsuperscript{57} See \textit{id.}
The proposal is being spearheaded by ATRA's General Counsel, Victor Schwartz. After pointing to specific "abuses" of class actions, Schwartz finds that in contrast to federal courts, "many state courts take a lax approach to class certification and fail to properly manage the lawsuits themselves." 58 He argues that "having fair federal forums decide diversity cases promotes effective interstate commerce and helps assure that out-of-state defendants receive fair and objective trials." 59 His argument, however, is not about bias by in-state parties against out-of-state interests. The rationale for the rule of "complete diversity" is the notion that where at least one plaintiff and one defendant are citizens of the same state, there is no single in-state interest that will be biased against an out-of-state party or interest. 60 Diversity jurisdiction does not address other forms of bias that may exist between citizens of the same state. The Constitution places few restrictions on internal state relationships. 61 Even the Fourteenth Amendment provides the federal government with power to intervene only in certain types of bias by states against their own citizens.

Schwartz equates the anti-corporate bias with in-state versus out-of-state bias as the predicate for minimal diversity. Although he claims the difference between federal court and state court handling of class actions against corporations amounts to a "denial of due process and equal protection," 62 that claim is difficult to support. The Supreme Court has gone so far as to hold that punitive damage awards can be so unreasonable as to violate due process. 63 As discussed below, however, the Court has rejected a due process challenge that would have effectively prevented nationwide state-court class actions. 64 If states' handling of tort litigation was causing Fourteenth Amendment violations, then corporate defendants should be seeking review and succeeding in the Supreme Court on that basis. If they thought they could succeed, corporations would be filing civil rights actions in federal court against state class-action laws. They are not doing so. Rather, ATRA and its supporters are attempting to manipulate diversity jurisdiction in order to achieve what they cannot accomplish under federal question jurisdiction. 65 Through a minimal

58 Schwartz, Fair Federal Forums, supra note 11, at 2117.
59 Id. at 2118.
61 U.S. Const. art. I, § 10.
62 Schwartz, Fair Federal Forums, supra note 11, at 2119.
diversity statute, they are seeking near-exemption from state class-action litigation. That is not to say that limits on state-court class actions are inappropriate, but only that the proposed legislation, S.353, is not constitutionally "necessary or proper."

1. Fitting the Solution to the Problem

The class-action removal proposal stretches the constitutional limits of federal jurisdiction in diversity without solving the class-action problems already facing federal courts. The normal standard for the exercise by federal courts of diversity jurisdiction, i.e., cases between citizens from different states, is that of complete diversity. For complete diversity, none of the parties-plaintiff may be a citizen of the same state as any of the parties-defendant. Congress, however, has the constitutional power to provide for minimal diversity. That is to say, Congress can choose to permit federal court jurisdiction, based on diversity between at least one of the plaintiffs and one of the defendants. Congress has done so sparingly, most notably in interpleader actions where otherwise no single court may have jurisdiction to determine rights to a single res. In proposing a routine transfer of class actions to federal court, the proponents are arguing something very different; their chief complaint is that the state courts are abusing the class-action device.

The proposal for easier removal to federal court assumes that federal class actions somehow solve the problem identified. What the proponents of removal seem to think is that federal courts will certify fewer class actions. At best, this solution only indirectly deals with the real problem, which routinely occurs in both state and federal class actions, namely the conflicts created among the laws of two or more states. Both state and federal class actions regularly include unnamed plaintiffs who are not citizens of the forum state. Regardless of whether these are federal or state class actions, the trial court must decide whose state law applies. The application of the appropriate state law is a major federalism issue and one which is not resolved by the proposal to federalize most class actions.

Schwartz actually does briefly identify the important federalism issue in class actions when he writes: "State courts will often apply their own law to claims arising in other states and involving plaintiffs and defendants from other jurisdictions even when their own law is in direct conflict with the laws of those states." The problem Schwartz identifies in state courts

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68 Id. at 530.
69 Schwartz, Fair Federal Forums, supra note 11, at 2119 (emphasis added). In a longer version of the article, with the same title, Schwartz devotes more attention to the
applies as well to federal courts, a matter which is complicated by the
\textit{Erie}^{70} doctrine. For the purposes of simplifying the analysis, we focus here
on state-court class actions. However useful class actions are, nationwide
class actions in state courts implicate the limits on a state to resolve issues
occurring outside its borders between parties, neither of whom are citizens
of the forum state. In other words, this question arises: what right do state
courts have to govern matters that do not fall within the territorial limits on
their residual sovereign powers?

The class-action device has a long lineage, deriving from Equity.\textsuperscript{71} Its
extension to common-law actions, and the size of damage and attorney-fee
awards, has generated the controversy. However efficient they may be,
nationwide class actions raise complex federal constitutional issues. In
class actions, each individual plaintiff—named and unnamed—has his or
her own claim or cause against the defendant. It is permissible for a state
court to resolve a claim brought by a named plaintiff (whether a citizen of
the state or not) who invokes the jurisdiction of the forum's courts. As
long as the plaintiff can get personal jurisdiction over the out-of-state
defendant in that court (usually through a “long-arm” statute), the state
court can render a valid judgment which is entitled to full faith and credit in
other states.

When, however, a state court certifies a class action that includes
unnamed plaintiffs from other states, the question arises as to whether the
state court has jurisdiction over the unnamed plaintiffs and if so, what law
the court should apply. Those out-of-state plaintiffs have done nothing, at
least at the outset, to invoke the jurisdiction of the courts of the forum state.
When the defendant also is not a citizen of the forum state, the state court is
undertaking to resolve a dispute between two out-of-state citizens, neither
of whom have invoked the jurisdiction of that state’s courts. The fact that
the defendant may be subjected legitimately to the state court’s jurisdiction
regarding the dispute between the named plaintiff and the defendant does
not have any jurisdictional bearing on the dispute (if any) between the
unnamed, out-of-state plaintiff and the out-of-state defendant. In other
words, even if state law permits, the logic of federalism would seem to
conflict with the notion that state courts can certify nationwide class
actions.

\textsuperscript{70} \textit{Erie}, 304 U.S. 64 (1938); see also Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S.
487 (1941).

In *Phillips Petroleum Co. v. Shutts*, however, the Supreme Court ruled in such a way that allows nationwide state-court class actions, while placing only minimal limits on the ability of the state court to apply the substantive law of the forum state. The corporate petitioner raised a Due Process challenge to the jurisdiction of the state court over the unnamed plaintiffs in the certified class. The petitioner claimed that the Court’s minimum-contacts standard for state assertion of personal jurisdiction over out-of-state defendants also applied to out-of-state, unnamed plaintiffs.\(^72\) In rejecting the challenge, the Court found the unnamed plaintiffs were not prejudiced because they had the opportunity to opt out after receiving notice of the class action.\(^73\) On the issue of jurisdiction, the petitioner did not raise, and the Court did not consider any federalism issue. The petitioner, however, did assert both a Full Faith and Credit and also a Due Process challenge to the State’s application of its own law to the entire class. This presented a federalism claim on the question of choice of law. Contrary to its usual “hands-off” approach to the choice-of-law decisions by states, the Court held that the state court had violated the Constitution in applying its own law to the entire class, almost none of whom had any contact with the state. This Court did so without distinguishing between the Due Process and Full Faith and Credit Clauses.\(^74\)

2. Confining State Court Class Actions

Suppose that Congress could, in accord with the Constitution, prevent state class actions from including as unnamed plaintiffs anyone who is not a resident or citizen of the forum state. Although the U.S. Supreme Court has determined that states may include out-of-state non-named plaintiffs,\(^75\) it may be that Congress nevertheless has the power under the Full Faith and Credit Clause to legislate a rule to the contrary. Before addressing the constitutional issues, however, it is important to consider whether and to what extent such a solution would respond to the arguments made by the two sides in the debate over the proposal for class-action removal to federal court.

Legislation that barred, rather than removed to federal court, nationwide state class actions would respond in part to both the complaints of ATRA, and the objections of ATL. Ending nationwide class actions in state courts would eliminate from state court most of the large interstate class actions against which Schwartz argues.\(^76\) Such legislation would

\(^{72}\) 472 U.S. at 807-08.
\(^{73}\) *Id.* at 810-11.
\(^{74}\) *Id.* at 822-23.
\(^{75}\) See *id*.
\(^{76}\) Schwartz, *Diversity Jurisdiction Reform, supra* note 69, at 500-02 (discussing
leave certain interstate class actions in state court, e.g., those by state citizens against defendants, when at least one defendant is an in-state citizen. These remaining state-court class actions would not differ essentially from other cases involving less than complete diversity. Class actions against out-of-state defendants would still be removable, depending on the citizenship of the named parties. Indeed, considering the prospects for lower judgment amounts, as well as attorney-fee awards, in separate state-court class actions, corporate defendants might suddenly prefer to litigate class actions in state court. The risk of corporations settling defensible cases for fear of excessive judgments would be greatly reduced.

The abuses by state courts of class actions, where they occur, would be limited to the named plaintiffs and those unnamed plaintiffs who are citizens of the forum state. Such an approach would not end class-action plaintiffs' ability to "game the system" by preventing removal, but it would greatly reduce its impact. Nor would this solution address the "abuses" cited by ATRA in particular state judicial systems. To "reform" those practices, ATRA would be left to lobby in the particular states. Ending nationwide class actions in state courts, therefore, would give ATRA much of what it is attempting to achieve through the proposal to ease removal to federal court. This alternative solution, however, avoids expanding federal court jurisdiction, which is generally not favorable to federalism.

At the same time, many of ATLA's objections to the ATRA-backed federal class-action legislation would be satisfied. Corporate defendants would still be subject to class-action suits in state courts. Corporations choosing to do business in a state would remain subject to its laws. Limiting unnamed plaintiffs to citizens of the state would not change removability because the citizenship of unnamed parties in a class action is not considered when determining the existence of diversity jurisdiction.77 Named plaintiffs who are citizens of the same state as the corporate defendant(s) would still defeat diversity. In other words, the current rules requiring complete diversity for removal to federal court would remain unchanged. The unfairness of "allow[ing] the defendant to ultimately decide where a case is heard"78 would not occur. By having no impact on the removal of cases to federal court, such an alternative approach would answer the objections of ATLA's Fred Baron about 1) increasing the burden on over-burdened federal courts; 2) maintaining the ability of consumers to file class actions in state courts; and 3) respecting the right and responsibility of state courts to decide novel legal questions.79

78 Baron, supra note 32, at 2132-33.
79 See id. at 2133. This alternative does not address "coupon-only" settlements. See id.
Eliminating nationwide state-court class actions would certainly reduce the size of class-action judgments and, therefore, attorneys' fees in state court cases. While some of the better financed plaintiffs' tort lawyers may object to being so limited, the situation would leave litigation opportunities for many more plaintiffs' lawyers. The first judgment or a settlement against a corporation would not foreclose other litigation because res judicata would not affect potential plaintiffs in other states. Indeed, being subject to lawsuits in virtually every state would ensure that corporations are in fact subject to the laws of the different states, rather than the law of the one state where suit is filed.\textsuperscript{80} That result would not favor large corporations, which actually often prefer nationwide class actions.\textsuperscript{81} As exemplified by the tobacco settlements,\textsuperscript{82} large corporations and powerful plaintiffs' lawyers share a common interest in consolidating gigantic litigation. For reasons similar to why they generally prefer dealing with large labor unions, large corporations benefit from the efficiencies of scale offered by consolidating litigation. Even when the two sides consent, however, they should not simply be able to avoid the structural and jurisdictional limits imposed by constitutional federalism.

The alternative solution would protect the legitimate reach of state law. If a state's legislature and judiciary are "captured" by trial lawyers, federalism permits that state to shape its laws in ways that may offend ATRA. At the same time, ATRA members are not helpless. Although corporations are limited in their ability to charge different prices in

\textsuperscript{80} Under the choice of law jurisprudence, each state can choose to apply its own law to cases in which the state has some interest. See infra Part II.

\textsuperscript{81} In the early stages of a nascent mass tort phenomenon, defendants may either elect to negotiate a global settlement, as in the Silicon-breast implant litigation, or to litigate individual cases, as in the DES, Bendectin, and cigarette litigations. At this stage, defendants typically resist plaintiffs' efforts to procedurally consolidate cases. If parties choose to litigate individual cases, then a pattern of defendant victories will slow any movement towards aggregation, whereas a pattern of plaintiff victories will encourage consolidation.

A "mature mass tort" generally signifies a pervasive pattern of defendant losses, coupled with known or ascertainable settlement values. Once a mature mass tort has emerged, it is likely that (either or both) plaintiff and defense lawyers will seek consolidation of individual cases in a state or federal forum. In the most advanced mass torts, such as asbestos litigation, lawyers for the plaintiffs, defendants, and third-party insurers will seek global settlements typically using the class action settlement device.


\textsuperscript{82} See Saundra Torry & John Schwartz, \textit{Tobacco Agreement Needed Nudge from White House; President's Aide Suggested Idea to End Three-Month Standoff over Punitive Damages}, WASH. POST, June 23, 1997, at A06.
different states, they can "vote with their feet" by withdrawing their products from a state or by relocating if their businesses are located in-state. Corporations may respond that such an option is not a practical one; but by choosing neither to withdraw their products nor to relocate they must be presumed to have calculated that the benefits of staying outweigh the cost of leaving. They then must rely on in-state political strategies, and when appropriate, legal action.

One response and possible criticism of the alternative solution is that, as a practical matter, it seems to accomplish much the same result as the proposed minimal diversity removal legislation. The alternative solution by itself may reach much the same result as long as multistate and nationwide class actions are generally available in federal court. That, however, depends on what, if anything, happens with class actions in federal court. As stated above, for the purpose of clarifying the federalism problem, this part of the paper focuses only on state-court class actions. Nevertheless, even if nothing would change about the handling of federal court class actions, the alternative solution has the advantage of not expanding federal court jurisdiction.

The premise underlying the alternative choice of means is that expansions of federal court jurisdiction should be carefully limited because they come at the expense of state power. Analytically, though, the reason for offering the alternative solution is primarily to isolate the real problem of interstate and nationwide class actions, namely conflicts among state laws. These same conflicts over law are equally present in multistate and nationwide class actions in federal court. Some federal cases have dealt with these conflicts indirectly by resorting to the commonality requirements of the federal class-action rule, Federal Rule of Civil Procedure 23. This approach to choice of law masks the real issue of horizontal federalism, which is the ability of one state to resolve choice of law issues in a manner that impinges on other states.

II. THE CONFLICTS OVER LAWS

If inclined to do so, I might attempt to justify the proposal to end nationwide class actions in state courts by invoking Congress's power under the Commerce Clause to prohibit cross-border commercial activities, tied to an "affecting interstate commerce" rationale. A prohibition on the scope of state court litigation might well withstand a federalism

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84 See Spence v. Glock, 227 F.3d 308 (5th Cir. 2000); Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996).
85 See United States v. Darby, 312 U.S. 100 (1941).
challenge. I do not care to attempt such a justification, however. Even if the Supreme Court were to accept it, expansive Commerce Clause arguments unnecessarily distort the constitutional scheme. The Commerce Clause, as important a power as it is, is simply a part of the federal design, a design that includes other related provisions. Moreover, Congress has an obligation to determine whether a particular policy is “necessary and proper.” While looking for guidance from Supreme Court cases, Congress may decide a particular policy is neither “necessary” nor “proper,” despite the probability that the Supreme Court would determine the legislation to be constitutional. Indeed, the deference traditionally shown by the Supreme Court to congressional legislation stems from the assumption—often unwarranted—that Congress has considered the constitutionality of the legislation it adopts.

The alternative solution previously proposed serves the purpose of focusing on the territorial reach of state law. Without further elaboration, however, it fails to differentiate between the two distinct issues addressed in Phillips Petroleum v. Shutts, namely personal jurisdiction and choice of law. If state courts were prevented from adjudicating nationwide class actions, the choice of law issue, in most cases, would be eliminated. Otherwise, the choice of law issue would be this: whether in a nationwide class action a state court can apply its own law as between the unnamed, out-of-state plaintiffs and out-of-state defendants. Instead of directly addressing this choice of law issue, legislation to implement the alternative solution would prevent the exercise of jurisdiction by state courts over persons who are unnamed members of the class residing outside the

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88 The report of a recent speech by Justice Scalia offers the following observation: My court is fond of saying that acts of Congress come to the court with the presumption of constitutionality,” he said. But “if Congress is going to take the attitude that it will do anything it can get away with and let the Supreme Court worry about the Constitution . . . then perhaps that presumption is unwarranted.” Editorial, A Shot From Justice Scalia, Wash. Post, May 2, 2000, at A22.
90 See Aver v. State Farm Mut. Auto. Ins. Co., No. 97-L-114, 1999 WL 1022134 (Ill. Cir. Oct. 8, 1999), in which the trial court certified a nationwide class action and awarded compensatory and punitive damages based on Illinois' Consumer Fraud Act. The court found the defendant's use of "after-market" replacement parts, rather than the manufacturer's original equipment parts, a fraudulent practice. The court did not apply the law of other states in which the practice may have been an acceptable one. See Schwartz, Fair Federal Forums, supra note 11, at 2119 n.45.
territorial boundaries of the forum state. That brings us to a consideration of conflicts of law and the Full Faith and Credit Clause.

A. Federalism and Conflicts of Law

Conflicts of law scholarship, which includes choice of law,\(^{91}\) is a particularly esoteric subject which has been described as a “dismal swamp.”\(^{92}\) A field once dominated by clear, if not completely satisfactory, rules has generated intellectual and litigation chaos as a result of the influence of Legal Realism.\(^{93}\) “Most conflicts scholars decry the present chaotic state of affairs.”\(^{94}\) A leading conflicts scholar has suggested that non-conflicts scholars are less likely to be pessimistic about possible solutions and more willing to take risks.\(^{95}\) With that encouragement and an awareness of the risk of being accused of simple-mindedness, I venture forth to call attention to the clear logic in the relationship between federalism and territorially-based choice of law rules.

In the foundational American treatise on the subject of conflicts of law, Justice Joseph Story identified the territorial basis for all law and points to the particular importance of conflicts of law and choice of law in our federal system:

It is plain, that the laws of one country can have no intrinsic force, 
\textit{proprio vigore}, except within the territorial limits and jurisdiction of that country. They can bind only its own subjects, and others, who are within its jurisdictional limits; and the latter only while they remain there. No other nation, or its subjects, are bound to yield the slightest obedience to those laws. Whatever extra-territorial force they are to have, is the result, not of any original power to extend them abroad, but of that respect, which from motives of public policy other nations are disposed to yield to them, giving them effect, as the phrase is, \textit{sub}

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\(^{91}\) The subject of conflicts of laws covers 1) jurisdiction, 2) choice of law, and 3) recognition and enforcement of judgments. SYMEON C. SYMEONIDES ET AL., CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL 3 (1998) [hereinafter SYMEONIDES, CONFLICT OF LAWS].

\(^{92}\) William Prosser, \textit{Interstate Publication}, 51 MICH. L. REV. 959, 971 (1953), quoted in Michael H. Gottesman, Draining The Dismal Swamp: The Case for Federal Choice of Law Statutes, 80 GEO. L.J. 1 (1991) (“The realm of the conflict of laws is 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. The ordinary court, or lawyer, is quite lost when engulfed and entangled in it.”).

\(^{93}\) See Linda S. Mullenix, Federalizing Choice of Law for Mass Tort Litigation, 70 TEX. L. REV. 1623, 1648 (1992) (“What the entire field of conflicts seems to have done over the last century is move from a set of purportedly rigid, black-letter rules that were covertly manipulable to a modernized set of flexible principles that are overtly manipulable.”) [hereinafter Mullenix, Federalizing Choice of Law].

\(^{94}\) Gottesman, supra note 92, at 11 & n.42.

\(^{95}\) Mullenix, Federalizing Choice of Law, supra note 93, at 1662.
mutuae vicissitudinis obtentu, with a wise and liberal regard to common convenience and mutual necessities.


This is the natural principle flowing from the equality and independence of nations. For it is an essential attribute of every sovereignty, that has no admitted superior, and that it gives the supreme law within its own domains on all subjects appertaining to its sovereignty. What it yields, it is its own choice to yield; and it cannot be commanded by another to yield it as matter of right. And accordingly it is laid down by all publicists and jurists, as an incontestable rule of public law, that one may with impunity disregard the law pronounced by a magistrate beyond his territory. Extra territorium jus dicenti impune non paretur, is the doctrine of the Digest; and it is equally as true in relation to nations, as the Roman law held it to be in relation to magistrates.


The jurisprudence, then, arising from the conflict of the laws of different nations, in their actual application to modern commerce and intercourse, is a most interesting and important branch of public law. To no part of the world is it of more interest and importance than to the United States, since the union of a national government with that of twenty-four distinct, and in some respect independent states, necessarily creates very complicated relations and rights between the citizens of those states, which call for the constant administration of extra-municipal principles. This branch of public law may be fitly denominated private international law, since it is chiefly seen and felt in its application to the common business of private persons, and rarely rises to the dignity of national negotiations, or national controversies.\(^{96}\)

The modern Supreme Court has given very modest constitutional oversight to choice of law questions.\(^{97}\) Within very broad limits under the Due Process and Full Faith and Credit Clauses, the Court has allowed states to choose the law to apply in cases involving parties from different states. As Professor Douglas Laycock has argued, however, the current choice of law regime violates the principle of equality as between states and as between citizens of different states.\(^{98}\) He contends that the Privileges and Immunities and Full Faith and Credit Clauses of Article IV of the Constitution, together with the federal structure of the Constitution, require national choice of law rules be adopted either by Congress or the Supreme

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\(^{96}\) Story, supra note 3, at 7-9 (emphasis added).

\(^{97}\) See Symeonides, Conflict of Laws, supra note 91, at 440.

Court. Regardless of whether choice of law rules are constitutionally required, it is sufficient for present purposes to build on the proposition that Congress has the constitutional power to implement a national set of choice of law rules, and that some set of rules is very much needed.

B. The Privileges and Immunities and Full Faith and Credit Clauses

In terms of horizontal federalism, the Constitution contains several mutually reinforcing provisions: diversity jurisdiction, the Privileges and Immunities Clause, and the Full Faith and Credit Clause. The Privileges and Immunities and the Full Faith and Credit Clauses are found in Article IV, along with other provisions that reinforce horizontal federalism. Together they provide the constitutional authority for addressing the three domains of conflicts of law: 1) jurisdiction; 2) choice of law; and 3) recognition and enforcement of judgments. Jurisdiction and judgments are well-enough understood. The meaning of the diversity jurisdiction statute has been explicated through an endless number of cases. The enforceability of final judgments in other states under the Full Faith and Credit Clause has been strictly implemented by the Supreme Court. Choice of law issues, however, have neither been coherently resolved by the Supreme Court, nor been the subject of comprehensive congressional legislation. Diversity jurisdiction, the Privileges and Immunities Clause, and the Full Faith and Credit Clause should make it possible to resolve interstate conflicts on the basis of equality between states and between the citizens of different states.

First, in The Federalist, Hamilton explains diversity jurisdiction as being necessary to implement the Privileges and Immunities Clause. That may seem to be a doubtful assertion, because for a specific challenge based on the Privileges and Immunities Clause, Article III’s federal question jurisdiction would suffice. According to Professor Laycock, however, Hamilton means “that the Privileges and Immunities Clause is at issue in every diversity case.” That is to say, “Hamilton’s argument makes sense only if he means that in any litigation, arising under any law,

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99  Id.
100 Other examples include the Extradition Clause, U.S. Const. art IV, § 2, cl. 2, and the nullified Fugitive Slave Clause, U.S. Const. art IV, § 2, cl. 3.
103 See THE FEDERALIST No. 80 (Alexander Hamilton).
104 Laycock, supra note 98, at 279.
discrimination in the administration of justice against a citizen of a sister state would violate the Privileges and Immunities Clause.\textsuperscript{105}

Hamilton’s statement about discrimination in the administration of justice does not operate in favor of “minimal diversity” removal for corporations. As previously noted,\textsuperscript{106} the original status of corporations has evolved from their being treated as a group of individuals to being considered distinct entities. Since the nineteenth century, corporations have come to conduct virtually all cross-border commercial activity. That development has been reflected in the growth of federal legislation regulating corporations under the Commerce Clause. Such specific federal legislation is generally the basis for federal question jurisdiction. Simply the national or international status of many corporations, however, does not entitle them to the “protective jurisdiction” of the federal courts, such as was arguably the basis for the Supreme Court giving federal court access to the Bank of the United States.\textsuperscript{107} Relatively few corporations are creatures of the federal government. Almost all corporations remain creatures of state law. In that they are unlike individuals who are citizens; corporations thus do not enjoy the protection of Article IV’s Privileges and Immunities Clause, which Hamilton linked to diversity jurisdiction. The changed status of corporations is reflected in their protection as citizens under the Fourteenth Amendment,\textsuperscript{108} which implicates federal question, but not diversity, jurisdiction.

Second, Hamilton’s linkage between diversity jurisdiction and the Privileges and Immunities Clause naturally leads to the Full Faith and Credit Clause. On the one hand, a state must extend the “privileges and immunities” of its own laws to citizens of other states. On the other hand, states must give full faith and credit not only to judicial proceedings, but also to the “acts” and “records” of other states:

Section 1. Full Faith and Credit \textit{shall} be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the \textit{Congress may by general Laws prescribe} the Manner in which such Acts, Records and Proceedings shall be proved and the \textit{Effect thereof}.\textsuperscript{109}

\textsuperscript{105} \textit{Id.} (emphasis added).
\textsuperscript{106} \textit{See supra} text accompanying notes 14-18.
\textsuperscript{107} \textit{See Osborn v. Bank of United States}, 22 U.S. (9 Wheat.) 738 (1824) (holding that federal legislation gave the federally chartered Bank of the United States the right to sue in federal court and that the legislation was constitutional). It has been argued whether this was a form of “protective jurisdiction” for a federal entity. \textit{See HART & WECHSLER, supra} note 17, at 898-901.
\textsuperscript{108} \textit{Santa Clara County v. Southern Pac. R.R. Co.}, 118 U.S. 394 (1886).
\textsuperscript{109} \textit{U.S. CONST. art. IV, § 1} (emphasis added).
Obviously, some method is required to determine when a state may or must apply its own law and when it may or must apply the law of another state.

While the clause mandates ("shall") each act, record, and judicial proceeding be given full, faith, and credit, it also allows ("may") legislation regarding the proof and effect to be given to each. Although Congress has not yet done so, "almost everyone agrees that [Congress's power to specify the 'effect' of sister state law] includes power to specify choice of law rules."\(^{10}\)

Congress has paid little notice to its power under the Full Faith and Credit Clause to regulate choice of law issues and thus strengthen the horizontal dimension of federalism. Unlike Congress's exercise of other powers which have tended to erode state powers, the exercise of this power can protect the states by preserving the equal powers of each. Congress's ability to prevent some states from effectively imposing their laws on others is clearly the basis for a rare act adopted pursuant to the Full Faith and Credit Clause, namely the Defense of Marriage Act (DOMA).\(^{11}\) That Act authorizes states not to give full faith and credit to same-sex marriages enacted by the laws of any other state. In the absence of such legislation, states might be required to give full faith and credit to the acts of states authorizing such marriages.

Due to lack of legislation under this clause the meaning of the term "full faith and credit," except as to judgments, has not been refined through litigation. Thus, it remains to be seen how Congress' power will be construed by the Supreme Court. On one hand, it certainly seems that the purpose of the Full Faith and Credit Clause "is to make it easier for a state to regulate its own affairs, not to enable it to fiddle with the affairs of others."\(^{12}\) Nevertheless, arguments have been put forth that the Full Faith and Credit Clause would require states to recognize "same-sex marriages" permitted in other states. In reacting to that possibility, Congress has invoked the Full Faith and Credit Clause to enact DOMA. By so doing, Congress has attempted to isolate a state, at least to the extent of confining the "effect" of a certain "act" to that state. While scholarly opinion is

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\(^{10}\) Laycock, supra note 98, at 301 (footnotes omitted).

\(^{11}\) 28 U.S.C. § 1738(C) (1994) provides:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

\(^{12}\) David P. Currie, Full Faith & Credit to Marriages, 1 Green Bag 2d 7, 12 (1997).
divided on the constitutionality of DOMA, Congress certainly does have the power to adopt general rules regarding choice of law.

C. Inter-Jurisdictional Relationships

From a general, national perspective, the disagreements about state law—whether be tort laws or laws pertaining to marriage—need to be understood in terms of the two faces of federalism. On the one hand, within their borders, states are free to shape their own substantive and procedural law, generally as they deem best. Depending on their constitutions and legislation, states take various approaches in allocating responsibility to the legislature, the judiciary, and juries to determine outcomes. Whatever the state’s approach, the Constitution contemplates limits on the reach of a state’s law. By its nature, the constitution of a federal state must be designed to preserve some degree of independence for each state, not only from the national government, but from each of the other states. The Constitution deprives states of the sovereign power to control their borders, including specific prohibitions against conducting foreign affairs, regulating trade, and waging war. Having lost control of their borders, states are vulnerable. The Constitution must, and does, provide protection in the event one state legislates or acts in ways that damage other states. When one state has a particular cause of action against another, it can invoke the Supreme Court’s original jurisdiction. This is a substitute for resorting to war. Instead of litigation, however, two or more states may want to settle their disagreements cooperatively through some kind of agreement. The Constitution also allows states, with the consent of Congress, to enter into such compacts with each other.

113 See Scott Fruhwald, *Choice of Law and Same-Sex Marriage*, 51 FLA. L. REV. 799, 812 n.84 (1999) for a list of publications arguing both sides of the issue.


115 Robert H. Jackson, *Full Faith and Credit—The Lawyer’s Clause of the Constitution*, 45 COLUM. L. REV. 1, 26 (1945) (noting “the mutual limits of the states’ powers are defined by the Constitution”).

116 U.S. CONST. art. I, § 10, cl. 1 (“No State shall enter into any Treaty, Alliance or Confederation.”).

117 U.S. CONST. art. I, § 10, cl. 2 (“No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its Inspection Laws.”).

118 U.S. CONST. art. I, § 10, cl. 3 (“No State shall . . . engage in War, unless actually invaded, or in such imminent danger as will not admit of delay.”).

119 U.S. CONST. art. III, § 2, cl. 2.

120 Without the consent of Congress, compacts among some states might threaten others or threaten the Union.

121 U.S. CONST. art. I, § 10, cl. 3 (“No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State.”).
The Constitution thus provides various federal solutions to maintain harmony and equality among the states. This horizontal federalism involves the principles of reciprocity and comity from international law. Whereas international comity is a matter of policy, the Constitution makes the principle mandatory. The Constitution requires the states to give full faith and credit to the judgments and acts of sister states, to extradite prisoners to other states, and to extend to citizens of other states the privileges and immunities afforded their own citizens.

These principles of cooperation, together with diversity jurisdiction, multiply the possibilities where plaintiffs might file particular litigation. This raises the issue of “forum-shopping.” In the debate over the proposal to make the state-court class actions removable with “minimal diversity,” each side accuses the other of forum-shopping. From their law school education, they understand “forum-shopping” to be a pejorative term. It connotes manipulation in the choice of a forum from among two or more possibilities. Forum-shopping, however, is as old as the common-law courts. Among the three common-law courts, and between these courts and the courts of equity, competition long existed. Litigants could choose the court with the most favorable law. This was quite consistent with the then-prevailing reality of a plurality of jurisdictions. That plurality of jurisdictions, however, eventually declined as courts centralized jurisdiction, a process fully completed during the nineteenth century.

By opting for a federal, rather than a unitary state, this country’s Founders were preserving a form of plural jurisdiction. The operation in every state of both federal and state law and a dual court system creates a dualism of jurisdiction. Together, the fifty states produce a pluralism of jurisdiction and law. This pluralism reflects the Framers’ concept of protecting liberty by limiting power in multiple ways. Indeed, diversity jurisdiction, which was created to protect those who are not citizens of the forum state, guarantees a certain amount of forum-shopping in suits between citizens of different states. Initially, if they meet the jurisdictional amount, plaintiffs can choose to sue citizens from other states in either state or federal court. If suit is filed in state court, the defendant may be able to remove to federal court. This kind of forum-shopping is part of the Constitution’s design to protect liberty.

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122 See Mark W. Janis, An Introduction to International Law 331-32 (3d ed. 1999); see also Lea Brilmayer, International Law In American Courts: A Modest Proposal, 100 YALE L.J. 2277 (1991) (explaining the use of horizontal and vertical applications of international law, and concluding that American courts are more likely to apply international law in cases involving vertical disputes).

123 See J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 34-37, 41-44 (2d ed. 1979).

124 See generally THE FEDERALIST NOS. 10, 51 (James Madison).
Forum-shopping involves selecting a forum for some advantage which might be derived from differences in law. It has long been well established that the forum court will apply its own law as to matters of procedure.\footnote{See Story, supra note 3, at 469-70; Hanna v. Plumer, 380 U.S. 460 (1965).} Lawyers often choose federal over state court, or vice versa, because they consider the rules of procedure, discovery, or evidence to be more favorable. As to substantive law, pursuant to \textit{Erie Railroad Co. v. Tompkins}\footnote{304 U.S. 64 (1938).} and \textit{Klaxon v. Stentor Electric Manufacturing Co.},\footnote{313 U.S. 487 (1941).} federal courts must, in cases under diversity jurisdiction, apply the law of the forum state, as interpreted by that state's courts. Thus, the substantive outcome in diversity cases theoretically should be the same, regardless of whether the case is litigated in state or federal court. Although \textit{Erie} condemned forum-shopping, it has not eliminated it.

Without a national set of choice of law rules, \textit{Erie} and \textit{Klaxon} have simply changed the dominant direction of forum-shopping. \textit{Erie} overruled \textit{Swift v. Tyson}\footnote{41 U.S. (16 Pet.) 1 (1842).} because, among other reasons, it allowed federal courts in diversity cases to apply "general common law" on issues which were not the subject of other state legislation or well-established local usage. \textit{Erie} condemned forum-shopping between state and federal courts; it characterized subjecting defendants to different rules of law, at the choice of the plaintiff, as a denial of equal protection of the law.\footnote{\textit{Erie}, 304 U.S. at 75.} Under \textit{Erie-Klaxon}, the forum-shopping incentives have shifted from the vertical (between state and federal court in the same state) to the horizontal (between courts state to state).\footnote{See Gottesman, supra note 92, at 10 & n.33.}

\textit{Erie} minimizes vertical forum-shopping by prescribing that the substantive law of a diversity case should not vary as between a federal and a state court in the same state. \textit{Klaxon}, applying \textit{Erie}, however, requires federal courts to apply state law governing choice of law as well. Thus, the substantive law of the case may well vary, depending on the state in which the plaintiff chooses to file. The Supreme Court has allowed states to choose which law to apply, which often means state courts apply their own law. They may apply their own law to almost any action in which the state has some "interest."\footnote{See Alaska Packers Ass'n v. Indus. Accident Comm'n, 294 U.S. 532, 547 (1935) ("[T]he conflict is to be resolved . . . by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight.").} As a result, the plaintiff can shop for the state with the most favorable law. When a federal case is transferred from one
district court to another, the law of the first state travels with the case,\textsuperscript{132} even when the plaintiff moves for the transfer.\textsuperscript{133}

Under a national set of choice of law rules, the incentives for state-to-state forum-shopping would be greatly reduced. Consider the simplest of examples, where citizen of state $A$ has an automobile accident in an adjoining state $B$ with a citizen of $B$, who is at fault. Currently, the plaintiff from $A$ can choose to sue in a state or federal court in $A$ if he can get personal jurisdiction over the defendant and meets the jurisdictional amount. Regardless of whether he can or cannot get personal jurisdiction in $A$, he can sue in a state or federal court in $B$, where he will be able to obtain personal jurisdiction. As things currently stand, the plaintiff may gain an advantage on substantive legal issues, such as contributory negligence, if the law of the two states differ. Under a uniform system of choice of law, however, it would not matter whether the plaintiff sued in the courts of $A$ or $B$. Such rules, regardless of their content, would specify which state's law would apply. While the choice of law rules would be nationally uniform, such rules would not change the substantive law of any state.

\textit{D. Personal Jurisdiction}

Thus far, this discussion has ignored that part of conflicts of law which addresses personal jurisdiction. At the time of the Founding, neither personal jurisdiction nor choice of law were much less complex than they have become. The relative simplicity was largely due to the lower level of interstate commercial activity, as well as the lower level of litigation. Moreover, Justice Story's treatise on conflicts of law provided an ordered framework. That framework, tied to the federal structure of the Union, rested on the principle of territoriality. That meant that the rules governing personal jurisdiction were also tied to territoriality. As clearly stated in what was long the controlling, but since abandoned, case of \textit{Pennoyer v. Neff}:\textsuperscript{134}

\begin{quote}
[E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. As a consequence, every State has the power to determine for itself the civil status and capacities of its inhabitants; to prescribe the subjects upon which they may contract, the forms and solemnities with which their contracts shall be executed, the rights and obligations arising from them, and the mode in which their validity shall be determined and their obligations enforced . . . . The other principle of public law referred to follows from the one
\end{quote}

\textsuperscript{134} 95 U.S. 714 (1877).
mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory . . . . The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions.\(^\text{135}\)

It has been said that "Pennoyer v. Neff established the principle that in the absence of a waiver the presence of defendant within the state was a necessary prerequisite to a court's asserting personal jurisdiction over him."\(^\text{136}\) In fact, however, general rules regarding jurisdiction had long been established in the common law. In actions involving real property and in mixed actions, jurisdiction was confined to the site of the real property; in personal actions, such as torts, jurisdiction was proper wherever the defendant was found.\(^\text{137}\) As is apparent from a comparison of the language just quoted from Pennoyer with the following quotation from Justice Story's work in Conflicts, personal jurisdiction—like choice of law issues—was tied to the fundamental principle of territorial sovereignty:

Considered in an international point of view, jurisdiction, to be rightfully exercised, must be founded either upon the person being within the territory, or the thing being within the territory; for, otherwise, there can be no sovereignty . . . . On the other hand, no sovereignty can extend its process beyond its own territorial limits, to subject either persons or property to its judicial decisions. Every exertion of authority of this sort, beyond this limit, is a mere nullity, and incapable of binding such persons or property in any other tribunals.\(^\text{138}\)

While questions of personal jurisdiction and choice of law are distinct, both come under the subject of conflicts of law. In the United States, until into the twentieth century, both matters were controlled by the principle of territoriality. At roughly the same time, constitutional and non-constitutional theories affecting both shifted to a "contacts analysis." On the issue of personal jurisdiction, the Supreme Court's decision in International Shoe Co. v. State of Washington\(^\text{139}\) "became a watershed case that redefined the constitutional limitations on state court jurisdiction and,

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\(^{135}\) Id. at 722.

\(^{136}\) WRIGHT ET AL. supra note 14, at § 1064 (emphasis added).

\(^{137}\) STORY, supra note 3, at 450 (footnote omitted).

\(^{138}\) Id. at 450-51 (footnote omitted).

\(^{139}\) 326 U.S. 310 (1945).
indirectly, the principles of personal jurisdiction, almost completely.\textsuperscript{140} Responding to increased interstate corporate activity, the Court adopted the approach of allowing states to assert personal jurisdiction over a defendant who had "minimum contacts" with the state, as long as doing so was consistent with "fair play and substantial justice."\textsuperscript{141} While not completely eliminating the principle of territoriality, this analysis greatly eroded its importance. In place of territoriality, due process became the prevailing standard. As a result, a number of states have jurisdictional statutes for out-of-state service of process, known as "long-arm statutes," which simply exercise personal jurisdiction to the maximum extent permitted by due process.\textsuperscript{142}

In defending the principle of territoriality, I am not arguing to end long-arm statutes. In order to respect the territorial limits of each state, however, I do think Congress has a role to play in determining the rules on interstate service of process. Initially, each state determines its own jurisdiction, within the limits of its own territory. If it wishes to assert jurisdiction beyond its own territory, that should be a matter treated under the Full Faith and Credit Clause. Congress has powers to legislate regarding "judicial proceedings"; that is, "Congress may by general laws prescribe... the Effect thereof." Congress could bring order to conflicts over interstate assertion of personal jurisdiction, if it chose to do so.

The issue of personal jurisdiction implicates the matter of enforcement of judgments. When an attempt is made to enforce a judgment from one state in another state, the second state must give full faith and credit to the judgment. That judgment, however, can be challenged if the court that rendered the judgment lacked jurisdiction.\textsuperscript{143} Whether or not a judgment is entitled to full faith and credit depends on the validity of a state's assertion of long-arm jurisdiction. Prior to \textit{International Shoe}, judgments based on long-arm jurisdiction would not necessarily have been entitled to full faith and credit. When considering issues of interstate assertions of jurisdiction, Congress has the power to integrate the Privileges and Immunities Clause and the Full Faith and Credit Clause, as long as it stays within the constraints of the Due Process Clause.

\textsuperscript{140} \textit{Wright et al., supra} note 14, at § 1067.
\textsuperscript{141} \textit{International Shoe}, 326 U.S. at 316.
\textsuperscript{142} See, \textit{e.g.}, the Alabama long-arm statute, ALA. R. CIV. P. 4.2 (a)(2)(A). The Supreme Court of Alabama has held that jurisdiction under the Alabama long-arm statute "extends... to the permissible limits of due process." \textit{Ex Parte Paul Maclean Land Servs., Inc.}, 613 So. 2d 1284, 1286 (Ala. 1993).
\textsuperscript{143} See, \textit{e.g.}, \textit{D'Arcy v. Ketchum}, 52 (11 How.) U.S. 165, 174-76 (1850).
Pennoyer stated the original Supreme Court understanding of the relationship between due process and assertions of personal jurisdiction:

Since the adoption of the Fourteenth Amendment . . . the validity of . . . judgments may be directly questioned and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law.¹⁴⁴

Later, the Supreme Court not only broke the link between due process and the territorial principle, it also drained the Full Faith and Credit Clause of much meaning as to “acts,” while it has strictly enforced the “judgments” dimension of the Clause. Except for DOMA, Congress has not legislated on the “acts” aspect of the Clause.

The fact that the Supreme Court has upheld state long-arm statutes under the Due Process Clause should not bar Congress from adopting uniform rules. Under City of Boerne v. Flores,¹⁴⁵ Congress’s power under Section 5 of the Fourteenth Amendment is limited to creating remedies; Congress cannot create rights. Congress must, therefore, demonstrate that it is remediying a problem. Not only could Congress readily do so, but the adoption of uniform standards regarding interstate service of process need not, as City of Boerne did, conflict with the Supreme Court’s decisions. Moreover, unlike City of Boerne, Congress would also be acting under its independent power under the Full Faith and Credit Clause.

Congressional legislation regarding interstate exercise of jurisdiction should address claims of jurisdiction over out-of-state unnamed plaintiffs in class actions. If Congress decided that states could not exercise jurisdiction over non-resident unnamed plaintiffs in class actions, it could implement the alternative solution proposed in Part I. If determined to be constitutional, such a legislative solution would be superior to expanding removal of state court class-actions for the reasons stated in Part I, namely that it avoids expansion of federal court jurisdiction. Regardless of whether legislation regulating state long-arm statutes is ever adopted, however, the most important need is the adoption of uniform rules on choice of law. While little doubt exists about Congress’s authority to adopt such rules, the real question concerns the feasibility of adopting such rules.

E. The Prospects for Choice of Law Rules

Proposing that Congress adopt choice of law rules is not novel. In 1993, the American Law Institute (ALI) submitted its Complex Litigation Project to Congress. Among its features, the Project proposed a set of choice of law rules for mass-tort and mass-contract actions transferred to federal courts. Congress has not enacted those proposals. If Congress cannot act on choice of law rules for the area that most cries out for it, one might assume the prospects for enacting comprehensive rules are even less favorable. The ALI’s Project, and one by the ABA, have been described as:

[A]n object lesson in law reform [with the] ABA’s Mass Tort Report collect[ing] dust somewhere; the ALI’s Complex Litigation Project... sit[ting] like an intellectual colossus next to its Study of the Division of Jurisdiction Between State and Federal Courts; and Congress is still puttering with yet a new version of the Multiparty, Multiforum Jurisdiction Act.

The fact that efforts to adopt choice of law rules for the limited area of complex litigation have failed does not mean that, à fortiori, any more general effort is doomed to failure. The fundamental obstacle seems to be intellectual. The circle of choice of law scholars in the United States is relatively small. Prevailing opinion among these scholars ignores the territorial principles of constitutional federalism and generally opposes the notion that rules for choice of law should exist. Therefore, any chance of achieving federalism-reinforcing choice of law rules would require scholars who 1) view choice of law issues in constitutional terms, rather than as grist for common-law, judicial policy-making; 2) take federalism seriously; and 3) accept the need for rules generally, not merely for mass litigation. Any attempt to draft territorial-based rules will meet considerable criticism from those who do not agree with the operating premises just listed. Predictably, the criticism will characterize any such effort as inflexible and impractical in our complex society. Nevertheless, despite the need for adaptability in the rules, traditional choice of law principles are based on the clear principle of territoriality and can be adapted to current needs.

There is a fundamental difference between changing particular rules as an adaptation of a principle and scrapping a principle. Modern choice of

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147 Mullenix, Mass Tort Litigation, supra note 81, at 756.
148 See Laycock, supra note 98, at 252-54.
149 See generally id.
law approaches, in the Legal Realist mold, are opposed to basing choice of law on a logical foundation. They present, instead, a cacophony of theories loaded with "factors" for decision-making, designed to avoid establishing rules. That is not to suggest that any set of rules will do. Any set of rules must be keyed to the guiding principles for good order in a federal system. The fundamental principle of territorial sovereignty over the making of law must be the premise upon which conflicts of law is based, as it was for Justice Story. Lacking a principled basis, and resistant to rules, modern choice of law scholarship has rightly been described as an intellectual swamp.\(^\text{150}\)

If the nations of the world can negotiate an agreement establishing the World Trade Organization, the states themselves ought to be able to get together to agree on a set of choice of law rules. The U.S. Senate should be the forum to initiate such a project. As a result of the Seventeenth Amendment, providing for direct election of senators, however, the U.S. Senate does not have the same solicitude for states as states as it did when its members more clearly represented states.\(^\text{151}\) Outside of the Senate, the states cannot enter into agreements among themselves without the consent of Congress.\(^\text{152}\) Of course, through the National Conference of Commissioners on Uniform State Law, the states often do harmonize their laws, following acceptance of a model or uniform law such as the Uniform Commercial Code. The Restatements on Conflicts might have served this purpose if these were uniformly accepted. That, however, is not the situation. Rather, "the dominant choice of law methodology in the United States today... would have to be called eclecticism."\(^\text{153}\) Neither uniform laws nor Restatements are binding. On the other hand, the Full Faith and Credit Clause is binding. By mandating a certain reciprocity among the states, the Constitution confirms that ours is not a confederation in which individual states retain the authority to govern their relationships with other states. Still, for horizontal federalism to function well congressional legislation to implement the Full Faith and Credit Clause is necessary.

Whether or not the Full Faith and Credit Clause requires a set of choice of law rules, the Clause certainly does not require any particular rules. Professor Laycock simply contends, as do I, that the set of rules must be based on the territoriality principle. With that principle established, the specific rules are matters for negotiation and compromise. More importantly, for purposes of federalism and interstate commerce,

\(^{150}\) See supra note 79.

\(^{151}\) M'Culloch, 17 U.S. at 435 (holding "the states themselves, are represented in congress [sic], and, by their representatives, exercise this power").

\(^{152}\) U.S. CONST. art. I, § 10, cl. 3.

\(^{153}\) SYMEONIDES, CONFLICT OF LAWS, supra note 91, at 284.
there needs to be a set of rules. With some set of clear rules, insurance companies and other businesses would have the ability to predict, plan, and price accordingly. As already noted, most conflicts scholars are not only opposed to rules, and even to Restatements of Conflicts. Nevertheless, a notable exception, my former colleague Dean Symeonides of Willamette University Law School, has drafted choice of law rules for Louisiana which became the first state to legislate choice of law rules. Dean Symeonides has defended to his peers in the field the notion that choice of law rules are desirable and possible. Just as Louisiana enacted the first modern criminal code in 1942, which became a resource for the Model Penal Code, Louisiana’s choice of law code may generate discussion and deliberations about a nationally uniform choice of law code. Unlike the Model Penal Code, however, such a code would need to be adopted by Congress. Just as the states’ criminal law falls within a state’s residual sovereignty, interstate relationships do not. Interstate matters are subjects governed by the Constitution and laws passed by Congress in pursuance thereof.

If Congress is going to enact any federal law related to torts, large corporations probably prefer it simply to enact uniform, federal rules governing the substantive rules on torts, at least as to product liability. A few conflicts scholars actually prefer this approach, at least for mass torts. Until the Supreme Court’s recent cases recognizing limits on Congress’s power under the Commerce Clause, it might have been supposed that Congress could, if it chose to do so, nationalize whatever parts of tort law it deemed “necessary and proper” by finding that the tortious activities have a “substantial” effect on commerce. United States v. Lopez and United States v. Morrison, of course, have shaken that assumption. The hurdle presented by these cases may open minds to a reconceptualization of the issue. Rather than debating whether the situation calls for a uniform substantive law solution under the Commerce Clause, even if it is constitutionally permissible, the issue should be understood in terms of horizontal federalism. States should not be able unilaterally to impose their laws on other states. That is a problem for which the Constitution does contemplate a national, or better a “general,” solution. It is one of a series of solutions which is procedural, not substantive.

156 See generally Mullenix, Mass Tort Litigation, supra note 81.
CONCLUSION

The Framers were greatly concerned about injustices done in many of the states.\textsuperscript{159} The Framers' approach in drafting the Constitution in large part was to limit discrimination by way of indirection. Thus, \textit{Federalist 10} offered its famous prescription for the problem of tyranny from majority factions. Through the multiplication of factions, \textit{The Federalist} described how factions would and should fight it out in the democratic process, thus protecting minority factions. Direct measures against discrimination within the states between the majority and minorities, as evidenced by the existence of slavery, were almost non-existent prior to the post-Civil War amendments. As a \textit{federal} Constitution, the protections were largely limited to protecting citizens as they traveled to other states. These protections did not extend to corporations through the Privileges and Immunities Clause.

Out-of-state corporations enjoy access to diversity jurisdiction as a result of federal legislation. The urge that motivates the attempt to stretch diversity jurisdiction beyond its normal limits in cases of multistate class actions may be understandable. Nevertheless, such legislation would only exacerbate the class-action burden on federal courts. The problem which affects all litigants in interstate cases is the choice of law.

In considering the choice of law chaos, one scholar has suggested that conflicts scholars generally are incapable of clarifying matters; but that teachers of civil procedure might be able to do so.\textsuperscript{160} I would agree that choice of law matters are too important to be left to conflicts scholars. This paper has argued that the situation calls for scholars who view the choice of law problem in terms of federalism, as does Professor Laycock. With the assistance of those few conflicts scholars who support the creation of rules, federalists should work toward the practical application of federalism to litigation through federally legislated choice of law rules.

\textsuperscript{159} See \textit{The Federalist} No. 1 (Hamilton).
\textsuperscript{160} Mullenix, \textit{Federalizing Choice of Law}, supra note 93, at 1626, 1662.