

CONSTITUTIONALIZING INTERSTATE RELATIONS: THE TEMPTATION OF THE DARK SIDE

WILLIAM BAUDE*

I.

What does the Constitution have to say about interstate relations? Well, it depends on how you ask.

One of the main topics in interstate relations is the question of what is called choice of law, which sounds very technical but fundamentally is the question of who governs—that is, which state gets to govern any given transaction.

The same kind of question comes up at the federal level—federal law versus state law—but it is dealt with by the Supremacy Clause of the Constitution, which makes clear that if a federal law is constitutional, it is controlling.¹ But there is no Supremacy Clause for state law, which has forced people who worry about this question to look harder and elsewhere for some sort of hint about which state is supposed to govern which transaction.

* Professor of Law and Aaron Director Research Scholar, University of Chicago Law School. This Essay is a lightly edited version of Professor Baude's remarks on March 14, 2020 at the Federalist Society's Panel, "Originalism and Interstate Relations," in dialogue with comments by Professors Douglas Laycock and Stephen Sachs and Judge David Stras of the Eighth Circuit. They, along with Robert Leider and Jonathan Urick, provided helpful comments, and Nathan Tschepik provided crucial research assistance. The SNR Denton Fund and Stuart C. and JoAnn Nathan Faculty Fund provided research support.

1. U.S. CONST. art. VI, cl. 2. Of course, federal law often chooses to permit or incorporate state law. See William Baude, *Beyond DOMA: Choice of State Law in Federal Statutes*, 64 STAN. L. REV. 1371, 1374–76, 1423–30 (2012) (discussing examples).

Now, the Supreme Court has largely abdicated any control of the topic of choice of law. And just to give a concrete example: in 1981, the Supreme Court decided a case called *Allstate Insurance v. Hague*.² A friend and learned scholar has described this case to me as one of the most indefensible Supreme Court opinions on any topic ever. It is a case that comes from the Minnesota Supreme Court, where a man named Ralph Hague was riding a motorcycle in Wisconsin and crashed.³

Now, once upon a time, it was well-settled that accidents in Wisconsin were always going to be governed by Wisconsin law. Classically, states followed the rule of *lex loci delicti*,⁴ meaning the law of the place of the wrong. Many states have changed that rule over the course of the twentieth century, depending on whether the people were from other states, and so on.⁵ But even under most of these modern approaches, this should still have been an easy case. Mr. Hague was in Wisconsin. He was from Wisconsin. The other driver was from Wisconsin. Pretty much everything about the trip and the accident involved Wisconsin.⁶

But the lawsuit was brought in Minnesota, which had a law that was much more favorable to Mr. Hague, and the Minnesota Supreme Court seized on basically one fact, which is that Mr. Hague worked in Minnesota.⁷ Now, he was not on his way to work. The accident had nothing to do with work. But he had been to Minnesota pretty regularly, and that, plus the Minnesota Supreme Court's

2. 449 U.S. 302 (1981).

3. *Id.* at 305.

4. See, e.g., *Bain v. N. Pac. Ry. Co.*, 98 N.W. 241, 243–44 (Wis. 1904), *overruled by Wilcox v. Wilcox*, 133 N.W.2d 408 (Wis. 1965); see also *Phelps v. Benson*, 90 N.W.2d 533, 535 (Minn. 1958), *overruling recognized by Milkovich v. Saari*, 203 N.W.2d 408, 412 (Minn. 1973).

5. Luther L. McDougal III, *The Real Legacy of Babcock v. Jackson: Lex Fori Instead of Lex Loci Delicti and Now It's Time for a Real Choice-of-Law Revolution*, 56 ALB. L. REV. 795, 795–96 (1993); Douglas M. Deibert, Comment, *Lex Loci Delicti: The Conflict Continues*, 17 S.D. L. Rev. 374, 375–78 (1972).

6. *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43, 44–45 (Minn. 1978).

7. *Id.* at 46.

conclusion that their own law was just better than Wisconsin's, caused them to think that they should apply their own law.⁸ This isn't something that Minnesota made up. It reflected the influence of Professor Robert A. Leflar, who wrote an influential article advocating this approach.⁹

The case went to the U.S. Supreme Court to decide whether anything in the Constitution stops the State of Minnesota and the Minnesota Supreme Court from deciding that their law is just better than everyone else's and applies even to things that have almost nothing to do with their state. But the Supreme Court turned down the opportunity to say that this was madness. Instead, the plurality opinion by Justice Brennan demonstrated uncharacteristic judicial restraint:

It is not for this Court to say whether the choice-of-law analysis suggested by Professor Leflar is to be preferred or whether we would make the same choice-of-law decision if sitting as the Minnesota Supreme Court. Our sole function is to determine whether the Minnesota Supreme Court's choice of its own substantive law in this case exceeded federal constitutional limitations.¹⁰

And they concluded nothing in the federal Constitution did.

This is pretty much where things stand today. When it comes to one of the most fundamental questions of interstate relations, if a state supreme court wants to apply their own law to almost anything, then as long as there is some connection, the U.S. Supreme Court will let them.¹¹

8. *See id.* at 49 (finding that "[t]he Minnesota rule is better" and that "[t]his consideration clearly mandates application of Minnesota law").

9. *See generally* Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966).

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

11. *See* Charles M. Thatcher, *Could a State Court's Selection of Another State's Substantive Law Exceed Constitutional Limitations on Choice of Law*, 61 S.D. L. REV. 20, 21–22 (2016) ("The ease with which the proponent of a state court's choice of law can satisfy the *Hague* test makes it unlikely that a state court's application of the substantive law of

But not all issues in interstate relations are left to the states. Last year, in a case called *Franchise Tax Board v. Hyatt*,¹² the Supreme Court had a very different question of interstate relations—or, at least, what they thought was a very different question—which is whether or not one state, in this case the State of California, ought to be able to claim sovereign immunity in another state’s court, in that case, the State of Nevada.¹³

This too is a question of interstate relations. One might even call it a question of choice of law. The Nevada Supreme Court sits over here deciding whether or not it can hear a case against the Franchise Tax Board of California. They conclude that the answer is yes.¹⁴ California thinks that Nevada’s choice is constitutionally out of bounds, so they go to the U.S. Supreme Court. If we were applying the same kind of deference the Court applies on choice of law, you would expect the U.S. Supreme Court to say, “It is not for us to decide whose theory of sovereign immunity controls.”¹⁵ But that is not what the Supreme Court said.

another state could ever be held to exceed the modest limitations the Constitution imposes on choice of law.”); Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057, 1058–59 (2009) (noting lax standard). The rare exception is *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), where the Court held that the Kansas Supreme Court could not apply Kansas law to class action plaintiffs with “no apparent connection to the State of Kansas.” *Id.* at 815, 823.

12. 139 S. Ct. 1485 (2019).

13. *Id.* at 1490 (“This case . . . requires us to decide whether the Constitution permits a State to be sued by a private party without its consent in the courts of a different State.”).

14. *See id.* at 1491 (describing the case’s history).

15. Professor Sachs and I filed an amicus brief arguing that the Constitution did not speak to the recognition of sovereign immunity in state court, though a state might have other constitutional options to avoid an adverse judgment. Brief of Professors William Baude & Stephen E. Sachs as Amici Curiae in Support of Neither Party, *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485 (2019) (No. 17-1299). *See generally* William Baude, *Sovereign Immunity and the Constitutional Text*, 103 VA. L. REV. 1 (2017) (discussing this view).

Instead, the Supreme Court stepped in—in what we could call Laycockian fashion¹⁶—to say this is an area where the Constitution controls. There is nothing in the text about this. There is nothing in the text that says which state’s law applies in a multi-state conflict. But the Supreme Court said, “Each State’s equal dignity and sovereignty under the Constitution implies certain constitutional ‘limitations on the sovereignty of all of its sister States.’”¹⁷ The Constitution “divests the States of the traditional diplomatic and military tools that foreign sovereigns possess” and “deprives them of the independent power to lay imposts or duties on imports and exports,” and thus, the Court concluded, it “embeds interstate sovereign immunity within the constitutional design.”¹⁸ Nevada’s choice to breach sovereign immunity violates a pre-constitutional norm, and California no longer has all of the pre-constitutional tools to retaliate. And therefore, the Court concludes, there are doctrines of federal law that now control things that previously were left to the raw power of the states.

Again, the same things might have been said in the choice of law context. The aggressive assertion of jurisdiction by the State of Minnesota violated a pre-constitutional norm, and the other states no longer have all of the pre-constitutional tools to retaliate. Taken seriously, the logic of *Franchise Tax Board* should lead to the constitutionalization of choice of law doctrine just as much as interstate sovereign immunity.

Instead, we have a strange inconsistency. In one area—sovereign immunity—the Supreme Court says that rules of federal constitutional law announced by the Supreme Court will control this. But in an analogous, and far more important area—choice of law—the

16. See generally Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249 (1992) (advocating constitutional limits on choice of law).

17. *Hyatt*, 139 S. Ct. at 1497 (internal alteration omitted) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980)).

18. *Id.*

Supreme Court says that there is almost no constitutional constraint on what the states can do. Sometimes we live with these inconsistencies in doctrine for a long time. But they usually are a clue that something has gone wrong.

II.

One way forward would be for the Supreme Court to constitutionalize choice of law doctrine. Professor Douglas Laycock has advocated this in a groundbreaking and important article.¹⁹ It uses some constitutional doctrines I do not completely endorse to achieve some results that I think might be good.²⁰ So, we might call this “the temptation of the dark side of The Force.”

And it is tempting indeed. I would be reasonably happy living in a world where the Constitution and Supreme Court doctrine controlled all questions of interstate relations. This is not an area where the states can be neutral arbiters, and the Supreme Court is as good a neutral arbiter as we have these days.

Yet as I have suggested, I have some textual misgivings about that world. For instance, I am not convinced that the Full Faith and Credit Clause does quite as much work as Professor Laycock advocates. On the one hand, it says that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”²¹ It sounds like nothing could be more than full faith and credit. But, on the other hand, it says that Congress is allowed to decide “the Effect thereof,”²² which means

19. See Laycock, *supra* note 16, at 297–301 (advocating that in the absence of congressional action under the Effects Clause, the Court should develop federal choice-of-law rules under the Full Faith and Credit Clause).

20. See also Caleb Nelson, *State and Federal Models of the Interaction between Statutes and Unwritten Law*, 80 U. CHI. L. REV. 657, 664 n.18 (2013) (“As a policy matter, there is much to be said for the system contemplated by Professor Laycock. But as a historical matter, the Constitution probably was not really understood to require such a system.”).

21. U.S. CONST. art. IV, § 1.

22. *Id.*

that what the effects of those laws are should be left up to Congress. Indeed, this was the original understanding: the Constitution required states to accept other states' laws as evidence of the law, but it did not speak to the legal effect of those laws. That question was left to Congress.²³

There is also no provision of the constitutional text that says that state jurisdiction is territorially limited, although this is an important conflicts principle.²⁴ And even if we overlook the absence of text, and say that the doctrine just has to be an unwritten structural postulate of the Constitution, a constitutional doctrine of territoriality leads to some practical problems, and has led to them in the past: When a dispute has connections to multiple territories, which territory governs? So the principle of territoriality, on its own, will not answer questions like, "What happens when an event affects more than one state?" Or, "What happens when an accident involves somebody driving from one state to another or people from one state and the accident takes place in another state?" Besides the principle of territoriality, you need what conflicts nerds would call a principle of localization—that is, a principle that determines which act really matters.²⁵

23. See Stephen E. Sachs, *Full Faith and Credit in the Early Congress*, 95 VA. L. REV. 1201, 1206 (2009) ("The real significance of the [Full Faith and Credit] Clause was the power it granted to Congress to specify that effect later."); David E. Engdahl, *The Classic Rule of Faith and Credit*, 118 YALE L. J. 1584, 1588 (2009) (making a similar statement); Ralph U. Whitten, *The Constitutional Limitations on State Choice of Law: Full Faith and Credit*, 12 MEMPHIS ST. U. L. REV. 1, 3 (1981) (making a similar statement); Nelson, *supra* note 20, at 664 n.18 (endorsing Professor Sachs's position).

24. See Laycock, *supra* note 16, at 317 ("The Constitution thus assumes that states are territorial, though it never quite says so.").

25. See, e.g., JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 5.4, at 53, § 53.2, at 304, § 59.2, at 308 (1935) (concerned with establishing "localizing rules"); Joseph M. Cormack, *Renvoi, Characterization, Localization and Preliminary Question in the Conflict of Laws: A Study of Problems Involved in Determining Whether or Not the Forum Should Follow Its Own Choice of a Conflict-of-Laws Principle*, 14 S. CAL. L. REV. 221, 241–43 (1941); Nelson, *supra* note 20, at 671–73 (describing need for localization under the First Restatement); Laycock, *supra* note 16, at 322–31 (proposing some different localizing rules than Professor Beale's); Kermit Roosevelt III, *Resolving Renvoi: The Bewitchment of*

The Supreme Court did briefly experiment with constitutionalizing territoriality *and* localization, but it was back in the *Lochner* era when the Supreme Court could determine, using a complicated doctrine of vested rights, that the constitutional right to have a particular state's law apply to a case was vested under the Due Process Clause as soon as a particular act happened.²⁶ Most people do not think the *Lochner* era's substantive due process doctrine is something we should return to.²⁷ Professor Laycock does want to restore that doctrine's application to choice of law. But unless we do, I am not convinced that a constitutionalization of the choice of law would be possible. Again, you see why I call it the dark side.

III.

In any event, it seems to me that right now we live in a strange world in between, where the Supreme Court is sometimes trying to constitutionalize principles of interstate relations, as it does in the sovereign immunity context, and then, other times, continuing to abdicate them as it does in the choice-of-law context, which is much, much more important. If we are going to constitutionalize this area, we ought to get something good out of it.

Our Intelligence by Means of Language, 80 NOTRE DAME L. REV. 1821, 1830–36 (2005) (discussing theoretical problems with First Restatement's territorial approach).

26. See James Y. Stern, Note, *Choice of Law, the Constitution, and Lochner*, 94 VA. L. REV. 1509, 1512 (2008) (footnote omitted) (“[O]f the eighteen *Lochner* Era opinions that used liberty of contract reasoning to sustain constitutional challenges to state and federal laws, eight involved instances of a state supposedly exceeding its territorial jurisdiction.”).

27. Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 387–88, 418–19 (2011). To be sure, the meaning (and implications) of the “*Lochner* era” are contested. See Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 873–74 (1987). For competing accounts, see HOWARD GILLMAN, *THE CONSTITUTION BESIEGED* (1993); DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE FREEDOM* (2011); Randy E. Barnett, *After All These Years, Lochner Was Not Crazy—It Was Good*, 16 GEO. J.L. & PUB. POL'Y 437, 437–438 (2018).

Still, suppose we don't. What would it look like to turn away from the dark side? As Professor Stephen E. Sachs has discussed, interstate relations were once governed not primarily by constitutional law but by the shared, unwritten, "general law."²⁸

The First Restatement of Conflicts and its doctrine of vested rights lent itself to constitutionalization. The century before the First Restatement, however, there was a brilliant treatise on conflict of laws by Justice Joseph Story, which we might see as a sort of "zeroth restatement," the original Restatement.²⁹ We could have done a lot better by trying to stick with that.

Justice Story described a set of territorial rules, but they were principles of general and international law, and so they were more flexible. Justice Story did not turn them into platonic axioms where there was one unique answer to everything. When the First Restatement tried to do that, it found itself forced into weird epicycles about what to do if someone was poisoned and traveled across multiple states while the poison took effect, and other strange things like that.³⁰

People rightly thought the First Restatement had become both byzantine and unforgiving, but rather than do something sensible, like go back to the zeroth restatement and loosen the edges of the territorial rules, they instead started jettisoning the old rules altogether.³¹

28. Stephen E. Sachs, *Pennoyer Was Right*, 95 TEX. L. REV. 1249, 1252–53, 1268–69 (2017); Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1875 (2012).

29. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS (1834).

30. Restatement (First) of Conflict of Laws § 377, cmt. a, illus. 2 (1934).

31. Here I profoundly agree with Professor Laycock. See Laycock, *supra* note 16, at 322 ("Beale's rules were crude, but territoriality did not make them so. They were crude because they tried to derive the solution to every choice-of-law controversy from the single premise that rights vested at the place of the last act necessary to the right. Critics of the Restatement appear to have assumed that all of Beale's mistakes were inherent in territorialism, and they diverted a generation of conflicts scholars from the task of developing more sensible and sophisticated territorial rules.").

It may be too late to bring back the old rules themselves. General law can cease to be the law if it falls out of use, and approaches based on comity have to consider the world as they find it. But it may not be too late to bring back the logic and the approach of a bygone age.

And if it is too late, then maybe the Supreme Court can at least constitutionalize some good rules for us.

ADDENDUM

In response to a question about lessons we can learn from the Supreme Court's exercise of original jurisdiction over controversies between states:

This is a not very widely studied area of the Supreme Court's docket unless you teach water law, contract law, or a couple of the other areas. Yet, every year there is something on the Supreme Court's docket that involves neighboring states fighting about a river, or an island, or something like that.³²

My own impression from those cases are two lessons—one optimistic, one pessimistic.

The optimistic lesson—especially for something like Professor Sachs's view—is that the Court takes a general law approach to a lot of these cases, relying on unwritten background principles.³³ The Court's approach in these decisions recognizes that there is a general principle governing where the border goes. Even though these questions—who ought to own Ellis Island³⁴ or what they ought to do with the lobster³⁵—are questions of policy, the Justices do not take advantage of their control over the case to pursue their own policy analysis.

Thus, the Justices seem to think their job is to make the federal system run more smoothly by preserving stable expectations to apply whatever law has been in place for a long time, if they can. That sounds good. If you take the Supreme Court's performance in those cases, it is what we hope for from a federal tribunal in charge of interstate relations. That is the good part.

32. *See, e.g., Montana v. Wyoming*, 138 S. Ct. 758, 758 (2018) (Mem.) (finding that Wyoming's water usage practices violated the Yellowstone River Compact).

33. *See supra* note 28 and accompanying text.

34. *See New Jersey v. New York*, 523 U.S. 767, 770–71 (1998) (holding that New Jersey has sovereign authority over the “new” land added to Ellis Island through land reclamation projects).

35. *See New Hampshire v. Maine*, 426 U.S. 363, 364–65 & n.1 (1976) (resolving a dispute between the two states over lobster fishing rights in a shared river).

The bad part is, from what I can tell, the Supreme Court does not like these cases very much. So when they hear the cases—and maybe this is partly a necessity—they generally appoint a special master who is not one of the Justices to be in charge of most the case, including fact finding, negotiating with the parties, managing a lot of the procedure, and then they, as a court, check in on the case every couple of years when the parties have some sort of problem.³⁶

Thus, the Supreme Court is exercising oversight over the case, and, if there is a legal issue, they ultimately do resolve it through oral argument and a written opinion. Yet, for the amount of time the case spends supposedly in the Supreme Court, it spends most of its time in front of a temporary agent of the Court where the Justices do not have to be concerned with it. While, again, there are practical reasons for that, I get the sense it is not an area of the Supreme Court's docket that they really think deserves their attention.

Beyond delegating the administration of these cases, the Justices also sometimes refuse to hear them at all. Now the Constitution and the federal statutes about the Supreme Court's original jurisdiction might lead you to believe that when two states have a dispute about something, they are entitled to bring it to the Supreme Court. The Supreme Court has jurisdiction. No other court has jurisdiction.³⁷ The normal practice in jurisdictional rules is that when a federal court has jurisdiction—especially when nobody else does—and somebody shows up and sues, the federal court puts it in its docket and deals with it.

Yet, the Supreme Court has created a doctrine where they decide whether they want to deal with it, even though if they say no, there

36. See Anne-Marie C. Carstens, *Lurking in the Shadows of Judicial Process: Special Masters in the Supreme Court's Original Jurisdiction Cases*, 86 MINN. L. REV. 625, 653–57 (2002) (explaining the role of special masters in original jurisdiction cases).

37. See U.S. CONST. art. III, § 2 (addressing the Supreme Court's original jurisdiction); 28 U.S.C. § 1251 (2018).

is nothing else for the states to do.³⁸ The Supreme Court regularly just declines to hear cases between two states.³⁹ Justice Thomas and Justice Alito have very recently started objecting to this practice, but they are the only ones.⁴⁰

So, the good news is when the Supreme Court hears these cases, it seems to do a decent job. But the bad news is that even if the Supreme Court agrees to hear a case, they do not necessarily hear it very much, and they reserve the right not to hear it.

38. See Kristin A. Linsley, *Original Intent: Understanding the Supreme Court's Original Jurisdiction in Controversies Between States*, 18 J. APP. PRAC. & PROCESS 21, 47 (2017) (“[E]ven when the parties do not have access to another forum in which to litigate, the Court still may use its discretion on a case-by-case basis to deny leave to file an original action.”); see also SUP. CT. R. 17(3) (providing that “[t]he initial pleading [in an action invoking the Court’s original jurisdiction] shall be preceded by a motion for leave to file”).

39. See David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 560–61 (1985) (explaining that the Court has denied these cases “[f]or many years” and giving several examples).

40. *Nebraska v. Colorado*, 136 S. Ct. 1034, 1034 (2016) (Thomas, J., joined by Alito, J., dissenting from denial of certiorari) (“Federal law does not, on its face, give this Court discretion to decline to decide cases within its original jurisdiction.”); *Arizona v. California*, 140 S. Ct. 684, 684 (2020) (Thomas, J., joined by Alito, J., dissenting from denial of certiorari) (“[W]e likely do not have discretion to decline review in cases within our original jurisdiction that arise between two or more States.”).