Choice of Law, The Constitution and Lochner

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INTRODUCTION

EVERY lawyer needs a choice of law theory. A choice of law is the starting point in any legal analysis, for it is impossible to apply a rule to a set of facts until one knows what rule to apply in the first place. Simply put, choice of law principles are the law of
laws. How surprising it is then that a state's decision to decide an issue under its own law and not another's is today practically immune from constitutional scrutiny. After all, the Constitution itself is a set of laws about laws; it might be expected to have something to say about choice of law. Yet even in a time of renewed interest in notions of state sovereignty, the jurisdictional dimension of "horizontal federalism" has not attracted attention from the Supreme Court.

This was not always the case. A century ago, the Supreme Court actively policed interstate boundaries of legislative jurisdiction, invalidating what it considered extraterritorial applications of state law. Aggressive federal review of state choice of law coincided with the period associated with *Lochner v. New York*, among the

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1 This Note uses the terms "choice of law," "conflict of laws," and "legislative jurisdiction" largely interchangeably.


4 Choice of law certainly has the potential to implicate the most controversial issues in American constitutional law, including same-sex marriage, abortion rights, and gun control. See Scott Fruehwald, Choice of Law and Same-Sex Marriage, 51 Fla. L. Rev. 799, 802 (1999); Seth F. Kreimer, "But Whoever Treasures Freedom...": The Right to Travel and Extraterritorial Abortions, 91 Mich. L. Rev. 907, 910-12 (1993); Allen Rostron, The Supreme Court, the Gun Industry, and the Misguided Revival of Strict Territorial Limits on the Reach of State Law, 2003 Mich. St. L. Rev. 115, 115-16; see also Paul Finkelman, An Imperfect Union: Slavery, Federalism, and Comity 3-4 (1981) (describing the role of conflicts of law with respect to slavery in precipitating national crisis in antebellum America).


7 198 U.S. 45 (1905).
most vilified Supreme Court decisions in American history, and the Court's choice of law opinions have been tainted by the broader criticisms of the *Lochner* Era Court. Professor Robert Sedler, for example, has argued that, in the field of choice of law, the *Lochner* Court dedicated itself to "protecting business enterprises from what it considered improper interferences with freedom of contract" just as it did in its substantive due process decisions.  

Certainly, there is a connection. *Allgeyer v. Louisiana*, authored by the same Justice who wrote *Lochner* and often considered the first case to use substantive due process to overturn a state law, struck down a Louisiana statute because it interfered with the "liberty to contract" protected by the Fourteenth Amendment. In *Allgeyer*, however, the Court did not create an absolute right to economic liberty. The defendant in the case was prosecuted for buying insurance from an out-of-state insurance company. The Court emphasized that Louisiana could have restricted or even outlawed the transaction if it had taken place in the state, but since the contract had been made in New York, only New York had the power to regulate it. In short, it was the state's extraterritorial regulation that offended the Due Process Clause. *Allgeyer v. Louisiana*, the
fountainhead of the infamous liberty of contract doctrine, was in fact a choice of law case.12

By no means was this an isolated link between “substantive” due process and choice of law principles. In fact, of the eighteen Lochner Era opinions that used liberty of contract reasoning to sustain constitutional challenges to state and federal laws,13 eight involved instances of a state supposedly exceeding its territorial jurisdiction.14 Whether the connection is the one Professor Sedler suggests is another matter, however. In the years since he wrote, scholarly understanding of the Lochner Court has undergone a mini-revolution,15 while at the same time there has been persistent dissatisfaction with contemporary choice of law theory.16

This Note will reconsider the Court’s choice of law decisions in light of these developments and suggest that the choice of law decisions have more to teach about Lochner than Lochner has to teach about choice of law. It will demonstrate that while the Court’s choice of law decisions cannot simply be dismissed as “Lochner-

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13 This figure is derived from Michael J. Phillips, The Lochner Court, Myth and Reality: Substantive Due Process from the 1890s to the 1930s, 86 n.210 (2001). Professor Phillips lists fifteen cases, of which eleven expressly turn on liberty of contract doctrines and four use one of those eleven as a rule of decision. To Phillips’s list, I have added three additional cases, all of which concern choice of law: New York Life Insurance Co. v. Head, 234 U.S. 149, 161 (1914) (“[I]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State and in the State of New York and there destroy freedom of contract without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends.”), Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 292 U.S. 143, 149–50 (1934) (following Head), and Aetna Life Insurance Co. v. Dunken, 266 U.S. 389, 390 (1924) (same). An argument could also be made for the inclusion of Home Insurance Co. v. Dick, 281 U.S. 397, 398 (1930). Phillips does discuss these cases in Michael J. Phillips, How Many Times Was Lochner-Era Substantive Due Process Effective?, 48 Mercer L. Rev. 1049, 1064 n.63, 1076 n.124 (1997).


16 See infra note 93.
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ing,” they illustrate certain philosophical preconceptions that help explain the rise and fall of the *Lochner* Era. Part I will provide a comprehensive account of how the Court’s choice of law doctrines operated as a matter of constitutional law. Part II will show that traditional criticisms of *Lochner* are largely inapplicable to the Court’s choice of law cases. Finally, Part III will help resolve lingering questions in *Lochner* scholarship by showing how the conceptions of legislative and judicial power suggested by the choice of law cases—and the later abandonment of those conceptions—shed light on *Lochner* Era fundamental rights.

I. DEVELOPMENT OF CONSTITUTIONAL CHOICE OF LAW RULES

Constitutional doctrines concerning interstate choice of law developed slowly across the eighteenth and nineteenth centuries. The most obvious treatment of the issue in the constitutional text is contained in Article IV, which requires states to give “full faith and credit” to the “public Acts, Records, and judicial Proceedings of every other State.”

Conflicts of law were relatively rare in ante-bellum America, and it was not until 1887 that the Supreme Court explicitly stated that the Full Faith and Credit Clause applied to the legislative acts of sister states, and not simply to the judgments of their courts. Having taken that step, however, the Court was faced with a set of questions far more complicated than those it confronted in forcing states to honor the judgments of one an-

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17 The most significant choice of law issue addressed by the Constitution is the relationship between federal and state law, dealt with in the Supremacy Clause of Article VI. Rather than conceive of state law as presumptively applicable but subject to pre-emption, nineteenth-century constitutional theory understood the Supremacy Clause as establishing a strict division of labor between the state and federal governments, an arrangement termed “Dual Sovereignty.” This was framed in territorialist terms. See, e.g., Abelman v. Booth, 62 U.S. 506, 516 (1859) (stating that the boundary between federal and state power was “as if the line of division was traced by landmarks and monuments visible to the eye”).


19 Chi. & Alton R.R. Co. v. Wiggins Ferry Co., 119 U.S. 615, 622 (1887) (announcing in dicta that “[w]ithout doubt, the constitutional requirement” of full faith and credit “implies that the public acts of every state shall be given the same effect by the courts of another state that they have by law and usage at home”); see also Comment, supra note 6, at 341.
other's courts. The Full Faith and Credit Clause might require a state to use another state's law in some situations, but the Privileges and Immunities Clause, also in Article IV, in some situations required just the opposite. A state needed to know when it was required, when it was permitted, and when it was forbidden to apply its own laws, and it needed to know whose laws it was to use when it was disabled from using its own. The Constitution's text raised more questions than it answered when it came to choice of law.

A. The Territorialist Premise in Public Law

The basic solution to the Full Faith and Credit puzzle was supplied by familiar notions of territorial sovereignty. Reigning choice of law theories already made heavy use of territorialism. As a matter of English practice, territorialism had deep roots, both because of the requirement at early common law that juries be selected from the local population and because of the obvious relevance of territorial limitations for an island nation. In continental Europe, positivist conceptions of law—according to which law was the expression of sovereign will rather than divine commandment or natural order—had developed in conjunction with the rise of walled city-states during the Renaissance, and this helped bring about territorial approaches to resolving conflicts of authority. Continental theorists, especially Dutch writer Ulrich Huber, posited that sovereign power was absolute within its territorial confines, but ended at its borders. In the seventeenth and eighteenth centuries, English courts began to combine continental theory with

20 As Professor Laycock has put it, "[t]o simultaneously apply the conflicting law of two states is impossible; to require each state to apply the law of the other is absurd; and to let each state apply its own law repeals the Clause." Laycock, supra note 2, at 297.
22 E.g., Nicolo Machiavelli, The Prince (1513).
English practice, and in 1834, territorialist principles were authoritatively distilled in U.S. Supreme Court Justice Joseph Story’s seminal *Commentaries on the Conflict of Laws*. Justice Story’s *Commentaries* took a strictly territorial view of sovereign power, but also postulated, as Huber had, that one sovereign might apply the laws of another in order to promote “comity.”

The version of territorialism Justice Story espoused was applied to relations between American states, not just to relations between independent nations, and both before and after the Civil War, the Supreme Court restricted state power on a territorial basis in numerous respects. The authority of states to adjudicate legal questions—their “judicial jurisdiction”—had long been limited by territorial principles. A judgment of personal liability was not entitled to full faith and credit if it was entered against a defendant absent from the state rendering the judgment. In such a case, the judgment-rendering state’s action was an “illegitimate assumption of power,” and was to be “resisted as mere abuse.” In 1877, the Court went even further, establishing in its landmark decision in *Pennoyer v. Neff* that enforcement of such a judgment would violate the Due Process Clause of the Fourteenth Amendment. The Court reasoned from Huber’s and Story’s territorialist maxims to

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26 Ernest G. Lorenzen, Story’s Commentaries on the Conflict of Laws—One Hundred Years After, 48 Harv. L. Rev. 15, 18–19 (1934).
27 Joseph Story, Commentaries on the Conflict of Laws § 609 (Boston, Little Brown, 8th ed. 1883).
28 In addition to the doctrines listed, it is worth noting that the Supreme Court initially ruled that state sovereign immunity—in many respects the inverse corollary of the theory of law as sovereign will—did not extend to suits brought in the federal court system. See Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 420 (1793), superseded by amendment, U.S. Const. amend. XI. Similarly, a state could not be sued in another state because no other state would be able to serve a state with process. See Caleb Nelson, Sovereign Immunity as a Doctrine of Personal Jurisdiction, 115 Harv. L. Rev. 1559, 1613–1614 (2002).
31 95 U.S. 714, 715 n.8 (1877).
establish the constitutional metes and bounds of state judicial power over persons and property.\textsuperscript{32}

The Court imposed territorial limits not only on the operation of state courts but on the reach of state laws. Every significant attribute of legislative power available to states was territorially circumscribed. First, and most fundamentally, a state’s “police powers” were said to end at its borders.\textsuperscript{33} States could not criminalize activities in other states.\textsuperscript{34} Nor could one state expect another to enforce its “penal” laws, a principle that not only limited the reach of state criminal laws but which in some cases denied civil plaintiffs the ability to recover super-compensatory damages.\textsuperscript{35} Second, state tax-

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\item[\textsuperscript{32}] Id. at 722 (stating that “every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory” but that “no State can exercise direct jurisdiction and authority over persons or property without its territory”). Notably for our purposes, the \textit{Lochner} Era Court later determined that an individual debt obligation followed the debtor wherever he went, and thus the courts of any state where a debtor was present could assert jurisdiction over the debt as if it were tangible property. See Harris v. Balk, 198 U.S. 215, 218 (1905).
\item[\textsuperscript{33}] The same was essentially true of the criminal jurisdiction of the United States government. The Court was willing to permit federal law to reach activities overseas only where the victim of the crime was the U.S. government, that is, the sovereign itself. United States v. Bowman, 260 U.S. 94, 98 (1922), or “in regions subject to no sovereign, like the high seas, or to no law that civilized countries would recognize as adequate.” Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 355-56 (1909) (Holmes, J.).
\item[\textsuperscript{34}] Nielsen v. Oregon, 212 U.S. 315 (1909); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 428 (1821) (Marshall, C.J.) (“[It is] clear, that a State legislature, the State of Maryland for example, cannot punish those who, in another State, conceal a felony committed in Maryland.”); cf. Strassheim v. Daily, 221 U.S. 280 (1911). For competing views on the force of these precedents, compare Seth F. Kreimer, Lines in the Sand: The Importance of Borders in American Federalism, 150 U. Pa. L. Rev. 973, 974-75 (2002), with Mark D. Rosen, Extraterritoriality and Political Heterogeneity in American Federalism, 150 U. Pa. L. Rev. 855 (2002). See also Story, supra note 27, § 620, (“The common law considers crimes as altogether local, and cognizable and punishable exclusively in the country where they are committed.”); cf. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 337 (1816) (Story, J.) (“No part of the criminal jurisdiction of the United States can, consistently with the constitution, be delegated to state tribunals.”).
\item[\textsuperscript{35}] Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 293-94 (1888); see also The Antelope, 23 U.S. (10 Wheat.) 66, 123 (1825) (Marshall, C.J.) (“The Courts of no country execute the penal laws of another.”); cf. Huntington v. Attrill, 146 U.S. 657 (1892). Indeed, the enactment by states of statutory wrongful death provisions in the years after the Civil War was a leading source of interstate choice of law questions. See Corwin, supra note 18, at 385. It should be noted that in cases like \textit{Pelican}, the Court affirmed the right of forum states not to enforce “penal” laws. Although the Court never faced a case in which a state's decision to enforce such a law was challenged, territorial limi-
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ing power was territorially bounded. On numerous occasions, the nineteenth-century Supreme Court invalidated attempts by states to tax property said to be located in other states, but the Court had difficulty locating the constitutional source of the limitation. Eventually, however, the Court settled on the Due Process Clause of the Fourteenth Amendment, striking down allegedly extraterritorial taxes some twenty times between 1903 and 1933. The Court also held that a state's power to exempt property from taxation—even property the state had called into being—did not extend into other states.

Finally, territorialism was a bedrock principle of a significant portion of the regulation of American businesses. Nineteenth-century American law understood corporations as artificial "crea-

tations on the reach of penal laws were generally "taken for granted, as a principle fundamental and beyond question." Robert A. Leflar, Extrastate Enforcement of Penal and Governmental Claims, 46 Harv. L. Rev. 193, 196 (1932).

36 As early as *McCulloch v. Maryland*, in which the state of Maryland essentially sought to tax the operations of the federally chartered Bank of the United States, Chief Justice John Marshall allowed that while a state may tax "every object brought within its jurisdiction," the tax imposed by Maryland went beyond that by levying a tax upon an entity created by citizens of other states as well as by its own. 17 U.S. (4 Wheat.) 316, 429 (1819). Chief Justice Marshall essentially justified the principle of federal supremacy on the basis of the limits of interstate jurisdiction to tax.


39 Bonaparte v. Tax Court, 104 U.S. 592 (1881); see also Joseph Henry Beale, Cases on Taxation 100–01 (1928).
tures of statute” and saw states’ authority to govern the legal powers of individual corporations as the appropriate mechanism to advance many of the regulatory concerns reflected today in complex commercial statutes. Territorialism was essential to this arrangement: because corporations were legislative creations, a corporation had no existence outside its state of incorporation unless other states chose to recognize it (as an act of comity). Under this scheme, the incorporating state could impose precise restrictions in the corporation’s charter, and any other state in which a corporation sought to do business could impose restrictions on the corporation in exchange for being allowed entry. A corporation that was neither incorporated nor “doing business” within a given state, however, could not be regulated by it, and a state admitting a foreign corporation could not include restrictions on corporate activities in other states as the price of admission. In short, territorial boundaries performed a crucial function in the regulation of large-scale business activity in pre-New Deal America.

Territorialism might have been an even larger part of the constitutional landscape were it not for an important doctrine that made it unnecessary to consider the issue in a significant number of cases. Throughout the nineteenth and early twentieth centuries, the so-called “dormant” commerce clause was seen as giving exclusive legislative jurisdiction to the federal government in the regulation of commercial activities that related to multiple states. The doctrine broadly restricted the extraterritorial reach of state laws, but there were a few important economic activities that fell outside its domain. Notably, the Supreme Court concluded that the business of insurance was not “commerce” for constitutional purposes, and states could therefore regulate interstate insurance contracts

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42 Fid. & Deposit Co. v. Tafoya, 270 U.S. 426, 435 (1926) (Holmes, J.) (“[A] corporation cannot be prevented from employing and paying those whom it needs for its business outside the State” as a condition of doing business in a given state.).
without any of the usual dormant commerce clause restrictions.\textsuperscript{43} The abundance of insurance cases among the Supreme Court's choice of law decisions suggests that use of the dormant commerce clause concealed what would likely have been an even larger concern for territorial limits on state power in the absence of the doctrine.

Viewed against this backdrop, neither the outcome in \textit{Allgeyer v. Louisiana} nor its reliance on notions of due process was especially remarkable.\textsuperscript{44} Underscoring this point is the fact that \textit{Allgeyer} was bookended by two decisions in which state restrictions on purchasing insurance from a foreign corporation were upheld—the difference being that in those cases, the corporations were said to have agents operating within the regulating state.\textsuperscript{45} Furthermore, \textit{Allgeyer} did not prove controversial. Decades later, Justice Holmes relied upon the case in an opinion striking down a state tax on insurance policies made with unlicensed foreign corporations.\textsuperscript{46} Territorial limits on state power, including the police, taxation, and corporate regulatory powers, were well established and even routine by the late nineteenth century as a matter of constitutional principle.

\textbf{B. Private Law and the Vested Rights Theory}

Despite the emphasis on the territorial boundaries of state power articulated in \textit{Allgeyer}, it would be nearly two decades before the Supreme Court would apply similar restrictions on state choice of law in suits between two private citizens. Differences in the theoretical underpinnings of public and private law made territorialism a more obvious guiding principle for the former than the latter. Public law governed the relationship between a state and an

\textsuperscript{43} Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868).
\textsuperscript{44} 165 U.S. 578 (1897).
\textsuperscript{45} See Nutting v. Massachusetts, 183 U.S. 553, 557–58 (1902); Hooper v. California, 155 U.S. 648 (1895).
\textsuperscript{46} St. Louis Cotton Compress Co. v. Arkansas, 260 U.S. 346, 349 (1922). Justice Holmes generally did not support territorial restrictions on state taxing power, and he later maintained that the \textit{Cotton Compress} statute was invalid only because it crossed the line from tax to penalty. See Compania General de Tabacos de Filipinas v. Collector of Internal Revenue, 275 U.S. 87, 100 (1927) (Holmes, J., dissenting).
individual person subject to its authority. Because the attributes of sovereignty were absolute, no sovereign power could ever overlap with the power of any other sovereign—that would be war—and thus the sovereign’s powers were territorially limited. Private law, however, dealing with relationships between individuals, by its definition did not directly implicate the interests of the sovereign.

As a result, theories of territorial sovereignty did not seem to be applicable in the private law context as a limit on choice of law. Thus, when it was said that a state’s “penal” laws were unenforceable in other states, the clear implication was that its non-penal laws could be enforced elsewhere—indeed, the Full Faith and Credit Clause had been held to require as much. Justice Story’s conflict of law theories dominated understandings of the subject, and his core idea that one state could apply another’s laws as an act of “comity” clearly showed a willingness to allow private law rules to operate outside the place they were created. His theory also hinted that if a forum did not feel constrained by the demands of comity, it could legitimately apply its own laws to a dispute that occurred someplace else, so long as the Constitution did not get in the way. In short, it is evident that territorialism was not the organizing principle in private choice of law that it was in the public law context. A conceptual adjustment would be needed in order to harmonize private choice of law with existing limits on the reach of public law.

1. “Negative” Law and the Obligatio

The constitutional unification of public and private law, when it came to state legislative jurisdiction, was made possible by redefining the exact boundary between the two domains. Private law rules, particularly common law rules of property and contract, had

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49 See Loucks v. Standard Oil Co., 224 N.Y. 99, 111 (1918) (Cardozo, J.) (“The misleading word ‘comity’ has been responsible for much of the trouble. It has been fertile in suggesting a discretion unregulated by general principles.”).
been understood as "facilitative of the will of the parties, rather than inherently regulatory in their own right." The existence of conflicts challenged the notion that the private law rules could be inherently non-regulatory. If they were non-regulatory, there would be no difficulty with a forum choosing to apply its own law to some far-flung transaction, but the Court plainly saw such a difficulty. In the face of this contradiction, the Court responded by treating state laws that create private relations as a manifestation of public power, bounded by the same territorial limits as a state's criminal code. Unlike a criminal law, however, private rights to bring a cause of action redressed violations of duties owed to individuals, rather than to the state whose law created those duties. Thus, while the law creating the duty was territorially circumscribed, the personal legal rights generated by the interaction of local conduct and local law were not. They were fixed, as of a particular moment in time, and could be "brought" from jurisdiction to jurisdiction by the person who "held" them.

This was the "vested rights" or classical theory of the conflict of laws. It was developed chiefly by Harvard Professor Joseph H. Beale, who served as reporter for the American Law Institute's First Restatement of the Law of the Conflict of Laws. Its great champion on the Supreme Court was Justice Oliver Wendell Holmes, who, consistent with the classical legal era, preferred the Roman term "obligatio" to refer to the plaintiff's right of action. The vested rights theory's primary attraction was that it provided a way to explain how a state could hear a cause of action created by another state's laws without offending the principle of strictly bounded sovereign powers.

In 1914, the theory acquired Allgeyer's constitutional force in the case of New York Life Insurance Co. v. Head, which invalidated

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52 See Slater v. Mexican Nat'l R.R. Co., 194 U.S. 120, 126 (1904) ("The theory of the foreign suit is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an obligatio, which . . . follows the person, and may be enforced wherever the person may be found."); W. Union Tel. Co. v. Brown, 234 U.S. 542, 547 (1914); Cuba R.R. Co. v. Crosby, 222 U.S. 473, 478 (1912); Am. Banana Co. v. United Fruit Co., 213 U.S. 347 (1909).
the application of Missouri insurance law by Missouri courts to an insurance contract said to have been made in New York. In a unanimous opinion, the Court held that the insurance company's obligations on the policy were defined by the laws of New York at the time the insurance policy was made. The use of Missouri law to determine the scope of the insurance agreement would add to the insurance company's substantive obligations, and this would be an impermissible interference with the company's "freedom of contract." Building upon this notion in subsequent cases, the Court went on to hold that a forum state could not prevent a defendant from raising a substantive defense to a cause of action that would have been allowed under the law of the state that created the cause of action. That too would illegitimately expand the scope of the defendant's legal obligation to the plaintiff.

The Court also spelled out an important corollary to its territorialist theory of law. While only the law of the place where a cause of action accrued could determine the substantive obligations of the parties, the state providing a forum to hear their dispute had exclusive power to determine the remedies and procedure associated with litigating it. Thus, for example, the Court held that a state ordinarily could not prevent a cause of action created by its law and arising within the state from being brought in another state. The state where the parties had interacted could alter the legal relationship between them, but it could not affect the manner in which the relationship was enforced elsewhere.

By prohibiting a state from applying its substantive law to a given controversy, Head and its progeny at most asked states to recognize what might be thought of as the "negative" law of other states. The cases asked one state to echo the other state's legisla-

53 234 U.S. 149, 156-57 (1914).
54 Id. at 157.
57 E.g., Aetna Life Ins. Co. v. Dunken, 266 U.S. 389, 393, 399 (1924); Dodge, 246 U.S. at 358.
tive silence and enforce the sister state’s default rule of permissiveness. In that sense, they still closely resembled Allgeyer, which demanded only that the adjudicating state sit on its hands, not that it actively enforce the enacted law of a sister state. The more complicated proposition, however, would be determining when a forum state had to apply the “affirmative” law of another state, using the other state’s law as a rule of decision—an idea in tension with the theory of strict territorialism and one that caused the Court great difficulties.

2. “Affirmative” Law and the Public Policy Exception

While Head held that a forum state could not supply a remedy when no right of action had accrued to begin with, the converse was not true. The law of the forum might not provide a remedy even though the plaintiff had brought a valid claim for recovery into its courts. Admittedly, this did not formally prohibit a forum state from providing recovery in excess of what could have been had in the state whose law created the right to sue, even though Head prevented forum states from enlarging the substantive obligation of a defendant. Most commonly, for example, the forum state might have a more generous statute of limitations than the state where the cause of action arose, which would for all practical purposes extend a plaintiff’s right of recovery. By the same token, though, a potential forum might just as easily have a shorter statute of limitations, preventing a suit from going forward. The net effect on liability of these kinds of rules might plausibly be thought to be a wash.

The most significant “procedural” rule of a forum state, however, was whether it would be willing to serve as a forum at all, and this remedial power only worked in one direction. The so-called public policy exception permitted a forum state to withhold a plaintiff’s remedy if the forum disapproved of the substantive grounds of the plaintiff’s recovery. In Union Trust Co. v. Grosman, for example, Justice Holmes upheld a Texas court’s judgment that

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58 See Roche v. McDonald, 275 U.S. 449 (1928); M’Elmoyle v. Cohen, 38 U.S. (13 Pet.) 312, 312 (1839). The Court was also willing to permit a state to defend against tort liability to enforce a contractual waiver of liability that was unenforceable in the forum state. See, e.g., Pa. R.R. Co. v. Hughes, 191 U.S. 477 (1903).
a woman could not be held to a contract that she had signed in Illinois to guarantee her husband's debt.\textsuperscript{59} While Illinois permitted women to alienate their marital property, Texas adhered to traditional common law coverture rules, and was not obliged to enforce the Illinois obligation when it conflicted with local public policy.\textsuperscript{60} The Supreme Court was willing to permit states in at least some circumstances to afford additional substantive defenses to causes of action arising under the laws of another state or simply to refuse to hear the plaintiff's suit at all. The Court gave forum states the power to limit liability but denied them the power to increase it.

The public policy exception proved one of the most persistent trouble spots in the constitutional regime of vested rights, and it was high on the syllabus of errors later drawn up by critics of the vested rights approach. A state had to recognize relevant sister state negative law, but thanks to the public policy exception, the same could not be said of sister state affirmative law. As a subconstitutional idea, the public policy exception was fairly consistent with traditional territorialism: no government had to enforce another's law against its will. Once the vested rights theory assumed a constitutional cast, however, the discretion not to honor another state's law became more problematic. As Beale himself put it, "no law can exist as such except the law of the land; but . . . it is a principle of every civilized law that vested rights shall be protected."\textsuperscript{61}

The Court varied in its approach to the issue.\textsuperscript{62} It reversed lower federal courts when they held that certain suits were offensive to

\textsuperscript{59} 245 U.S. 412, 417 (1918).

\textsuperscript{60} Indeed, because the woman was a Texas citizen, traditional common law rules might have suggested that Illinois should have looked to Texas law to determine the woman's capacity to contract. Justice Holmes noted that if suit had been brought in Illinois, the contract might have been given effect "by physical force." Id. at 415–16.

\textsuperscript{61} Beale, supra note 51, § 51; see also Dicey, supra note 51, at 56 ("The nature of a right acquired under the law of any civilized country must be determined in accordance with the law under which the right is acquired."); William Blackstone, 3 Commentaries on the Laws of England 109 ("[I]t is a settled and invariable principle in the laws of England, that every right when with-held must have a remedy, and every injury it's [sic] proper redress."); cf. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (finding a right to have commission delivered, withholding the remedy of mandamus, and quoting the preceding passage from Blackstone).

\textsuperscript{62} For its part, Beale's gloss on the common law required public policy objections to be "strong." See Restatement (First) of Conflict of Laws § 612 (1934).
the policy of the states where they sat;⁶³ it also imposed fairly strict limits on the ability of states to close their doors to actions to enforce the judgments of one another's courts.⁶⁴ When it came to actions not yet reduced to judgment, however, the Court showed much more reluctance to impose similar restrictions.⁶⁵ At least in a suit between foreign corporations, it perceived no constitutional difficulty in a state's refusal to hear a cause of action simply because it arose under another state's law.⁶⁶

As late as the Court's 1932 decision in Bradford Electric Light Co. v. Clapper, Justice Brandeis noted that "[t]here is room for some play of conflicting policies" when it came to a state's willingness to provide plaintiffs with a forum.⁶⁷ Three years later, however, in the waning moments of the vested rights era, Justice Brandeis qualified that statement, opining that "the room left for the play of conflicting policies is a narrow one," and the Court for the first time required a state to allow a foreign-created right of action.⁶⁸ Even then, a state appeared to be insulated from constitutional attack so long as it could point to a policy reflected in its statutes that did not rely on the mere fact that the cause of action arose outside the state.⁶⁹ The public policy exception was indeed exceptional, sitting in substantial tension with the Court's approach to choice of law questions. It blurred the line between remedies and rights, it denied plaintiffs what was thought to be rightfully theirs,⁷⁰ and it required federal courts to determine the compatibility of one state's laws with another's. Above all, it introduced a

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⁷⁰ See Loucks v. Standard Oil Co., 224 N.Y. 99, 110–11 (1918) (Cardozo, J.) ("If a foreign statute gives the right, the mere fact that we do not give a like right is no reason for refusing to help the plaintiff in getting what belongs to him.").
doctrine into choice of law inquiries that was unconstrained by the kind of firm formal rules that defined the vested rights approach.\textsuperscript{71}

C. From Contract to Status: Due Process or Full Faith and Credit?

At times, the Court's choice of law decisions suggested a constitutional doctrine in search of a textual home. In \textit{Head}, for instance, Justice White had trouble locating the source of the territorial limitation on state power, and reasoned impressionistically, noting that the "principle... [that] lies at the foundation" of the Court's full faith and credit jurisprudence, "is illustrated" by \textit{Allgeyer}'s freedom-of-contract principle, and "finds expression" in the due process limitations suggested by \textit{Pennoyer v. Neff} and the taxation cases.\textsuperscript{72} In fact, the Court used the Due Process Clause and the Full Faith and Credit Clause in different ways and to different effect. The rule of due process was the simpler of the two. The Due Process Clause was used as the source of the principle that a state law could not be applied to property or occurrences beyond the borders of the state. It was the preferred mechanism for upholding the negative law of a sister state. Due process was never invoked as a limitation on a forum's ability to decline to hear a foreign-created cause of action.

The Full Faith and Credit Clause was used to require a forum to apply the affirmative law of another jurisdiction, rather than simply to refrain from using its own. This use took three different forms. First, full faith and credit was used in order to require one state to recognize a cause of action acquired in another state, either in the form of a judgment rendered by the other state's courts or in the form of an accrued cause of action not yet reduced to judgment. This use of the Full Faith and Credit Clause, particularly for causes of action not reduced to judgment, was relatively weak because of the availability of the public policy exception. Second, the clause was used to force a forum state to recognize ways in which the law creating a cause of action imposed substantive limitations on the


cause of action.\textsuperscript{73} This was in many ways a junior version of the negative foreign law principle at work in the due process cases, which helps explain both why the Full Faith and Credit Clause packed a stronger punch where it was used defensively—rather than as the basis for a cause of action—and why due process and full faith and credit could seem confusingly interchangeable, even to the Court.\textsuperscript{74}

The final, and arguably the most significant, way in which the Full Faith and Credit Clause was used concerned situations where one state's laws sought to alter the effect that future occurrences would have on the legal rights of its citizens. In a sense, these were cases concerned with status or capacity, attributes that under traditional choice of law rules were determined by the law of a person's state of domicile. Applying the Full Faith and Credit Clause to status questions permitted a person's home state to project its law extraterritorially in a fashion somewhat reminiscent of the "statuist" approach to conflicts of law of medieval continental law.\textsuperscript{75} Yet the Court gave comparatively weak full faith and credit protection to domicile law when it came to conventional issues of status, like marriage, mental competence, adoption, and legitimacy.\textsuperscript{76} Rather, the Court deployed the Full Faith and Credit


\textsuperscript{74} Perhaps this explains the occasional reference to the "due faith and credit clause." E.g., Olmsted v. Olmsted, 216 U.S. 386, 395 (1910); Wabash R.R. Co. v. Flannigan, 192 U.S. 29, 37 (1904); Huntington v. Attrill, 146 U.S. 657, 666 (1892); Fauntleroy v. Lum, 210 U.S. 230, 238–39, 242–45 (1908) (White, J., dissenting).

\textsuperscript{75} Medieval European law resolved many conflicts of law by looking to the law of a person's citizenship or tribal membership. See Mills, supra note 23, at 7. Notice that the words "statute," "status," and "estate" share the same root. Part of the explanation for this apparent extraterritoriality may lie in the remedies available to protect the status created by the domicile. Each of these could be protected by courts of equity, which were not territorially limited because they were said to "act upon the person." See Polly J. Price, Full Faith and Credit and the Equity Conflict, 84 Va. L. Rev. 747, 804–805 (1998).

\textsuperscript{76} In Grosman, Justice Holmes did hint that a contract entered into by a married woman outside her domicile might not be valid even in the state where the contract was made when the law of her domicile denied her the power to make such a contract. Union Trust Co. v. Grosman, 245 U.S. 412, 416 (1918). Traditional status rules could be used to support both the majority's and the dissent's position in Yarborough v. Yarborough, 290 U.S. 202 (1933), but the Court repeatedly sought to ensure that each state had complete control over the disposition of land within its borders, and it therefore held that sister states could not act to transfer ownership of real property to their domiciliaries when they were disabled from holding it under the laws of the state.
Clause by recognizing new forms of status, typically arising out of some kind of enduring relationship whose center of gravity lay within a state and that altered the legal effect of subsequent actions. Thus, the Court required states to use another state’s law to determine the obligations of beneficial fraternal organizations to their members, the personal liability of corporate stockholders, and the right of injured employees to recover from their employers. In Justice Holmes’s view, a fraternal benefit society was like a kind of economic matrimony: “The act of becoming a member is something more than a contract, it is entering into a complex and abiding relation, and as marriage looks to domicil, membership looks to and must be governed by the law of the State granting the incorporation.”

To see how due process and full faith and credit doctrines interacted, consider the case of Bradford v. Clapper, in which a Vermont resident, working for a Vermont-based power company, was electrocuted while carrying out an assignment in New Hampshire. While Vermont’s workers’ compensation statute had eliminated common law tort liability, New Hampshire’s had not, and so there would be no violation of due process territorialism by allowing New Hampshire to give the worker’s estate a cause of action against his employer. In an innovative opinion, Justice Brandeis ruled that an employment relationship was a kind of status, at least where the workers’ compensation regime was in place. Thus, while the Due Process Clause did not forbid application of New Hampshire law, the Full Faith and Credit Clause did.

where the property was situated. See Olmsted, 216 U.S. 386; Fall v. Eastin, 215 U.S. 1 (1909); Clarke v. Clarke, 178 U.S. 186 (1900).

77 Indeed, the first Supreme Court opinion to state that the Full Faith and Credit Clause applied to sister state statutes dealt with one state’s determination of the scope of the powers that a corporation had been authorized to exercise by the state that created it. See Chi. & Alton R.R. Co. v. Wiggins Ferry Co., 119 U.S. 615 (1887).


81 Modern Woodmen, 267 U.S. at 551.

82 286 U.S. 145.

83 Id. at 157–58.
In these cases, the Court was moved by the apparent need for a uniform legal rule to govern a complex relationship affecting multiple parties. Yet, in the kinds of cases where these issues were litigated, the Due Process Clause typically could not be used to police state choice of law because some sort of legally significant event did occur within the forum state. Full faith and credit could be used to require the forum state to recognize the ways in which its own law was preempted by some larger relationship governed by the laws of some other state.

**D. Federal Questions**

If all that were required to enforce the Supreme Court's territorial vision of law was a commitment to the principle that no state's laws could operate beyond its territory, the Court's task in supervising state choice of law would have been easy. Unfortunately for the Court, however, enunciating the principle of non-extraterritoriality was only the first step in what could be a complex and baffling inquiry. In choice of law cases, there were at least six subsidiary questions the Court potentially had to answer under the territorial scheme it had embraced.

First, there was the question of whether the cause of action was of a kind that a sister state could adjudicate. Was a wrongful death statute that allowed a plaintiff to recover a fixed level of damages penal or compensatory? Was a bequest of real property a question of local property law, or a question of the law of wills and trusts? Was a state’s declaration that a particular cause of action created by its laws could not be brought in other states a procedural limitation, in which case it had no force if the action would have been considered "transitory" at common law, or a substantive one, in which case it did?

Second, assuming the forum could hear the claim, there was the question of the class of controversy within which the particular legal dispute fell. Was the failure to perform a contract for the sale of land within the state a contract claim or a property claim? Was an agreement to waive tort liability a defense to a tort action, or was it only an independent legal action that would have to be enforced by means of a separate legal action in contract law? Was a statute of limitations that applied only to a particular cause of action procedural or substantive? Was an agreement between an insurance
company and a merchant to insure a particular shipment of goods for a particular price an independent contract when the two parties had already entered into a general contract that the company would act as the merchant’s insurer, or merely an incident of their standing agreement?

Third, there was the question of what the rule was for selecting the state whose law governed that category of disputes. Was the question involved status-based, and hence governed by the law of the state of domicil, or was it event- or transaction-based, and therefore governed by the place where the event or transaction took place?

Fourth, having placed the right of action into one of those categories, there was the question of how to determine what the domicil or place of transacting was. Marriage might be governed by the law of the state of domicil, but what is the domicil of a married couple who have separated and are living in different states? Was a suit for breach of contract to be decided under the law of the place where the breach allegedly occurred, by the place where a message of acceptance was placed in the mail, or by the place where the message was received?

Fifth, having selected the state whose law governed the dispute, there was the question of what the law of that jurisdiction actually was. Was a misinterpretation of sister state law a constitutional violation?

Sixth and finally, there was the question of whether a forum’s refusal on grounds of public policy to enforce a cause of action created under another state’s law was a valid exercise of its sovereign prerogatives.

In short, territorialism may have seemed like an obvious and straightforward way to select between the competing claims of different states to govern the same subjects, but in practice, it presented a host of difficult questions. To be sure, Beale and others had formulated answers to many of them as a matter of ordinary common law. Doctrinal issues—for example, what law governs capacity to make a contract?—could be solved by incorporating them as federal rights. Much trickier, however, were questions relating to the application of the doctrine—for example, was a loan agreement, using a life insurance policy as security for the loan, a free-
standing contract when the right to borrow against the policy was included in the terms of the life insurance policy?

It is unclear how committed the Court was to bringing the entire choice of law inquiry under the federal umbrella. Certainly, the principle of non-extraterritoriality was enforced as a constitutional limitation, and in particular as a requirement of due process. At the very least, this meant that state courts and legislatures could not regulate matters that they acknowledged to be beyond their borders. If states were nonetheless permitted to redefine the location of the subjects of regulation, however, the requirement would obviously lose a great deal of its force. The Court therefore found it necessary in at least some cases to review both the articulation and the application of jurisdiction-selecting rules by the states, despite once holding that "a mistaken application of doctrines of the conflict of laws . . ., being purely a question of local common law, is a matter with which this court is not concerned." A state, for example, could not simply declare that a contract was made within its borders and thereby satisfy the requirements of due process. What is less apparent is whether the rules for selecting the appropriate state were thought to be constitutionally hard-wired or whether they amounted to a kind of federal common law. Given

84 See supra Subsection I.B.1.
85 Kryger v. Wilson, 242 U.S. 171, 176 (1916) (Brandeis, J.). Contrast Justice Brandeis's opinions in Bradford, 286 U.S. 145, and Home Insurance Co. v. Dick, 281 U.S. 397 (1930), both of which overturned the application of forum law by state courts. Because the Court in Kryger was being asked to reverse a state court decision to apply the forum's law to a contract for the sale of land located within the forum, a full faith and credit challenge might have been more persuasive than a due process challenge, but only the latter challenge was made. Also worth noting is that in Kryger, the cases Justice Brandeis cited as authorities for the non-reviewability of state choice of law concerned decisions declining to review one state's interpretation of another state's law, not its antecedent rule for selecting the proper state whose law was to govern.
86 In the days before Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938), federal courts may well have felt empowered to interpret anew a state's view of "general common law," at least where federal jurisdiction could be asserted. Consider that one area where federal courts frequently functioned as common law courts was in cases involving marine insurance contracts, precisely the subject matter at issue in Allgeyer. See William A. Fletcher, The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance, 97 Harv. L. Rev. 1513, 1539 (1984) ("The federal courts were always conscious in marine insurance cases that they were developing and administering a system of general common law that they shared with the state courts.").
Congress's power to legislate pursuant to the Full Faith and Credit Clause, the latter seems more likely, but since Congress never passed any such legislation, the answer cannot be known.

The Court apparently was aware of at least some of the thorniness that it faced in reviewing state choice of law, as evidenced by its consistent refusal to review one state's interpretation of another state's law. So long as a state purported to decide a particular question under the right law, the Supreme Court would not review the correctness of its actual application of that law. Finally, as we have seen, the Court saw the Full Faith and Credit Clause as a limit on states' ability to abstain on public policy grounds from enforcing the laws of sister states. Although the Court failed to craft precise limits on the public policy exception, it was willing to place some limits on states' ability to side with defendants on grounds of states' own local policy—even as it refused to review one state's interpretation of another's law.

This, then, was the system the Supreme Court developed to review state choice of law, incorporating positivist conceptions of sovereignty and international relations, traditional common law doctrines, and contemporary choice of law theories into a framework of federal rights enforceable by individuals against states. Although it was not inconsistent with the Court's case law earlier in the nineteenth century, it did not really blossom until the height of the *Lochner* Era. As we shall see, at precisely the moment the *Lochner* Era gave way to the New Deal Constitution and its approach to economic regulation, the territorialist, vested rights system the Court had adopted was cast off in favor of the permissive approach the Supreme Court has maintained ever since.

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87 But see Henry Schofield, The Supreme Court of the United States and the Enforcement of State Law by State Courts, 3 Ill. L. Rev. 195, 195 (1908) (arguing for Supreme Court review of errors of state law by state courts under the Fourteenth Amendment's Due Process Clause).


89 See supra Subsection I.B.2.
II. WHAT \textit{LOCHNER} TEACHES ABOUT CHOICE OF LAW

Was the Supreme Court "Lochnering" in the field of choice of law? The answer may prove important, but it is not one that current choice of law literature has sought to provide. Other than the initial barrage of criticism decades ago that was designed to discredit the entire classical enterprise in the choice of law field, legal commentators have largely ignored the \textit{Lochner} Court's choice of law opinions. It is time to reexamine the Supreme Court's \textit{Lochner} Era choice of law decisions in order more clearly to understand what the Court was up to—and why. There are several reasons why such a reexamination is necessary. First, choice of law theorists by and large ignore the extent to which incorporating common law choice of law doctrines as positive constitutional law might have strengthened—or weakened—the logical foundation on which those doctrines rested.\textsuperscript{9} Attacking choice of law questions as a constitutional problem alters the analytic and political justifications behind the vested rights system. To the extent that the classical approach has been judged only as a set of doctrines a state imposes on itself, rather than as a set of restrictions mandated by federal law, those judgments are incomplete.

Second, and more importantly, the so-called "choice of law revolution," in which the vested rights system was overthrown and replaced with a system that seeks to evaluate the strength of a state's interest in having its law resolve a particular legal question,\textsuperscript{91} remains controversial. A number of state courts have chosen to adhere to some version of the vested rights system,\textsuperscript{92} and academics have heaped criticism on the modern "interests analysis" approach to choice of law\textsuperscript{93} and on constitutional inattention to choice of law

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\textsuperscript{9} See infra text accompanying notes 132--33.
\textsuperscript{91} See Brainerd Currie, Selected Essays on the Conflict of Laws 183--184 (1963).
\textsuperscript{92} See Symeon C. Symeonides, Choice of Law in the American Courts in 2005: Nineteenth Annual Survey, 53 Am. J. Comp. L. 559, 595 (2005). For a vivid judicial datum, see \textit{Paul v. National Life}, 352 S.E.2d 550, 555 (W. Va. 1986) ("\textit{Lex loci delicti} has long been the cornerstone of our conflict of laws doctrine. The consistency, predictability, and ease of application provided by the traditional doctrine are not to be discarded lightly, and we are not persuaded that we should discard them today.").
\textsuperscript{93} See, e.g., Lea Brilmayer, Governmental Interest Analysis: A House Without Foundations, 46 Ohio St. L.J. 459 (1985); Perry Dane, Vested Rights, "Vestedness," and Choice of Law, 96 Yale L.J. 1191 (1987); Friedrich K. Juenger, Conflict of Laws:
questions. Yet despite calls for greater constitutional involvement in choice of law, scholarly analysis of the only period in which constitutional limits were actually imposed on state choice of law has been cursory at best.

Lastly, *Lochner* Era choice of law doctrine has been misunderstood. Several prominent choice of law scholars have advocated principles reminiscent of the classical approach to choice of law, but in the course of advancing their own theories, those scholars have been at pains to distinguish their views from it, in some cases mischaracterizing the classical scheme in the course of doing so. Professor Lea Brilmayer argues that her “political rights model” differs in two respects from the traditional vested rights theory. First, her model creates individual rights against the state, rather than against other individuals. As we have seen, however, recognizing the “public” aspect of private law was essential to the creation of the *Lochner* Era choice of law regime. Second, Brilmayer notes that her model is principally concerned with prohibitions on government action, rather than requirements that the government affirmatively act in a particular way. But this, too, was a basic feature of the *Lochner* Era system, most obviously in the public policy exception to a state’s obligation to provide a remedy to a plaintiff bringing an out-of-state cause of action.

Professor Douglas Laycock, meanwhile, has sought to reestablish territorialism as a constitutional limit on state choice of law, but he rejects the notion of the vesting of rights as “crude” and


96 In addition, Part III.A., infra, will show that deontological concerns, which Brilmayer views as a distinctive concern of her approach to choice of law, were not far from the surface in the *Lochner* Era choice of law cases.
"mindless conceptualism." Territorialism can be made appropriately sophisticated, he says, by incorporating "the principal insight" of modern interests-analysis theories of choice of law: "the significance of relationships." Yet as the Court's innovative approach to "status" relations in cases like Bradford v. Clapper shows, the importance of relationships between individuals that are more jurisdictionally significant than discrete events was apparent to the Court and was an important part of its doctrine. Finally, Professor Perry Dane has argued in favor of "vestedness" as a solution to choice of law questions but he notes that his theory has "nothing whatsoever to say" about classical territorialism, which may sound like a more significant difference than it actually is insofar as the actual "location" of a particular legal controversy could be defined in surprisingly creative ways.

This Note makes no attempt to assess the merits or desirability of the classical system. These observations about contemporary choice of law debates are merely offered to suggest that a failure to examine how Lochner Era constitutional choice of law doctrines operated has distorted the debate over the way courts today ought to proceed when confronting choice of law problems. Whether because of reflexive hostility toward the Lochner Court or simple lack of interest, it is clear that association with a discredited period in American constitutional law makes it easy to dismiss the pre-New Deal choice of law doctrine without appreciating all of its nuances. It is therefore necessary to address the extent to which the Supreme Court's decisions relating to choice of law are susceptible to the traditional criticisms of Lochner Era constitutional law.

At the outset, it is helpful to understand what the Court understood itself to be doing as a matter of legal analysis in setting forth
its choice of law rules. To some extent, the answer is straightforward. Whether or not the Court's Full Faith and Credit Clause holdings are defensible in their particulars, there is no question that the Full Faith and Credit Clause is relevant to the choice of law issue. Whatever the Court's motivations and whatever the quality of its reasoning, the Court's function could plausibly be described as interpreting the meaning of an important portion of the constitutional text.

The Due Process Clauses of the Fifth and Fourteenth Amendments, however, are not as obviously connected to the choice of law problem. Understanding what made the Due Process Clauses seem to the *Lochner* Era Court like an appropriate vehicle to impose choice of law limitations is the best way to understand what its members thought choice of law was all about. Broadly speaking, there are three basic ways in which "due process" operates. The first, a "positivist" view, holds that due process only prevents executive and judicial officers from acting without legislative authorization. The process required is simply the "rule of law." The second, a "procedural" view, goes further, severing the scope of the legal interest protected by the due process guarantee from the acceptability of the procedures that must be followed before that interest can be taken away. On this view, a judge may invalidate the procedural requirements that a legislature requires courts and executive branch officials to follow before invading a protected interest if the judge considers the procedures inadequate or unfair. Finally, a "substantive" approach to due process calls upon judges to refer to their own views of what governments may or may not legitimately do and to invalidate legislation that exceeds those powers, essentially removing considerations of procedure from the equation.

Attempting to place *Lochner* Era choice of law doctrine into one of these categories illustrates just how difficult it can be to separate substance and procedure, for it is hard to say definitively which account best describes what the Court was doing in its due process choice of law cases. Requiring executive and judicial officers to ad-

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101 For a more sophisticated typology of due process understandings, see the excellent discussion in John Harrison, Substantive Due Process and the Constitutional Text, 83 Va. L. Rev. 493, 504–543 (1997).
Choice of Law

here to enacted law, as a positivist understanding does, fails to an-
swer the question of which law a government actor ought to be fol-
lowing. Some baseline choice of law rule must itself be posited in
order to select which substantive rule to apply. The Court’s
choice of law decisions therefore are not necessarily inconsistent
with a positivist take on due process, even if the Court was arti-
culating choice of law rules it derived from legal “first principles,”
rather than from positive law. The choice of law decisions could
also be described as examples of procedural due process, since they
dealt with what were essentially jurisdictional questions, pertaining
to the process of adjudicating disputes. Finally, the idea that the
enforcement of extraterritorial legislation could never provide due
process of law had an important substantive dimension. Although
the restriction was based on geography, rather than subject matter,
it nonetheless absolutely prevented legislative bodies from govern-
ing certain matters in any way.

That said, the rule of non-extraterritoriality articulated by the
Court is probably most consistent with a positivist take on due
process. Unlike true substantive due process, it left intact the abil-
ity of some state to govern the matter at hand, as long as the state
had the proper relationship to it. And unlike procedural due proc-
ess, the Court largely avoided the language of procedural fairness
in justifying its holdings. Instead, the Court seems to have under-
stood the non-extraterritoriality principle as an unwritten constitu-
tional presupposition, not unlike the principle of sovereign immu-
nity. Perhaps because of limitations thought to be inherent in the
nature of sovereignty, perhaps because of the nature of America’s
constitutional union, but most likely because it was simply incon-
ceivable to the Court that a person could be governed by two valid

102 Perhaps this can be seen most clearly with respect to preemption questions. The
enforcement of an unconstitutional state law would presumably not be due process of
law, despite a state legislature’s having enacted it, because the Constitution is the “su-
preme law of the land” and renders invalid the legislature’s action. The constitutional
text does not offer a correspondingly clear rule about interstate conflicts of law, but to
say that this permits a state to make up its own rule is itself to make a choice of law
judgment (that the forum state gets to make its own rule). This is the very issue ex-
plicitly decided for federal courts sitting in diversity by Klaxon Co. v. Stentor Electric
Manufacturing Co., 313 U.S. 487, 492 (1941). In short, a choice of law is unavoidable
if due process has any meaning at all.

103 See Hans v. Louisiana, 134 U.S. 1, 13 (1890) (“It is inherent in the nature of sov-
ereignty not to be amenable to the suit of an individual without its consent.”).
but conflicting legal regimes at the same time, states were thought
to be incapable of governing matters beyond their borders. In that
sense, it is not entirely a stretch to say that the Due Process
Clause—historically understood as the "the law of the land"—
literally meant matching law with land.

Given the complexity of the Court's approach to due process in
the choice of law cases and the roots of *Lochner v. New York*'s
substantive form of due process in cases like *Allgeyer*, it is impor-
tant to consider how the choice of law decisions compare with the
traditional complaints lodged against the *Lochner* Era Court.
Broadly speaking, there are four basic criticisms of the *Lochner*
Court, which are set out below. While the validity of these com-
plaints has arguably been qualified by recent revisionist scholar-
ship, they are still the basic elements in a charge of "Lochnering."
What follows is an investigation into whether received opinion on
*Lochner* provides much guidance in understanding the choice of
law cases and the extent to which those cases are symptomatic of
the disease of Lochnerism. A careful analysis reveals that while the
Court's choice of law doctrine is not entirely immune to the tradi-
tional criticisms of *Lochner*, by and large those criticisms do not
provide a useful way to describe or evaluate the *Lochner* Court's
choice of law doctrine.

**A. Naked Judicial Preferences**

The first of the classic objections to the *Lochner* Court is that it
played politics in the guise of constitutional decisionmaking and
that its members were either naïve or, more likely, disingenuous
when they claimed that their hostility to Progressive regulation was
based on legal interpretation rather than personal political views.
Choice of Law

Professor Robert Sedler has explicitly extended this critique to the choice of law cases, asserting that the Court’s aim was to protect big business. While it is impossible to know what really went through the heads of the Justices of the *Lochner* Court, the cases in which those doctrines were developed can at least be examined to see whether they are inconsistent with an “attitudinal” explanation.

Certainly there is some evidence to support such a claim. The Court in numerous decisions acted to protect corporations—insurance companies, most notably—from regulation by states. At a more general level, one of the most significant features of the vested rights approach to the conflict of laws—and one which has not been noted by conflicts of laws scholars—is the way in which it was inherently liability-limiting. A state asked to provide a remedy for a private wrong had significantly more leeway to restrict a plaintiff’s recovery than to expand it. To put it another way, Grant Gilmore’s characterization of Justice Holmes’s approach to contract law, as “dedicated to the proposition that, ideally, no one should be liable to anyone for anything,” could just as easily be applied to Justice Holmes’s conflict of laws decisions. The classical choice of law rules the Court adopted were not neutral with re-

to *Lochnerize.*); Thomas Reed Powell, The Judiciality of Minimum-Wage Legislation, 37 Harv. L. Rev. 545, 545–46 (1924); Cass R. Sunstein, Naked Preferences and the Constitution, 84 Colum. L. Rev. 1689, 1697 (1984) (“In the *Lochner* era, the Court attempted to create a separate category of impermissible ends, using the libertarian framework of the common law as a theoretical basis.”).

See Sedler, supra note 9, at 67. Consider also Judge Jerome Frank’s remark that Joseph Beale was “the right wing of the right wing.” Laura Kalman, Legal Realism at Yale: 1927-1960, at 26 (1986) (quoting Frank).

See generally Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model (1993).

Professor Brilmayer has criticized modern-day interest analysis on the grounds that it is “pro-resident, pro-forum, and pro-recovery.” Lea Brilmayer, Interest Analysis and the Myth of Legislative Intent, 78 Mich. L. Rev. 392, 398 (1980). While her claim might be taken to imply that the alternatives would be less “pro-recovery,” it does not convey the degree to which the vested rights approach tilted against plaintiffs as a formal matter. Modern interest analysis allows a forum state to decide unilaterally whether to allow liability or not. Under the vested rights system, by contrast, both the state where the litigated events took place and the forum state had to agree to allow the plaintiff to recover.


spect to the conflict between plaintiffs and defendants, and to the extent that defendants in cases presenting difficult choice of law questions were likely to be corporations, the classical system protected their interests.\textsuperscript{111}

Nonetheless, the vested rights theory cannot be explained away as a manifestation of laissez-faire politics. For one thing, the fact that Justice Holmes—who memorably dissented in \textit{Lochner}—was a leading proponent of the vested rights approach suggests that the choice of law cases were about something other than the protection of capitalism from Progressive regulation.\textsuperscript{112} In fact, both Justice Holmes and his progressive colleague Justice Louis Brandeis were willing to work within the territorialist system in order to secure instrumental goals, as they did in the cases creating new forms of status for workers' compensation (Brandeis) and fraternal benefit societies (Holmes). Justice Brandeis himself came to support the way the strictly territorialist scheme discouraged forum-shopping, thwarting attempts to escape innovative regulatory schemes adopted by states.\textsuperscript{113} Nor were the beneficiaries of the system simply business interests. \textit{Union Trust v. Grosman}, for example, pro-

\textsuperscript{111} These cases might also be compared to the development of common law tort doctrines during the nineteenth century, which has been explained by some scholars as an attempt by courts to subsidize the growth of American industry by limiting tort liability. See Morton J. Horwitz, The Transformation of American Law, 1780-1860, at 85–89 (1977); see also Lawrence M. Friedman, A History of American Law 473 (2d ed. 1985). More recent scholarship has challenged this "subsidy thesis," however. See, e.g., Gary T. Schwartz, Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation, 90 Yale L.J. 1717, 1720 (1981) ("[T]he nineteenth century negligence system was applied with impressive sternness to major industries and that tort law exhibited a keen concern for victim welfare."); see also G. Edward White, Tort Law in America: An Intellectual History 3 (1980) (attributing much of the development of nineteenth century tort doctrine to jurisprudential and conceptual factors).

\textsuperscript{112} Moreover, Justice John Marshall Harlan, author of \textit{Lochner}'s other dissent, was similarly an advocate of territorialism. \textit{Allgeyer}'s freedom of contract was taken from Justice Harlan's dissent in a similar case in which he would have invalidated a state law on the grounds that it operated extraterritorially. See Hooper v. California, 155 U.S. 648, 664 (1895) (Harlan, J., dissenting).

\textsuperscript{113} See Edward A. Purcell, Jr., Brandeis and the Progressive Constitution: \textit{Erie}, the Judicial Power, and the Politics of the Federal Courts in Twentieth-Century America 152 (2000). With respect to \textit{Erie}, it is worth noting that the only dissenters from \textit{Erie}'s decision in favor of the Erie Railroad Company and against the severely injured Harry Tompkins were Justices Pierce Butler and James McReynolds, the only two of the "four horsemen" hostile to President Franklin Roosevelt's New Deal still on the Court at the time. \textit{Erie}, 304 U.S. at 81 (Butler & McReynolds, JJ., dissenting).
tected an individual from suit by creditors, albeit by means of retrograde restrictions on women's property ownership. Finally, and perhaps most importantly, the effects of the system were muted. Unlike its fundamental rights decisions, the Court's strict territorialism did not shield activities from state regulation altogether, only regulation by the "wrong" state. The claim that the Court was merely acting to protect powerful economic interests or advance the free market does not convincingly describe the nature of its decisions and doctrines.

B. The Countermajoritarian Difficulty

The second family of criticisms of the *Lochner* Era Supreme Court charges that the Court failed to appreciate the proper role of judges in a democratic system. On this argument, the Court ought to have shown more restraint before acting to overrule the decisions of politically accountable lawmakers on matters of public policy. In the context of state choice of law, this criticism again lacks some of the force that the Court's substantive due process decisions might lend to such a charge. With respect to legislative action purporting to regulate matters outside the state, Supreme Court invalidation did not prevent the state within whose territory the subject matter was said to rest from regulating it in whatever way the state saw fit. With respect to judicial choice of law, made by state court judges in the absence of legislative direction, the state policy being overridden was not legislative to begin with and the risk of setting aside the will of popular majorities is much lower since such procedural questions seldom motivate voters on Election Day. With respect to legislative attempts to reach subjects outside the state, the problem of overruling democratic majorities also seems fairly minimal since those laws would typically affect citizens

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114 245 U.S. 412 (1918).

115 See Strauss, supra note 8, at 386 ("The justices' failure was in a sense a lack of humility: an inability, or refusal, to understand that although they were vindicating an important value, matters were more complicated than they thought."); see also Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 16–17 (1962).
of other states, who had no opportunity to participate in the political process that generated the law.\textsuperscript{116}

Perhaps the most problematic aspect of the Court’s choice of law decisionmaking from the standpoint of democratic accountability is its willingness to require a state to enforce a law that the state considered incompatible with its own local policy.\textsuperscript{117} As we have seen, however, the Court showed tremendous reluctance to second guess state court invocations of the “public policy exception.” Moreover, constraining the public policy exception was the only way in which to make what was otherwise a pro-defendant choice of law regime more party-neutral, and the Full Faith and Credit Clause provided a textual rationale for this oversight. Not only that, federal courts sitting in diversity were required to judge a state’s policy interests anyway, both before\textsuperscript{118} and after\textsuperscript{119} the Court’s decision in \textit{Erie Railroad Co. v. Tomkins},\textsuperscript{120} making it impossible to avoid the issue altogether. In short, the charge of countermajoritarianism does not have much weight in the choice of law arena.

\textbf{C. Bad Law}

The third group of arguments condemning \textit{Lochner} charges that it “simply manufactured a constitutional right out of whole cloth,”\textsuperscript{121} with no basis in the Constitution’s text or history and no coherence as legal doctrine.\textsuperscript{122} By and large, it is difficult to criticize the choice of law cases on these grounds. It is true that the Court seemed to start with the premise of territorialism and to look for a textual home for the idea, ultimately settling on the open-ended language of due process. As a matter of original understanding,

\textsuperscript{116} See John Hart Ely, Democracy and Distrust 83 (1980) (“[N]onresidents are a paradigmatically powerless class politically.”).
\textsuperscript{119} See Griffin v. McCoach, 313 U.S. 498 (1941).
\textsuperscript{120} 304 U.S. 64 (1938).
\textsuperscript{122} See W. Coast Hotel v. Parrish, 300 U.S. 379, 391 (1937) (“What is this freedom? The Constitution does not speak of freedom of contract.”); Friedman, supra note 105, at 1412 (“Contrary to revisionist claims, \textit{Lochner}-era decisions simply defy attempts to divide the cases into doctrinal categories.”).
Justice Story's more flexible notions of comity, while similar to the vested rights theory, are arguably more in line with prevailing understandings at the time the Constitution and the Fourteenth Amendment were ratified. Nonetheless, territorialism was well-grounded as a principle of constitutional law and is in some sense inescapable, since territorial boundaries are the principal way in which we define states. The constitutional text contained numerous provisions that strongly implied that state legislative jurisdiction was territorial, and decisions affirming the notion that sovereign power was limited by the sovereign's borders existed from the earliest days of the Court.

The idea that a right of recovery might be carried from place to place was a familiar one. English common law had long distinguished between "transitory" and "local" causes of action, allowing transitory actions to be brought anywhere in the kingdom. The concept of vested rights was equally well established. The vested right was a key principle of the common law of property, and it could claim a plausible constitutional home in the text of the Contracts and Takings Clauses. Indeed, Progressive constitutional theorist Edward Corwin asserted that the doctrine "represented the essential spirit and point of view of the founders of American Constitutional Law."

Furthermore, the common law recognized the idea of the "chose in action," the property-like right to bring a lawsuit. According to Blackstone,

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123 For example, the extradition clause of Article IV required each state to surrender fugitives from criminal prosecution in another state to "the State having Jurisdiction of the Crime." Article IV also provided that no new states would be formed "within the Jurisdiction of any other State," strongly implying that the word "jurisdiction" was synonymous with the state's physical borders. The idea that a legal act had a location is also supported by the language of Article III and the Sixth Amendment, which both require criminal trials to be held in the state where the crime alleged "shall have been committed."

124 See, e.g., The Antelope, 23 U.S. (10 Wheat.) 66, 122 (1825) (Marshall, C.J.) ("No principle of general law is more universally acknowledged, than the perfect equality of nations.... It results from this equality, that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone.").

125 See Arthur K. Kuhn, Local and Transitory Actions in Private International Law, 66 U. Pa. L. Rev. 301, 303 (1918); see also Stout v. Wood, 1 Blackf. 70 (Ind. 1820).

126 Corwin, supra note 100, at 276.

127 See generally William S. Holdsworth, The History of the Treatment of Choses in Action by the Common Law, 33 Harv. L. Rev. 997, 1027 (1920). Interestingly, it was
If a man promises or covenants with me to do any act, and fails in it, whereby I suffer damage, the recompense for this damage is a chose in action, for though a right to some recompense vests in me at the time of the damage done, yet what and how large such recompense shall be can only be ascertained by verdict.\textsuperscript{128}

Finally, the distinction between vested rights and unvested remedies was also well established. After all, if vested rights were unalterable, any change in law, however minute, that could limit enforcement of a vested right would be a violation of property or contract rights protected by the Constitution. Thus, the Marshall Court held that a state could prevent collection from a debtor within the state without offending the Constitution;\textsuperscript{129} at the same time, however, such laws could not erase the creditor's underlying right to collect, and they could not prevent another state that was willing to provide a remedy from doing so.\textsuperscript{130} Note also that making remedies law the exclusive province of the forum state was consistent with decisions like Pennoyer, which limited the jurisdiction of state courts—the dispensers of remedies—to persons and property within the state's borders.

In one sense, however, the Court was undertaking something novel in its choice of law decisions. Beale ultimately insisted that each forum was the master of its own choice of law rules and that there were no super-national laws that govern one sovereign's choice of law policy. He was therefore willing to permit different courts to use different choice of law rules, with the result that vested rights might be defined differently in different courts.\textsuperscript{131}

\textsuperscript{128}Beale's nemesis Walter Wheeler Cook who sought to explode the notion that the chose in action was generally inalienable. See Walter Wheeler Cook, The Alienability of Choses in Action, 29 Harv. L. Rev. 816 (1916); see also Bonaparte v. Tax Court, 104 U.S. 592, 592 (1881) (holding that a municipal bond, as a chose in action, cannot be exempted from taxation outside the state where it had situs). The assignability of legal claims was well enough established that the authors of the first Judiciary Act perceived the need to make it clear that diversity of citizenship for purposes of federal court jurisdiction would not be based upon the citizenship of a legal assignee. See Judiciary Act of 1789, ch. 20, §§ 11-12, 1 Stat. 73 (codified as amended at 28 U.S.C. § 1652 (1994)).

\textsuperscript{129}2 William Blackstone, Commentaries on the Laws of England § 540 (1768) (emphasis added).


\textsuperscript{131}See Dane, supra note 93, at 1196.
Constitutionalizing Beale's doctrines transformed them from forum policy into rules that the forum was compelled to obey by a higher authority, regardless of the rule the forum would prefer to enact. Even if this amounted to a significant departure from prior theory, however, it was not necessarily an unjustified one. Enforcing Beale's rules as constitutional doctrine might be said to have resolved the tension between sovereign power in the sense of sheer might and sovereign power in the sense of legitimate authority. In any event, the principle of territorial limitations was well enough established that it is hard to consider the Court's choice of law doctrine a radical shift away from existing legal understandings.

D. A Jurisprudence of Conceptions

A final criticism of 

Lochner Era constitutional law is that its method of reasoning was overly abstract and conceptualistic. Consequently, judges could manipulate the results of their analyses by means of artful characterization or simply succumb to the

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132 See David Currie, The Constitution in the Supreme Court: The Protection of Economic Interests, 1889-1910, 52 U. Chi. L. Rev. 324, 377 (1985) (stating that, in Allgeyer, "the due process clause had become the constitutional peg on which to hang Justice Story's territorialist choice-of-law views"). Even if this step was not an act of unjustified innovation, it may simply have been theoretically problematic. To the extent that Beale's theory was itself an attempt to create a choice of law rubric that was compatible with the premise that there were no super-national rules, recasting it as constitutional law may have undermined the case for the system and its strict separation of individual states' law-creating and law-enforcing powers as sovereigns.

133 How else can one make sense of Justice Holmes's statement that "jurisdiction is power," Mich. Trust Co. v. Ferry, 228 U.S. 346, 356 (1913), in light of his willingness to hold that a state was without jurisdiction to apply its own law in a dispute within its own courts, an act clearly within its "power"? Even vested rights critic Walter Wheeler Cook, who argued that limits on a state's power to affect legal relations do not "inhere in the constitution of the legal universe," conceded they could exist "where some limitation is imposed by some system of positive law, such as the federal constitution." Walter Wheeler Cook, The Logical and Legal Bases of the Conflict of Laws, 33 Yale L.J. 457, 484-85 (1924).

134 See, e.g., Roscoe Pound, Mechanical Jurisprudence, 8 Colum. L. Rev. 605 (1908); see also Jack M. Balkin, "Wrong the Day it Was Decided": Lochner and Constitutional Historicism, 85 B.U. L. Rev. 677, 686 (2005) (describing conventional account that "during the 'Lochner Era' courts employed a rigid formalism that neglected social realities").

“beguiling”\textsuperscript{136} sense of certainty that the vested rights approach encouraged.\textsuperscript{137} This is probably the most salient criticism that can be lodged against the Court’s conflicts of law doctrine; determining where a particular legal relationship was created was in many cases a highly artificial inquiry. Minute differences of contract language could lead to opposite determinations of the proper location of a contract.\textsuperscript{138} The idea that an insurance company was not “doing business” in a state where it sold insurance policies by mail is difficult to swallow, all the more so when it was possible for a person to “travel” to another state and make a contract there without doing anything more than walking to the mailbox. In the abstract, Justice Holmes may have been right that “[t]he injustice of imposing a greater liability than that created by the law governing the conduct of the parties at the time of the act or omission complained of is obvious,”\textsuperscript{139} but where a telegraph company loses an important message in the state in which the message was to be delivered, is it really so unjust to subject it to suit under the law of the place from which the message was sent?

Moreover, the Court itself began to blur the formal territorial lines that the system was founded upon. The Court in several cases allowed states to punish acts done outside the state but “intended to produce and producing detrimental effects within it.”\textsuperscript{140} The idea that acting with the intention to affect matters within the legislative competence of a particular lawmaking body brought a person otherwise beyond the body’s reach within it was not unprecedented in the Supreme Court’s decisions.\textsuperscript{141} Nonetheless, it represented a retreat from the strict territorialism that supported the vested rights system. Moreover, a requirement of purpose soon gave way to

\textsuperscript{139} W. Union Tel. Co. v. Brown, 234 U.S. 542, 547 (1914).
\textsuperscript{140} Strassheim v. Daily, 221 U.S. 280, 285 (1911).
\textsuperscript{141} Compare Coronado Coal Co. v. United Mine Workers, 268 U.S. 295 (1925), with Mine Workers v. Coronado Coal Co., 259 U.S. 344 (1922).
mere foreseeability in the context of various tort suits. That the Court itself was unwilling to adhere to the rules it announced is strong evidence against their utility and made their selective imposition all the more arbitrary. It is conceivable that the system could have been reformed rather than discarded wholesale—as was done in the cases recognizing new forms of status relationships entitled to full faith and credit—but as implemented, the results often seem unconvincing.

Certainly, each of the staple criticisms of the *Lochner* Era has some applicability to the restraints the *Lochner* Era Court imposed on state choice of law, but for the most part, they lack significant persuasive or explanatory force. The only complaint that seems especially plausible is the argument that the Court’s doctrine was arbitrary and technical. With hindsight, this is unsurprising in light of the premise of territorialism: if state power was defined in purely geographic terms, it followed that every legal issue had to possess a location—an abstract fiction that invoked the language of ordinary perception but that existed only in the minds of lawyers. The strictness of the Court’s rules was bound to produce unpalatable results in difficult cases, to some extent an intractable problem in the field of choice of law, but a fact that its concrete metaphors seemed to deny. To some extent, these were problems that nineteenth- and early twentieth-century jurists, including Justice Holmes, were willing to live with, for reasons that will be suggested in Part III. By the 1930s, however, that tolerance would be a thing of the past.

III. WHAT CHOICE OF LAW TEACHES ABOUT *LOCHNER*

Recent historical revisionism has significantly altered understandings of the ideas at work in the *Lochner* Era Supreme Court. This Part will show how an examination of the choice of law cases adds to the effort to understand the story of the *Lochner* Era Court, both in terms of the Court’s theory of political power and its methods of legal reasoning.

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A. "Liberty of Contract" and Social Contract

The Supreme Court's *Lochner* Era decisions overturning legislative action on the grounds that it interfered with individual liberty of contract fall into two categories. One group, as we have seen, invalidated what the Court viewed as attempts to extend legislation extraterritorially. The second group invalidated certain laws because of their substantive content, rather than the geographic scope of their application—the far more controversial and well known set of liberty of contract cases. It may be that the Court's use of the same doctrinal language to describe the two categories was accidental, but there are reasons to suspect that the two sets of cases reflect some common concerns that led the Court to speak of them in the same way.

With only one exception, every one of the cases in the second group overturned legislation that regulated the terms of employment contracts. The Court could have reached the same result by characterizing them as deprivations of property without due process of law, which would have been far more conventional. It is not difficult to see how a statute imposing a minimum wage could be characterized as a deprivation of an employer's property, and statutes setting minimum prices for goods, rather than for labor,

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143 Wayne McCormack, *Lochner*, Liberty, Property, and Human Rights, 1 N.Y.U. J.L. & Liberty 432, 458 (2005) ("The rights involved in the *Lochner* era were generally described as 'liberty of contract' rather than property interests, although property-like notions drove many of the arguments.")


145 Indeed, some decisions invalidated the employment regulations because they violated both liberty and property rights. E.g. *Wolff Packing*, 262 U.S. at 544 (holding that wage statute deprived an employer "of its property and liberty of contract without due process of law").
were never described as liberty of contract infringements. What seems likely, particularly in light of the rhetoric of Free Labor that developed in the context of the political struggle over slavery in the middle of the nineteenth century, is that the appeal to liberty indicated that the right protected was "special" to *Lochner* Era political understandings. 146

As a basis to overturn state law, however, liberty of contract made its debut in the choice of law context. The soaring rhetoric of liberty was certainly unnecessary to reach the result in the choice of law cases, as these too could have been described merely as property deprivations. 147 Moreover, only two months before the Court decided *New York Life Insurance Co. v. Head*, it reached the conclusion that insurance was a "business affected with a public interest" and hence amenable to regulation as a public concern in a way that ordinary "private" businesses were not. 148 Why then did the territorial question resonate so strongly with the Court? Three ideas at work in the choice of law cases help explain the Court's invocation of liberty of contract—freedom of movement, notice, and reciprocity—and those three unifying themes share a common concern for individual consent to political power. The way in which consent was understood helps to explain the outlook of the *Lochner* Era Supreme Court more broadly, and in particular, the notions of public power and private rights that animated its substantive due process cases.

Freedom of movement, the first of the three unifying themes in the choice of law cases, was an important component of the idea of legislative jurisdiction. Consider that the use of liberty to protect economic rights was not uncontroversial in its own day. In 1926, the scholar Charles Warren argued that the Fourteenth Amendment incorporated a common law conception of liberty, which "meant simply 'liberty of the person,' or, in other words, 'the right

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147 In fact, in *Home Insurance Co. v. Dick*, Justice Brandeis did just that, finding that the defendants in the case had been deprived of property without due process of law because the application of forum law "increases their obligation and imposes a burden not contracted for." 281 U.S. 387, 409 (1930).
to have one's person free from physical restraint.” Liberty of contract as a limitation on where a state could extend its powers encompassed more than the right not to be incarcerated, but it still related to the idea of physical movement. In declaring the limits of state power, the Court was creating a right to escape the regulatory power of the state. This concern was particularly significant given that the primary use of the Due Process Clause as a limit on state legislative jurisdiction was in the protection of foreign corporations from being regulated by states in which they were not “doing business,” a test which essentially hinged on whether or not a corporation had an agent physically present within the state. Unlike natural persons, corporations were not entitled to protection under the Privileges and Immunities Clause of Article IV. A corporation incorporated in one state did not enjoy the right to “travel” to other states; it could only enter another state if that state consented to allow it to enter, which usually entailed payment of a franchise tax, appointment of an agent upon whom process could be served, and willingness to conform to various restrictions on its conduct. Just as states had the right to deny a corporation entry, liberty of contract protected a corporation’s right to not enter a given state. A state’s “jurisdiction” to regulate was confined to those who consented to be brought within it and to be subject to its regulatory power.

150 Thus in Head the Court spoke of the Fourteenth Amendment’s protection against imposing a “perpetual contractual paralysis.” N.Y. Life Ins. Co. v. Head, 234 U.S. 149, 161 (1914).
152 See supra Section I.A.
153 In Allgeyer v. Louisiana, for example, the defendants challenged Louisiana’s law on the grounds that its “real purpose” was to force foreign corporations to appoint agents so that the corporations would be subject to franchise taxes, but that “it is beyond the legitimate sphere of state government to compel a foreign corporation to enter its borders for the transaction of business which can be done elsewhere.” Brief of Plaintiffs in Error at 18, Allgeyer v. Louisiana, 165 U.S. 578 (1897) (No. 446). Justice Harlan’s dissent in Hooper v. California, the principal source of Allgeyer’s liberty of contract language, argued that a state could not criminalize transacting with “a foreign corporation that chooses not to enter the former state by its own agents.” 155 U.S. 648, 664 (1895) (Harlan, J., dissenting).
154 Hence the Court’s rationalization that an out-of-state motorist temporarily present in a particular state has consented to allow the state to appoint an agent for him
The second dimension of the liberty of contract cases is a concern with notice. If a legal standard can be applied to a particular action that differs from the one in operation at the time and place of the action, it becomes difficult for an actor to know how to conform his behavior to the law. The *Lochner* Era Court perceived a significant constitutional problem with the retroactive application of laws, even where more specific textual prohibitions like the Ex Post Facto Clause and the Contracts Impairment Clause did not apply. Tellingly, this concern extended to accrued rights to sue for civil damages. Justice Holmes analogized state legislation depriving a litigant of an accrued right to bring a lawsuit to a requirement that "a man pay a baker for a gratuitous deposit of rolls," and he upheld a due process challenge to the legislation. Justice Holmes was willing to accept *Lochner*'s premise that some redistributive legislative action—even legislation that applied to bakeries—was itself illegal because it was in some important sense confiscatory. It is also worth noting that the Court struck down on due process grounds several state laws that it considered unconstitutionally vague, implicating similar concerns about retrospective lawmaking as well as the separation of powers. The Court also

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155 See, e.g., *Lynch v. United States*, 292 U.S. 571, 579 (1934) (Brandeis, J.) (invalidating, under Fifth Amendment guarantee of due process, a congressional attempt to annul insurance contracts that were "valid when made").

156 See *Ettor v. City of Tacoma*, 228 U.S. 148, 156–58 (1913) (unanimously holding that a "right to compensation was a vested property right" and retroactive repeal of statutory cause of action violated Fourteenth Amendment).


for the first time required states to provide "just compensation" in cases where legislation disturbed preexisting property rights.\footnote{See Chi., Burlington & Quincy R.R. v. City of Chicago, 166 U.S. 226, 234–41 (1897) (dictum); Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).}

The choice of law problem is consistent with the basic concern of all of these cases. If retroactivity presents the problem of "conflict of laws viewed in reference to time,"\footnote{Francis Wharton, Retrospective Legislation and Grangerism, 3 Int'l Rev. 50, 57 (1876).} as one contemporary commentator put it, then conflict of laws might be thought of as the problem of retroactivity in reference to space. The unifying theme is an aversion to shifting legal standards and the defeat of individual expectations. It has been suggested that aversion to retroactive legislation and the protection of accrued rights was rooted in separation of powers ideas, according to which legislatures acted prospectively while courts acted retrospectively.\footnote{See Wallace Mendelson, A Missing Link in the Evolution of Due Process, 10 Vand. L. Rev. 125, 133 (1956). See generally Gordon S. Wood, The Origins of Vested Rights in the Early Republic, 85 Va. L. Rev. 1421 (1999).} This is an important insight, but it does not go far enough. Choice of law doctrine addresses the separation of governments more than the separation of government functions, yet the underlying concerns in these cases were the same. Rather than simply principles relating to formal structures, non-retroactivity and non-extraterritoriality expressed a shared concern for notice—an essential ingredient to the individual grant of consent to be governed. Without knowledge of the law that is to govern one's activities, one can hardly choose to be ruled by it. The idea that some degree of voluntariness was required before the law could apply brings these different lines of decisions together.

The third dimension of the Court's legislative jurisdiction cases is reciprocity. Reciprocity was an explicit concern in a number of different contexts. Consider that the Supreme Court on several occasions struck down state taxes because they imposed taxes on property whose owners received very little benefit from the taxes.\footnote{See, e.g., Standard Pipe Line Co. v. Miller County Hwy. & Bridge Dist., 277 U.S. 160, 162–63 (1928); Road Improvement Dist. v. Mo. Pac. R.R., 274 U.S. 188, 192–94 (1927); Myles Salt Co. v. Bd. of Comm'rs, 239 U.S. 478, 483–85 (1916).} That same rationale was used to explain why a state could not tax property located outside the state. Where the property was located
in another state, the owner derived no benefits from the state seeking to tax it.163 A similar idea of reciprocity operated in the realm of corporations law. A corporation outside a state could not be forced to pay a franchise tax "for the privilege of doing business" in the state if it was not in fact enjoying the privilege. Why did reciprocity matter to the Court? Its larger significance can be better seen by looking to one of the most famous pillars of "classical" American law: the doctrine of consideration in contract law. The consideration doctrine required that a promise be given in exchange for some reciprocal benefit in order to be enforceable at law. This mutuality, however formal, served as a manifestation of assent to be bound.164 Reciprocity between the state and the individual—indicated by territorial presence—operated similarly. When a state attempted to regulate matters beyond its borders, it imposed a non-reciprocal burden on the individual being regulated. The fact that there was no reciprocity in the relationship between the individual and the state indicated a defect of assent to be governed.

The common thread through these three principles—freedom of movement, notice, and reciprocity—is an idea of political consent and voluntariness. The choice of law doctrine could easily have been framed in terms of the rights of states against states, as the language of the Full Faith and Credit Clause, Justice Story's comity theory, and the modern interest analysis methodology all tend to do. The Court, however, consistently cast the issue in terms of individual rights against the government and based its doctrine primarily on the Due Process Clause.165 The Court was less concerned about interstate harmony than about protecting individuals from government power imposed against their will.

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165 Indeed, the idea that due process of law precluded the extraterritorial application of law was not confined to legal conflicts between two states. See Home Ins. Co. v. Dick, 281 U.S. 397 (1930) (deciding conflict between law of Texas and Mexico); Compania General de Tabacos de Filipinas v. Collector of Internal Revenue, 275 U.S. 87 (1927) (deciding conflict between the Philippine protectorate and France); see also W. Union Tel. Co. v. Brown, 234 U.S. 542, 547 (1914) (citing the Supremacy Clause rather than due process to resolve a conflict between South Carolina and the U.S. federal government).
This idea helps tie together competing scholarly interpretations of the *Lochner* Era. Revisionist accounts of *Lochner* have stressed what Professor Howard Gilman has called "the principle of neutrality," according to which the Supreme Court condemned legislation that bestowed government favors on certain groups at the expense of others as arbitrary and "partial." This concern for neutrality is thought to have arisen out of Jacksonian hostility toward special privileges, as well as Madisonian ideals of republican government, free from the control of particular factions. Gilman's interpretation rejects the view advanced by New Deal partisans that the *Lochner* Court can be explained in terms of a bias in favor of wealthy interests and a desire to enshrine *laissez-faire* economics as constitutional dogma. Rather, the Court's concern was with those who had managed to gain control of the legislative process to use public powers for their own private ends.

Other scholars, however, have sought to qualify the neutrality thesis. In their account, preexisting notions of private rights shaped the meaning of neutrality, giving certain rights, particularly those relating to employment, a core substantive meaning. The concern about restrictions on employment can be traced to Northern "Free Labor ideology," which made the right to sell one's own labor a centerpiece of the eventually triumphant outlook of the Republican Party in the middle and late nineteenth century. According to these scholars, the *Lochner* Court did indeed seek to protect certain fundamental rights, keeping them safely behind the protective shield of the Due Process Clause.

An unexpected synthesis between the Marshall Era concern with vested rights and the countervailing Jacksonian repudiation of special privileges may help explain the role of fundamental rights ideas in shaping the Due Process Clause. The Court was willing to declare legislation "arbitrary" not only because its essential purpose was to redistribute wealth, but also because it operated retrospectively or extraterritorially. What made all of these illegitimate was the use of government power for ends beyond those for which

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167 Id. at 114.
168 See Barry Cushman, Rethinking the New Deal Court 90 (1998); McCurdy, supra note 146, at 167.
it had been granted. Government action that shifted economic power, like legislation in these other forms of jurisdictionally deficient government action, was inherently coercive.\(^{169}\) It was inconceivable that a government constituted in the first instance by the *unanimous* consent of the governed would have been given authority to take property from its members against their will.\(^{170}\)

This view has been anticipated in some respects by Professor Owen Fiss, who argues that "[t]he theory of the social contract prevalent in the nineteenth century defined the bargaining relationship among the founders in such a way as to deny government the power to redistribute wealth."\(^{171}\) The exercise of government powers for the general good was presumed to be voluntary, on the premise that individuals willingly surrender some degree of their natural sovereignty in order to establish civil society and protect their own interests.\(^{172}\) Senseless or selfish exercises of power, however, were not viewed as part of that grant of power. Thus *Calder v. Bull*'s statement in 1798—that "a law that takes property from A. and gives it to B" violated "the great first principles of the social compact"—found renewed expression in the writing of Justice Holmes in 1922, who declared that "the Constitution and the first principles of legal thinking allow the law of the place where a con-

\(^{169}\) It is perhaps in light of this view that Justice Holmes viewed only those government regulations that secured "an average reciprocity of advantage" for those being regulated as exempt from the Fifth Amendment's "just compensation" requirement when the regulations affected rights of property ownership. See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

\(^{170}\) See James Madison, *Sovereignty* (1835), *reprinted in* 9 Writings of James Madison 568, 570–71 (G. Hunt ed., 1910) (arguing that the establishment of civil society "must result from the free consent of every individual").


\(^{172}\) See *Munn v. Illinois*, 94 U.S. 113, 124 (1876) (stating that formation of the social compact "does not confer power upon the whole people to control rights which are purely and exclusively private; but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another") (citation omitted); see also *Yick Wo v. Hopkins*, 118 U.S. 356, 369–70 (1886).

\(^{173}\) 3 U.S. (3 Dall.) 386, 388 (1798) (emphasis altered); see also *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 658 (1829) (Story, J.) ("We know of no case, in which a legislative act to transfer the property of A. to B. without his consent, has ever been held a constitutional exercise of legislative power in any state in the union.") (emphasis added).
tract is made to determine the validity and the consequences of the act.” The Court was not of one mind on all the issues it faced, and Justice Holmes certainly disagreed with its conclusion in *Lochner.* Nonetheless, Justice Holmes and his colleagues consistently agreed that a state lacked the power to reshape private ordering where the parties involved had not at least impliedly consented to come within its jurisdiction.

The importance of voluntariness in delineating the lawful powers of states helps explain the particular concern for the protection of rights related to employment. Free Labor ideology is thought to have connected government interference in bargains between employers and employees with Southern chattel slavery, the ultimate form of state control of the labor market and a rival model to Northern industrialism. But there is more to Free Labor even than this, as can be seen by comparing it with classical protection of property rights. Redistribution of property was by definition non-neutral, and hence coercive, “confiscatory,” and unjustified—but redistribution of the rights to control how one used one’s person was even worse, for it struck at the heart of the idea of voluntary political arrangements. Free Labor ideology was more than a theory of economic self-determinism. It implicated the most basic rights of citizenship and democratic participation. No less a theorist of the relationship between labor, property, and social compact than John Locke argued that men lack the power to consent to enslave themselves. The idea that all men are endowed with an *inalienable* right in their own persons was central to the liberal order because it was this right that permitted civil society to be formed in the first place. No law proceeding from the sovereign power originally vested in the people who established the American gov-

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174 Mut. Life Ins. Co. v. Liebing, 259 U.S. 209, 214 (1922) (emphasis added); see also The Federalist No. 44, at 250 (James Madison) (Clinton Rossiter ed., 1961) (“[L]aws impairing the obligation of contracts are contrary to the *first principles of the social compact* and to every principle of sound legislation.”) (emphasis added). Admittedly, the decision in *Liebing* upheld a state’s application of its own state law to a contract.


176 Consider Abraham Lincoln’s declaration: “[N]o man is good enough to govern another man, without that other’s consent. I say this is the leading principle—the sheet anchor of American republicanism.” Abraham Lincoln, Speech at Peoria, Ill. (Oct. 16, 1854), *reprinted in* 2 *Collected Works of Abraham Lincoln* 266 (Roy P. Basler ed., 1953).
ernment could operate to divest the people of the original right that the American government had been established to secure. The prepolitical character of the right to enter into voluntary arrangements was essential to any outlook that imagined a prepolitical moment.

In this regard, the argument articulated by commentators like Professor Cass Sunstein that the *Lochner* Court’s error was in its assumption that “[m]arket ordering under the common law was understood to be a part of nature rather than a legal construct” misstates somewhat the nature of the political theory suggested by these cases. The core principle of the social contract view was that nature did not give any person the right to rule any other. There was no divine right of any one man to be king. Each was by nature sovereign. Thus, in a choice of law case involving slavery, Lord Mansfield opined that slavery could only exist by “positive law”: when a slave was brought into the territory of a government that did not acknowledge slavery, the slave reverted to the natural human state of non-slavery. If there was no natural right to rule another person, the only political arrangement that was in accord with nature was one that derived from the consent of every member of the polity. The *Lochner* Court made it clear that there was no vested right in the common law rules for acquiring property—the common law was not itself part of nature and could be altered prospectively. The common law was not the “baseline” of valid wealth distribution, except insofar as the actions taken in reliance upon existing legal rules were entitled, within limits defined by pressing public need, to their promised legal effect.

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178 *Somerset v. Stewart*, 98 Eng. Rep. 499, 510 (K.B. 1772); see also *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 612 (1842) (Story, J.) (holding that, but for the inclusion of the Fugitive Slave Clause in the Constitution, any slave who escaped to a free state would have been made free, regardless of his masters’ claimed property rights).

179 See, e.g., *Second Employers’ Liab. Cases*, 223 U.S. 1, 50 (1912); see also David E. Bernstein, *Lochner’s Legacy’s Legacy*, 82 Tex. L. Rev. 1, 23 (2003); Woolhandler, supra note 47, at 1024.

180 Doctrinally, nonretroactivity and nonextraterritoriality were both qualified by the government’s inherent police power. Understood as the general means of protecting health, safety, and welfare, however, the police power simply reflected the goals that motivated individuals to form civil society in the first place. Thus, to say that the Court permitted modification of common law rules only when justified by police power interests does not reflect a bias in favor of the common law. Cf. Cass R. Sun-
wealth undeniably altered the practical ability of individuals to obtain certain goods by voluntary agreement, but that disparity was not what was prepolitical. What was prepolitical was the right to grant or withhold consent to political power.

The *Lochner* Court's willingness to give heightened protection to certain fundamental rights can be reconciled with the principle of neutrality by recognizing the importance of voluntariness in the establishment of civil society and the formation of the American Constitution. The use of due process to police state choice of law is highly revealing, for it shows that the ultimate meaning of due process was neither substantive nor procedural but constitutive. It protected individuals from the application of government authority that they never consented to be subjected to in the first place.

**B. The Reality of Realism**

Conventional accounts of the decline and fall of the *Lochner* Era have stressed the importance of external political forces upon the Supreme Court's actions. The *Lochner* Era, it is argued, should be understood as a sustained effort on the part of the individual Justices of the Court to force their political opinions on the nation through the exercise of judicial review. According to these "externalist" accounts, the Court only changed course after its *laissez-faire* economic views brought national scorn following the onset of the Great Depression and precipitated a showdown with President Franklin Roosevelt, in the form of his "Court-packing" plan.

Although revisionist accounts challenging this interpretation have emerged, the narrative is still a mainstay in many accounts of the New Deal and the history of the Supreme Court.

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*stein, Reply—Lochnering, 82 Tex. L. Rev. 65, 69–70 (2003) (arguing that the Court in the *Lochner* Era had a "limited" view of the police power when it came to legislatures departing from the common law). Rather, it reflects the view that any change in private ordering had to accord with the powers granted by naturally autonomous individuals, which were not thought to include the power to redistribute for redistribution's own sake.


* See Cushman, supra note 181, at 203 n.3.
As we have seen, the Supreme Court's choice of law decisions shared certain connections with its substantive due process decisions, in doctrinal rhetoric and in an underlying political and constitutional theory. It is less surprising, but equally important, to note that they shared a methodological approach—an understanding of what law is and what the judges who administer it do. The Court's choice of law doctrine, jettisoned at the same time its substantive due process doctrine came apart, lost favor largely because it reflected a metaphysical understanding of the law that had been replaced by a radically different outlook. Given the fundamental nature of this shift, as well as the conceptual overlap between the vested rights theory and substantive due process doctrines, it is unlikely that the philosophical change was an unimportant part of the abandonment of Lochner's notions of substantive due process.

The Lochner Court's use of due process to protect "liberty" and "property" from legislative interference relied on notions of distinct public and private spheres. Only businesses that were "affected with a public interest"—typically monopolies like railroads—could be subjected to price regulations, for example.\footnote{See Barry Cushman, Some Varieties and Vicissitudes of Lochnerism, 85 B.U. L. Rev. 881, 961–962 (2005).} Where there was no public interest, a business was private, and its property rights could not be infringed by government action without offending the Due Process Clause. And as we have seen in the context of liberty of contract, there was generally no legitimate public interest in how a person might choose to employ his labor.

The public-private distinction that was central to Lochner Era constitutional law provided the mechanism animating the vested rights choice of law theory.\footnote{In fact, the public-private distinction partly developed out of issues related to the conflict of laws, since it was the development of sovereignty theories that made the conception of a distinct public sphere possible. See Morton J. Horwitz, The History of the Public/Private Distinction, 130 U. Pa. L. Rev. 1423, 1423 (1982).} Where substantive due process relied on marking a single boundary between public power and private rights, however, choice of law introduced another variable, establishing a three-way public-public-private distinction. The Court's choice of law doctrine cleaved the public power of a state into two different spheres of authority. The first public sphere referred to the power of a state to create legal obligations, including both obli-
gations owed to itself, such as criminal laws, and obligations owed to other people. The second public sphere referred to the power of a state to establish rules for enforcing private rights. These public powers included the remedies and procedure law and, not surprisingly, the public policy exception to the obligation to enforce foreign causes of action. The two public spheres (assuming a cause of action was being brought in a state other than the one creating it) were separated from one another by territory. The place where particular events took place determined the nature of the rights flowing from those events. The place where the bearer of those rights was asserting them determined the appropriate procedure and remedies.

What made this separation possible was the distinction between substance and procedure, which grew out of the distinction between the public and private spheres of human activity. The vested rights system functioned by harnessing the traditional idea of private rights, theorizing that a plaintiff with an accrued cause of action had acquired a kind of property interest that had an existence of its own and could be transported from place to place. Only by creating this independent benchmark against which to measure the asserted powers of states to regulate the way in which laws were enforced could a line be drawn between the competing powers of the states.

The strict separation between substance and procedure, right and remedy, private and public, was necessary in order to maintain a conceptually clear understanding of what law is. As Beale put it, "If two laws were present at the same time and in the same place upon the same subject we should also have a condition of anarchy." There could be no rule of law if a multiplicity of contradictory laws could be invoked at any particular time. For classical legal thinkers, conflicts of law were the clearest threat to their view of the law as a seamless web, perfectible and neutral, governed by rules that could be worked out without reference to the policy concerns appropriate to legislative bodies. It was resolved by estab-

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185 Loucks v. Standard Oil Co., 224 N.Y. 99, 110 (1918) (Cardozo, J.) ("The plaintiff owns something, and we help him get it.").
187 See Horwitz, supra note 184, at 1425–26.
lishing firm rules that drew upon the established principles separating the public interest from the ordering of private life.

Almost as soon as the vested rights choice of law theory began to establish a constitutional footing, it became a prime target of the emerging Legal Realist movement. The Realists condemned Beale’s system on a number of grounds, rejecting it not only as constitutional but also as common law doctrine. First, as an empirical matter, the Realists maintained that the theory simply did not describe the process by which courts decided conflicts of law. In their view, the vested rights doctrine was little more than a vocabulary of post hoc justifications judges employed after deciding cases before them on the basis of other considerations. Second, as a normative matter, the theory provided unsatisfying results. Because it was “mechanical,” abstract, and conceptualistic—precisely the neutral, legal features that made it attractive to classical thinkers—it failed to do justice in individual cases. Moreover, the wooliness of its concepts made results unpredictable, both because its rules were incoherent and manipulable, and because the public policy exception made their elaborate formality ultimately pointless, since the forum still had the last word on a plaintiff’s right to sue.

But so what? No one ever claimed the law was perfect. These objections could have been raised with equal force against any number of other nineteenth-century legal doctrines. For some reason, however, conflict of laws became a special target of American Legal Realism. Part of the explanation may be that choice of law theory was an attractive target because it had no ready constituency of support. It is not as if the American Liberty League—the Wall Street-backed advocacy group that argued against the consti-

188 See, e.g., Michael S. Green, Note, Legal Realism, Lex Fori, and the Choice-of-Law Revolution, 104 Yale L.J. 967, 967 (1995) (noting that the “choice-of-law revolution” is “widely recognized to have been a product of legal realism”).
192 Lorenzen, supra note 189, at 746.
193 I am grateful to Professor Michael Collins for suggesting this idea.
stitutionality of New Deal legislation—was concerned with these kinds of jurisdictional issues. Of course, it is not entirely true that no particular political group had a stake in the maintenance of the classical approach to choice of law: at a time when courts were reluctant to enforce contractual choice of law provisions, the ability of parties (read: insurance companies) to structure their activities by taking advantage of the law's formalities undoubtedly functioned as an alternative route to the same result. And at a more basic level, territorialism restricted the scope of regulatory power, a feature that surely made it appealing to commercial interests. Nonetheless, there is undoubtedly a great deal of truth in the notion that Beale's doctrine was low-hanging fruit, within the Realists' easy reach. At the very least, the fact that choice of law was not a salient political issue likely made the Realists' efforts easier.

At the root of the Realists' critique of the vested rights approach, however, was a more fundamental source of disagreement that helps explain their determination to see it abandoned. The Legal Realists simply did not believe in the existence of "neutral" principles of law and objected to a legal system predicated upon what they saw as fairy tales masquerading as reality. To Walter Wheeler Cook, the most dogged of Beale's adversaries, those searching for determinate rules to guide choice of law were like babies "cry[ing] for the moon." The distinction between rights and remedies was imaginary. A right without a remedy was no right at all. Once this distinction was obliterated, the difference between public and private rights, substance and procedure, central


195 See Roosevelt, supra note 94, at 2459 (noting that Cook's "central attack was aimed at the jurisprudential groundwork of Beale's theory, his understanding of the nature of law and rights").


197 For this reason, Cook argued that the separation of law and equity artificially suggested that only the common law defined property rights. The availability of equitable remedies, in Cook's view, was as central to the nature of ownership as the common law's rules. See Walter W. Cook, The Place of Equity in Our Legal System, 3 Am. L. Sch. Rev. 173 (1912).
to the vested rights system collapsed. Thus, Cook articulated the view that a so-called vested right was simply the public policy of the forum state, a right created by its law that happened to mimic the law of another state.198 If the judgment a plaintiff might receive differed depending on what state the plaintiff sued in, then the plaintiff's right of recovery was equally varied. All law was politics and policy, and the separation of functions that gave the judiciary its meaning was built on a fiction. The conceptually elegant if practically unworkable regime that was devised in order to deny the possibility that laws could ever overlap, and hence that there always existed a single governing rule of law, was replaced by a system in which there were multiple possible "right answers" to choice of law questions.

Jurisprudential impulses drove Beale to formulate the vested rights theory, and jurisprudential impulses drove Realists like Cook to tear it apart. Legal Realists and the Progressives who adopted their ideas may have had political aims,199 but their disagreement with the formalism of the classical approach to the conflicts of laws was not in every sense instrumental. Theirs was a complaint about what they perceived as the artificial nature of judicial decisionmaking flowing from the premise that there was always one law, and only one law, governing any particular person, thing, or event at any given moment. Their success in persuading the bench, and the Supreme Court in particular, to reject the classical understanding of the law almost certainly was not the result of external political pressure. It proceeded on its own as the result of a collective loss of faith, the effect of which was magnified by changes in Court personnel.

This highlights an important irony of the Realists' critique of classical law. Their complaint against nineteenth-century formalism was that it was abstract and conceptualistic, premised on a belief in a transcendent structure of rules that simply was not real. Yet the point of their contention was itself philosophical and abstract, and their success grew out of the fact that the conflicts rules they con-

198 Cook, supra note 133, at 475 ("[A] court never enforces foreign rights but only rights created by its own law.").
demned did not attract a political constituency. As a result, the nature of their complaint obscures their own role in changing the way the law was understood. “One thing is clear,” argued Karl Llewellyn, perhaps the most influential of the Realists. “There is no school of realists. There is no likelihood that there will be such a school.”

Regardless of whether Llewellyn’s claim is accurate, the claim is itself revealing of the way legal thinkers like Llewellyn thought about the changes that they were bringing about in the American legal landscape. The Realists denied the difference between substance and procedure—all judicial decisionmaking was politics. How else, then, could Realism explain Lochner’s rise and fall except as the result of political shifts? The reality is that Realism itself was an important player, but Realists were unlikely to say so (to make the statement in this way, after all, relies upon the kind of reification they deplored). The role of differences in legal philosophy is obscured by a philosophy that disputed the existence of a distinctly legal realm.

Within a year of the publication of Beale’s First Restatement, the vested rights theory was a dead letter as a matter of constitutional law, and the fingerprints of Realists like Cook were all over it. At the same time, its demise was connected with the unraveling of substantive due process protection of economic rights. The public-private distinction had been dealt a body blow in 1934 in the Supreme Court’s decision in Nebbia v. New York. Nebbia rejected the proposition that only certain businesses were “affected with the public interest” and could be subject to price regulations without offending the Due Process Clause. Yet that decision in some sense merely repeated the sophistic maneuver that had brought about the creation of the “affected with the public interest” doctrine in the first place: defining government intrusion in the seemingly private sphere as a necessary means to protect the public good and hence outside the original property right.

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200 Karl N. Llewellyn, Some Realism About Realism—Responding to Dean Pound, 44 Harv. L. Rev. 1222, 1233 (1931).
201 291 U.S. 502 (1934).
203 Hence Justice Roberts’s statement that “‘affected with a public interest’ is the equivalent of ‘subject to the exercise of the police power.’” Nebbia, 291 U.S. at 533.
basic proposition that a private right remained whenever the police power could not validly be invoked survived.

The next year, the Court turned to the conflict of laws, where the repudiation of private right was more complete. In *Alaska Packers Ass'n v. Industrial Accident Commission*, the Court permitted California to apply its workers' compensation statute to persons injured in Alaska but employed in California. Rather than discuss the issue in terms of fixed rights of the parties, determined by territorial principles, the Court adopted an analysis based on the balancing of the interest of the states involved. Relations between individuals were to be determined with reference to entirely public concerns. Even more profoundly, the Court denied the existence for constitutional purposes of a fixed obligation between two citizens. It was entirely possible that private rights with respect to the same issue could differ as a matter of law depending on what court happened to determine them. And if there were no hard and fast private rights, there was no meaningful distinction between economic activities that a legislature could and could not reach by regulation.

This was the modernist, Realist view of law. While the intricacies of the Court's better known Due Process Clause and Commerce Clause decisions lie outside the scope of this Note, the interest shown by Legal Realists in choice of law doctrine and their success in toppling its classical premises suggests that at least part of the New Deal Era constitutional shift took place in a more esoteric, law-centered arena. To accept without qualification a Realist account of the Supreme Court's increasing tolerance of economic regulation is to overlook the effect of Legal Realism itself as a movement in the law. The Supreme Court may have followed "th'

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iliction returns, but it didn’t have all that much to follow when the names Idealism and Materialism did not appear on the ballot.

CONCLUSION

In its attempt to perfect the application of American law by creating a unified, determinate system for resolving interstate choice of law questions, the Supreme Court fell short of its goal. The Court’s fairly blind reliance on common law choice of law rules was ill-suited for a time of increasing heterogeneity in the legal forms created by states. How far short of its goal the Court fell, however, is an open question. This Note has provided an account of how the Court’s theories worked and a framework by which to judge them in light of the standard criticisms of *Lochner* Era constitutional law. It has also shown how the basic commitment to rule of law grounded in individual consent helps unite competing ideas of the *Lochner* Court’s constitutional understanding, and how its doctrine was overcome, not by political pressure as such, but by changes in legal metaphysics that encouraged a more political outlook by the Court. Normative judgments about the Court’s choice of law and due process doctrines should begin with the question of whether our constitutional culture today ought to share those same underlying commitments.

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