REVIEW ESSAY
RECENSION CRITIQUE

Interstate Choice of Law and Early-American Constitntional Nationalism. An Essay On *Joseph Story and the Comity of Errors: A Case Study in Conflict of Laws*

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Alan Watson, *Joseph Story and the Comity of Errors: A Case Study in Conflict of Laws.* Athens, Ga.: University of Georgia Press, 1992. Pp. x, 136 [$25.00].

In this review essay on Alan Watson's *Joseph Story and the Comity of Errors: A Case Study in Conflict of Laws*, the author presents a methodological point, a historical argument, and a historiographical observation. Those three kinds of remarks were derived from Story's early-federalist treatise on American choice-of-law rules, or from Watson's comparative, historical study of that book.

The author's methodological point is that intellectually-oriented legal history should aspire to the rigours of good cultural history. Comparative legal history grounded exclusively in lawyers' technical source materials should therefore limit severely the kinds of cultural conclusions it draws from those narrow sources, or it should expand dramatically the kinds of primary and secondary source materials upon which it relies in order to justify social or intellectual generalizations.

The author's historical argument is that Story's 1834 *Commentaries on the Conflict of Laws* is a book about the sovereignty of individuals, vested private rights, and consent-based normativity. As such, that book should be regarded as an extension of Story's constitutional scholarship. For ethical, political, and social reasons, Story was keen to harmonize private law across the newly united American states. As an interim measure on the road to uniformity, Story emphasized conflict-of-laws doctrine to enhance the portability of privately-acquired rights. He used the older European concept of comity as a way of checking for the voluntariness of tacit or customary adoption by states of choice-of-law rules that necessarily compromised their juridical sovereignty. Story therefore subsumed the promotion of harmonious relations among states under the imperatives of interstate commerce by treating comity as an aspect of the security of jurisdictionally-mixed private rights and the consent-based ability of states to negotiate with each other about the scope and structure of conflicts rules.

The author's historiographical point is that Story's unprecedented, Anglo-American work on interstate choice-of-law issues should be considered in the context of modern historical scholarship that treats United States' constitutional rhetoric in the antebellum period, rather than solely on the basis of North Atlantic traditions of private international law. Because *Commentaries on the Conflict of Laws* was written in an American crucible of constitutional nationalism, federalist lawyering and market culture, the rich secondary literature on states' rights, early-American republicanism, and the role of antebellum lawyers in the consolidation of recently-acquired federal gains offers promising touchstones for extended examination of Story's choice-of-law thought.

Cette recension critique porte sur le livre *Joseph Story and the Comity of Errors: A Case Study in Conflict of Laws* par Alan Watson. L'auteur soulève des points de vue méthodologique, historique et historiographique en analysant le livre *Commentaries on the Conflict of Laws*, écrit par Joseph Story en 1834, et en commentant l'étude historique et comparative que Alan Watson en fait.

Pour ce qui est de la méthodologie, l'auteur prétend que l'histoire du droit devrait être aussi rigoureuse que l'histoire culturelle. Une étude historique et comparative qui se limite aux sources juridiques proprement dites doit se contenter de conclusions culturelles bien modestes: il faut une documentation beaucoup plus riche pour tirer des conclusions sociales et intellectuelles plus générales.

Quant à son argument historique, l'auteur est d'avis que *Commentaries on the Conflict of Laws* n'est pas seulement un traité sur les conflits de lois, mais un livre sur la suprématie de l'individu, les droits subjectifs et l'importance du consensualisme. Ainsi conçu, cet ouvrage fait pendant aux écrits constitutionnels de Story. Pour des raisons morales, politiques et sociales, Story voulait harmoniser le droit privé des États américains qui venaient de s'unir. Dans le but d'uniformiser le plus possible le droit privé américain, Story mit l'accent sur les règles de conflits de lois afin que les droits acquis par un individu dans un État donné fussent respectés par les tribunaux des autres États. Par le biais de la notion européenne de *comitas gentium* (courtoisie internationale), il parvint à expliquer comment les États pouvaient accepter des règles de conflit qui minaient leur souveraineté. Pour Story, la promotion de relations harmonieuses entre les États faisait partie des exigences du commerce interétatique, et la notion de *comitas gentium* permettait de protéger les droits subjectifs par delà les frontières étatiques tout en reconnaissant aux États la possibilité de discuter des règles de conflits de lois et de leurs modalités.

L'observation historiographique que nous livre l'auteur est que toute analyse du traité de Story doit s'appuyer sur les études qui ont été effectuées du droit constitutionnel américain de la période précédant la guerre de Sécession, et pas uniquement sur les doctrines nord-américaines en matière de conflits de lois. Lorsque Story écrivit *Commentaries on the Conflict of Laws*, le nationalisme constitutionnel battait son plein aux États-Unis, les avocats préconisaient une vision fédéraliste du pays, et tout le monde croyait au pouvoir magique du marché; pour comprendre la pensée de Story en matière de conflits de lois, il faut donc puiser dans la littérature abondante traitant des droits des États, du républicanisme américain naissant, et du rôle des avocats dans la consolidation du pouvoir fédéral.

*Faculty of Law and Institute of Comparative Law, McGill University. Willis Reese, a long-tenured member of the Columbia Law School, taught me most of what I know about conflicts of law. Despite the fact Reese thought that in private international law "a page of history is worth less than a blank sheet", he was eccentrically supportive of the historical curiosity of others.[1] He introduced me to John Gorham Palfrey, whose family had mingled with the Storys for eight or ten generations, and he took me to see the saintly, stained-glass depictions of Joseph Story in the Cathedral of Saint John the Divine, a few blocks from Columbia University. And Reese is one of the few teaching models of whom I think regularly when I walk into the classroom. He was also a lively postal correspondent and a gracious guest in our Canadian home long after I graduated from law school. I have honoured his memory in my prayers, and am now glad to be able to do so publicly.

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[1]W.L.M. Reese & M. Rosenberg, *Cases and Materials on Conflict of Laws*, 7th ed. (Mineola, N.Y.: Foundation Press, 1978) at 4.

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Iutroduction

Almost fifteen years ago, as a student in Willis Reese's "Advanced Conflict of Laws" seminar at Columbia Law School, I prepared a term paper on Joseph Story's *Commentaries on the Conflict of Laws*.[2] That paper was a tentative history of a uniquely-influential, one-hundred-and-fifty-year-old book. Reese awarded me a passing grade but, as I should have anticipated from the Chief Reporter of the current *Restatement of Conflicts* and co-editor of a leading American conflicts casebook, he scrawled across the title page of that essay: "Have you said enough about the logic of Story's choice-of-law rules themselves?"[3] Soon afterwards, I presented that paper to Lea Brilmayer's "Conflicts" class at the University of Chicago Law School. Brilmayer, an emerging Storyesque presence among contemporary American conflicts scholars, thought I had devoted sufficient attention to the symmetry of Story's black-letter rules but wanted to know much more about the policies that underlay and motivated them.[4] Later the same year I delivered that paper again to a University of Wis-

[2]J. Story, *Commentaries on the Conflict of Laws, Foreign and Domestic, in Regard to Contracts, Rights, and Remedies, and Especially in Regard to Marriages, Divorces, Wills, Successions, and Judgments* (Boston: Hilliard, Gray and Company, 1834) [hereinafter *Commentaries on Conflicts*]. A portion of that 1979 term paper was published as G.B. Baker, "Social Planning and Nineteenth-Century American Choice of Law" in H.M. Blake & S.W. Bruchey, eds., *Law and American Economic Development*, vol. 3 (New York: Columbia Law School, 1981) at 962.

[3]See *Restatement (Second) of Conflict of Laws* (1969) [hereinafter *Restatement (Second) of Conflicts*]; Reese & Rosenberg, *supra* note 1. For profiles of Reese, see generally H. Smit, "In Memoriam: Willis Livingston Mesier Reese" (1991) 91 Colum. L. Rev. 1, and the Reese *festschrift* in (1981) 81 Colum. L. Rev. 933.

[4]See generally L. Brilmayer, *Conflict of Laws: Foundations and Future Directions* (Waltham, Mass.: Little, Brown, 1991) at 145-235. Anglo-American private international law traditionally

consin Law School workshop, which triggered a pointed intervention by Bob Gordon. Gordon said contextual aspects of Story's treatise-writing project, like antebellum (pre-Civil War) cultures of professionalism, should dominate a history of *Commentaries on Conflicts*.[5]

Those substantially different responses from enthusiastic mentors daunted me. I therefore postponed indefinitely reflection on Joseph Story and early-nineteenth-century choice-of-law doctrine. My source of discomfort was not fear of engaging in controversial revisionism or the difficulty of finding new themes in a crowded academic field. Although Story accurately prophesied to American Supreme Court reporter Richard Peters that *Commentaries on Conflicts* would be his "best Law work" among nine landmark legal treatises and seven lesser texts,[6] and in spite of the fact that the book inaugurated a new era of private international law on three continents, the secondary literature on Story has avoided systematic treatment of his work on interstate choice-of-law issues.[7] A similar gap exists in the historiography of conflicts of law.[8] Rather

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was governed by choice-of-law rules that were few in number and all-embracing in character. Commencing about 1960, those unitary rules began to break down, especially in American torts and contracts cases. In the early-1970s, Reporter Reese of the *Restatement (Second) of Conflicts* asserted that the principal issue in contemporary private international law was whether there ought to be choice-of-law rules at all, or merely methodological, *ad hoc* approaches to conflicts issues. See *Restatement (Second) of Conflicts*, *ibid.*, vol. 1 at 13-17; W.L.M. Reese, "Choice of Law: Rules or Approach" (1972) 57 Cornell L. Rev. 315. Brilmayer's renewed emphasis on principled, rule-oriented, choice-of-law decisions has become an influential counterpoint to the American Law Institute's modern position.

[5]A generalized version of Gordon's commentary can be found in R.W. Gordon, "The Ideal and the Actual in the Law: Fantasies and Practices of New York City Lawyers, 1870-1910" in G.W. Gawalt, ed., *The New High Priests: Lawyers in Post-Civil War America* (Westport, Conn.: Greenwood Press, 1984) 51.

[6]Letter from Joseph Story to Richard Peters (24 April 1833), reproduced in W.W. Story, *Life and Letters of Joseph Story*, vol. 2 (Freeport, N.Y.: Books for Libraries Press, 1971) at 140-141. Story's close friend Daniel Webster said that *Commentaries on Conflicts* was "fit to stand by the side of [Hugo] Grotius [*Le droit de la guerre et de la paix* (Paris: A. Seneuze, 1687)], to be the companion of [Justinian's] Institutes [*Elementa, sive Institutiones juris civilis* (Venetiis, Italy: Nicolaum Tridentinum, 1565)] [; it is] now regarded by the judicature of the world, as the great book of the age" (*New Jersey Steam Navigation Company* v. *Merchants Bank of Boston*, 47 U.S. (6 Howard) 344 at 377 (1848)).

[7]There are four major biographies of Story, of which the leading and most recent one is by Kent Newmyer. Each of those accounts also contains extensive bibliographies of related secondary literature: R.K. Newmyer, *Supreme Court Justice Joseph Story: Statesman of the Old Republic* (Chapel Hill: University of North Carolina Press, 1985); J. McClellan, *Joseph Story and the American Constitution: A Study in Political and Legal Thought with Selected Writings* (Norman: University of Oklahoma Press, 1971); G.T. Dunne, *Justice Joseph Story and the Rise of the Supreme Court* (New York: Simon and Schuster, 1971); H.S. Commanger, "Joseph Story" in A.N. Holcombe, ed., *The Gaspar G. Bacon Lectures on the Constitution of the United States, 1940-1950* (Boston: Boston University Press, 1953) 31. See also M.D. Schwartz & J.C. Hogan, eds., *Joseph Story: A Collection of Writings By and About an Eminent American Jurist* (New York: Oceana Publications, 1959).

[8]Scattered commentary, of uneven quality, on Story's conflicts scholarship can be found in: G. Kegel, "Story and Savigny" (1989) 37 Am. J. Comp. L. 39; B. Wardhaugh, "From Natural Law to Legal Realism: Legal Philosophy, Legal Theory, and the Development of American Conflict of Laws Since 1830" (1989) 41 Maine L. Rev. 307; K.H. Nadelmann, "Bicentennial Observations on the Second Edition of Joseph Story's *Commentaries on the Conflict of Laws*" (1980) 28 Am. J.

than a surplus of scholarly competition, the basis of my intimidation was an apparent lack of the resources required to meet the expectations of three different constituencies represented by Reese, Brilmayer and Gordon, all of which have a real interest in the intellectual history of choice-of-law doctrine. I suspect similar anxiety has something to do with other historians' reluctance to address *Commentaries on Conflicts.*

Autobiographic and historiographic factors therefore combined to pique my interest in Alan Watson's new monograph, *Joseph Story and the Comity of Errors: A Case Study in Conflict of Laws.*[9] Although I cannot speak for Reese, Brilmayer, or Gordon in this review essay, they predisposed me to have high expectations of scholarship about Story and interstate choice-of-law issues. Whether Watson's one-hundred-and-thirty-six-page *Comity of Errors* meets those standards or not, his book deserves a conscientious review on the analogy of mountaineering alone: Watson is the first modern writer to have attempted to scale the visible and challenging peak of *Commentaries on Conflicts* in any manner approaching a purposeful one. As Reese would have said: "Excelsior!"

Watson's thesis is conveniently encapsulated in the last paragraph of *Comity of Errors*:

> Important as doctrines of conflict of laws inevitably were in the United States, given the numerous States, their development would be described by a plain man as "happenstance." They were not planned, nor did they emerge from the psyche of the nation. The central doctrine, that of comity as understood by [Ulrich] Huber [1635-94], was adopted from English law. The English law was developed primarily by Lord Mansfield, who based it on his experience in Scottish appeal cases. Scots law was influenced by Huber because many Scots law students studied at Dutch universities. Huber's view of comity was not highly regarded in civil-law jurisdictions and came to be misunderstood in the United States because of a judgment, praising comity, but not in Huber's sense, from the civilian state of Louisiana. Story's *Commentaries on the Conflict of Laws* was the main vehicle for the acceptance of this different view of comity, but Story had simply misunderstood Huber.[10]

In the course of advancing that thesis, *Comity of Errors* dissects selected doctrine carefully, charts Story's sometimes nefarious influence on mid-nineteenth-century American interstate slavery cases, and offers a causal explanation for

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Comp. L. 67; K.H. Nadelmann, "Joseph Story's Contribution to American Conflicts Law: A Comment" (1961) 5 Am. J. Legal Hist. 230 [hereinafter "Joseph Story's Contribution"]; A.A. Ehrenzweig, "American Conflicts Law in its Historical Perspective — Should the Restatement be 'Continued'?" (1954) 103 U. Penn. L. Rev. 133 at 135-47; W.R. Leslie, "The Influence of Joseph Story's Theory of Conflict of Laws on Constitutional Nationalism" (1948) 35 Miss. Valley Hist. Rev. 203; E.G. Lorenzen, "Story's Commentaries on the Conflict of Laws — One Hundred Years After" (1934) 48 Harv. L. Rev. 15. Watson made use of some, but not all, of that older commentary in the monograph under review. Compare Watson, *infra* note 9 at 102 note 10, 107 note 7.

[9](Athens, Ga.: University of Georgia Press, 1992) [hereinafter *Comity of Errors*]. Alan Watson is Ernest P. Rogers Professor of Law at the University of Georgia.

[10]*Ibid.* at 83-84. See also *ibid.* at ix. Secondary literature closest in thematic orientation to *Comity of Errors* is: D.J.L. Davies, "The Influence of Huber's *De Conflictu Legum* on English Private International Law" (1937) 18 Brit. Y.B. Int. L. 49; Note, "American Slavery and the Conflict of Laws" (1971) 71 Colum. L. Rev. 74; J. Weinstein, "The Dutch Influence on the Conception of Judicial Jurisdiction in 19th Century America" (1990) 38 Am. J. Comp. L. 73.

choice-of-law principles set out in *Commentaries on Conflicts*. Curiously, however, *Comity of Errors* does not address much more than ten percent of Story's text or judicial conflicts decisions, and provides little by way of cultural, social, or institutional context for his choice-of-law ideas.

This review essay's argument can be summarized in a page or two. The history of doctrine is a crucially-important variety of legal history that can bring it into welcome harmony with other forms of intellectual or cultural history.[11] In view of that potential alignment, doctrinal legal history should aspire to the rigours of good intellectual history. It should, for example, be sensitive to the place of particular legal concepts in the general structure of its historical subjects' thought, it should avoid interpreting or judging those subjects with language or ideas they could not have had, and it should canvass the mutually-constitutive impact of legal doctrine and related concepts from politics, ethics, metaphysics, and epistemology. Good cultural history should therefore aspire to understand how selected historical subjects could have thought, written, or acted as they did.[12] With respect to Joseph Story and the international legal principle of comity, the controlling question therefore should be why Story misrepresented Ulrich Huber's early-modern Dutch conflicts scholarship, rather than merely whether or how he misstated it.

Conceived under the influence of that general approach to doctrinal legal history, an account of *Commentaries on Conflicts* comes out looking different from *Comity of Errors*. My alternate history begins by situating Story's treatment of interstate conflicts of law in the context of intergovernmental and intercourt conflicts that preoccupied early-American federalists, and animated antebellum constitutional rhetoric. It proceeds by reconstructing Story's theory of sovereignty that privileged individuals rather than states or nations, and it characterizes that theory as an opposing position to statist tendencies in antebellum law and government. *Commentaries on Conflicts* was written in an American crucible of constitutional nationalism, market culture, and republican lawyering that emphasized vesting and protecting private rights, circumscribing state institutions, and standardizing pluralistic, regional norms. The pursuit of comity among the United States thus emerges in my alternate history of Story's choice-of-law doctrine as a categorically different and much less significant value than imperatives like limiting state power and harmonizing private law doctrine. Story's interstate conflicts rules were quasi-constitutional norms designed to regu-

[11]Watson was similarly keen, in *Comity of Errors*, to reassert the integrity of doctrinal legal history: he devoted a short appendix to that project. There are, however, significant differences between his aspirations for doctrinal history and mine. Compare Watson, *ibid.* at 96-99 to text accompanying notes 184-201.

[12]For methodological discussion of the history of books relevant to this review essay and to Watson's treatment of *Commentaries on Conflicts*, see generally R. Darnton, "What Is the History of Books?" (1982) 111:3 *Daedalus* 65. For good, contemporary examples of that genre, see P. Girard, "Themes and Variations in Early Canadian Legal Culture: Beamish Murdock and his *Epitome of the Laws of Nova Scotia*" (1993) 11 Law & Hist. Rev. 101; J.R. Moore, "1859 and All That: Remaking the Story of Evolution — and — Religion" in R.G. Chapman & C.T. Duval, eds., *Charles Darwin, 1809-1882: A Centennial Commemorative* (Wellington, N.Z.: Nova Pacifica, 1982) 167; R.W. Gordon, "Holmes' *Common Law* as Legal and Social Science" (1982) 10 Hofstra L. Rev. 719.

late the conduct of states and nations, with a view to preventing them from trenching unduly on the privately acquired rights of interstate traders. Because Story extrapolated from the autonomy of individuals to that of nation-states, he needed a test of the willingness of states to compromise their sovereignty by adopting his choice-of-law rules. Comity, a principle of public rather than private international law, provided a reservation on adoption that checked for the voluntariness of what was otherwise silent or tacit ratification of interstate conflicts rules. Manipulating the concept of comity by emphasizing the fiction of willing ratification thus helped Story reconcile popular sovereignty with principles of international law derived from an older, natural-law tradition.

Contrary to Watson's conclusions in *Comity of Errors*, Story's interstate choice-of-law doctrine was neither happenstance nor autonomous from the time and place in which it was conceived. That doctrine emerged directly from the psyche of New England federalism Story extruded on such diverse fronts as division-of-powers adjudication in the Supreme Court, nationally-oriented law teaching at Harvard, pioneering private-law treatise writing, management of financial institutions and the investment portfolios of Massachusetts' captains of industry, legal codification initiatives, and trend-setting, circuit-court jurisprudence on admiralty, interstate commerce, and diversity-of-citizenship issues. Even without access to privately held archives of Story's papers, of which Watson examined none either, the cache of published writing by Story is sufficient to support a provisional account of his choice-of-law thought that is more consonant with the intellectual historiography of the antebellum period than the one provided in *Comity of Errors*.[13] And that alternate account suggests themes for a history of Story's choice-of-law doctrine that are at variance with those proposed by Watson. Those tentative themes include the role of popular consent in conceptions of state sovereignty, the circumscription of governmental power by private-law unification, and the relationship of choice-of-law scholarship to commercial nationalism.[14] It is no surprise that *Commentaries on Conflicts* is a book about sovereignty and vested rights. As Edward White noted in his recent Oliver Wendell Holmes Devise history of the later Marshall Supreme Court, those two broad issues dominated elite American legal controversy during the period between 1815 and 1835.[15]

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[13]Collections of Story's papers can be found in Philadelphia's Free Library, the Library of Congress, the Massachusetts Historical Society, Salem's Essex Institute, Harvard Law School's Treasure Room, Harvard University's Archives, the Yale University Library, San Marino, California's Huntington Library, and New York's Pierpont Morgan Library. On the issue of archival sources my hope is that the adoption of a review-essay format, framed by provisional themes, will exempt me from the rigour appropriate to a full-blown study. None the less, as Reese would have said, "*mea culpa*", Joseph Story and readers.

[14]Readers are therefore cautioned that this review approaches the "manufactured" one described in G.E. Parker, "A Field Guide to Book Reviewing" (1967) 20 J. Legal Educ. 169 at 171. But I see no other way to call into relief Watson's assumptions about the sources, methods, and goals for intellectually-oriented legal history. Compare W.E. Nelson, "Standards of Criticism" in W.E. Nelson & J.P. Reid, eds., *The Literature of American Legal History* (New York: Oceana Publications, 1985) 303.

[15]Compare G.E. White, *The Marshall Court and Cultural Change, 1815-1835* (Oxford: Oxford University Press, 1991) especially at 927-75.

I. Early-Modern Choice-of-Law Doctrine

Conflicts of law, understood in contemporary parlance, is the component of a state's local law that tells its courts how to choose among alternative and usually foreign systems of substantive law for purposes of application to a particular lawsuit. In theory, every private lawsuit presents a conflicts issue since, for at least a moment at the outset of litigation, the decision-maker must reflect upon his or her jurisdiction and upon the identity of the applicable body of local law. In most cases, that choice-of-law indecision is subconscious or passes quickly when the law of the decision-maker's forum is chosen and the parties to litigation do not contest that choice. In other instances, choice-of-law considerations are explicit, prolonged, and challenging. Those cases include ones in which the facts in issue are closely connected to another jurisdiction, those involving legislation containing a choice-of-law provision, and others where the litigants have stipulated mutually (such as by way of a contractual choice-of-law clause) that a body of law other than that of the dispute-settlement forum should govern the impugned transaction. Local courts may therefore acquire jurisdiction to apply law other than their own by *ex ante* agreement of the parties to a dispute, or by way of local-law rules that direct them to some body of foreign law on the basis of a contested event's contacts with the territory or jurisdiction in which that other law prevails. Foreign law is generally proven, as a matter of fact by expert witnesses or by extrajudicial certification, to the forum's decision-maker before it is applied. The principles, policies, or rules that guide local courts in their selection and application of extrajurisdictional law constitute the core of interstate conflicts of law. Choice-of-law doctrine, as those considerations have come to be known, has spawned a sizeable Anglo-American treatise literature in the last century and a half.[16] And neither the rate nor volume of that scholarly production shows signs of abatement, at least outside the United States.[17]

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[16]Representative components of that Anglo-American literature include, for Britain: W. Burge, *Commentaries on Colonial and Foreign Laws Generally, and in their Conflict with Each Other and with the Law of England* (London: Saunders and Benning, 1838); J. Hosack, *A Treatise on the Conflict of Laws of England and Scotland* (London: Blackwood, 1847); J. Westlake, *Treatise on Private International Law* (London: W. Maxwell, 1873); A.V. Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws* (London: Stevens, 1896); F. Harrison, *On Jurisprudence and Conflicts of Laws* (Oxford: Clarendon Press, 1919); G.C. Cheshire, *Private International Law* (Oxford: Clarendon Press, 1935); R.H. Graveson, *The Conflict of Laws* (London: Sweet and Maxwell, 1948); for the United States: F. Wharton, *Treatise on the Conflict of Laws* (Philadelphia: Kay and Brother, 1881); J.H. Beale, *A Treatise on the Conflict of Laws* (New York: Baker, Voorhis and Co., 1935); W.W. Cook, *The Logical and Legal Bases of the Conflict of Laws* (Cambridge: Harvard University Press, 1942); R.A. Leflar, *American Conflicts Law* (Indianapolis: New Bobbs-Merril Co., 1959); D.F. Cavers, *The Choice-of-Law Process* (Ann Arbor: University of Michigan Press, 1965); and for Canada: E. Lafleur, *Conflict of Laws in the Province of Quebec* (Montreal: C. Theoret, 1898); J.D. Falconbridge, *Essays on the Conflict of Laws* (Toronto: Canada Law Book, 1947); W.S. Johnson, *Conflict of Laws*, 2d ed. (Montreal: Wilson & Lafleur, 1962); J.-G. Castel, *Canadian Conflict of Laws* (Toronto: Butterworths, 1975); E. Groffier, *Précis de droit international privé québécois*, 4th ed. (Cowansville, Que.: Yvon Blais, 1990).

[17]Compare J.G. McLeod, *The Conflict of Laws* (Calgary: Carswell, 1983); P.M. North & J.J. Fawcett, eds., *Cheshire and North's Private International Law*, 12th ed. (London: Butterworths, 1992); L. Collins, ed., *Dicey and Morris on the Conflict of Laws*, 11th ed. (London: Stevens, 1987);

However, Anglo-American academic interest in choice-of-law methodology is a comparatively recent phenomenon. Watson was able to characterize Story as "the prime architect of nineteenth-century American conflicts law" on the basis of the delayed, late-eighteenth and early-nineteenth-century development of Anglo-American private international law.[18] Scholarly writing on interstate choice-of-law issues in Story's legal culture was sparse, scattered, and perfunctory before the second quarter of the nineteenth century.[19] And, Watson added, "conflict of laws was not really discussed in common law courts until the time of Lords Hardwicke [1733-56] and Mansfield [1756-88]".[20] With the large and historically critical exception of jurisdictional or intercourt conflicts, Watson was probably correct in those generalizations. Story's own research confirmed Watson's periodization of judicial recognition of interstate conflicts issues. In 1809 he compiled an exhaustive, unpublished digest of two dozen reported American interstate conflicts cases, whereas he was able to refer to some three hundred United States choice-of-law decisions twenty-five years later in the first edition of *Commentaries on Conflicts*.[21]

W. Tetley, *International Conflicts of Law: Common, Civil, Maritime* (Cowansville, Que.: Yvon Blais — International Shipping Publications, forthcoming).

[18]Watson, *supra* note 9 at 2. See also *ibid.* at 58. For contemporary reviews that made the same point about the novelty of *Commentaries on Conflicts*, see *e.g.* (1834) 11 Am. Jur. L. Mag. 365; (1835) 17 Am. Q. Rev. 303. For a representative, mid-nineteenth-century Canadian comment to that effect, see O. Mowat, "Observations on the Use and Value of American Reports in Reference to Canadian Jurisprudence" (1857) 3 Upper Can. L.J. 3 at 5: "No books, for example, are more used in England or here than Judge Story's on almost every subject on which he has written ... His able work on the Conflict of Laws has a world-wide reputation. It was the very first that appeared in the English language on the subject of which it treats, and it will probably have no rival for many years to come."

[19]A more-or-less complete catalogue of pre-Story, Anglo-American conflicts literature would include: H. Home (Lord Kames), *Principles of Equity*, 2d ed. (Edinburgh: Kimlaid, Bell and Millar, 1767) at 345-374; J. Henry, "Treatise on the Difference Between Personal and Real Statutes, and its Effect on Foreign Judgments, Contracts, Marriages and Wills" in *The Judgment of the Court of Demerara in the Case of Odwin v. Forbes* (London: n.p., 1823) at 1-86; N. Dane, *A General Abridgment and Digest of American Law* (Boston: Cummings, Hilliard and Co., 1823-29) vol. 8 at 333, vol. 9 at 782 [hereinafter *General Abridgment*]; E. Cowan, "Digest of Decisions on Lex Loci", 4 Cowan 510-31 (N.Y. 1825); S. Livermore, *Dissertations on the Questions Which Arise from the Contrariety of the Positive Laws of Different States and Nations* (New Orleans: B. Levy, 1828) [hereinafter *Dissertations*]; J. Henry, ed., "Wheaton's Restatement of American Conflicts" (1828) 1 *Jurist* 430 [The *Jurist* is also known as the *Quarterly Journal of Jurisprudence and Legislation*], reproduced in K.H. Nadelmann, "Henry Wheaton on 'American Law' in 'The Jurist' (London)" (1958) 4 New York L.F. 59; F. Dwarris, *A General Treatise on Statutes: Their Rules of Construction and the Proper Boundaries of Legislation and Judicial Interpretation*, vol. 2 (London: Saunders and Benning, 1830) at 647-51, reproduced in J. Purdon, ed., *The Law Library* (Philadelphia: J.S. Littell, 1835) at ix; J. Kent, *Commentaries on American Law*, 2d ed. (New York: O. Halsted, 1832) vol. 1 at 36, 81-82, 93, 118-22, 419, vol. 2 at 86, 91-93, 108, 394, 453-63, 515, 522. But see Watson, *ibid.* at 102 note 5.

[20]Watson, *ibid.* at 3, 37, 78, quoting Kent, *ibid.*, vol. 2 at 455, and Story, *supra* note 2 at 10 note 1. See also Watson, *ibid.* at 48, 67-70, 90-92. There were, for instance, only five British North American cases reported before the publication of *Commentaries on Conflicts* in which an intercolonial or international choice-of-law issue was argued. Perhaps the most glaring examples of unarticulated, private international law issues are decisions of the early-Canadian Court of Common Pleas for Detroit-Hesse reproduced in W.R. Riddell, *Michigan Under British Rule: Law and Law Courts 1760-1796* (Lansing, Mich.: Michigan Historical Commission, 1926) at 72-264, 268-355.

[21]Compare K.H. Nadelmann, ed., "Extract From Joseph Story's Manuscript *Digest of Law*"

Various explanations, mostly internal to the Anglo-American legal tradition, have been offered for the late appearance of interstate choice-of-law doctrine in that system. Watson's version of those internal accounts notes that: "England was remarkably bereft of legal scholars in general until the nineteenth century"; "issues of jurisdiction hindered the development of conflict of laws. ... To found jurisdiction for the English court, the pleadings had to claim that the contract was made in England"; "mercantile cases were judged by the [international] law maritime [rather than by diverse systems of local law]"; "foreign scholars were themselves not law for the United States [and] in any event, they held conflicting opinions [on choice-of-law issues]"; and, "when [conflicts] issues arose, the British government, as is typical, did not legislate [and] [t]he making of a system of conflicts law was left to the English subordinate lawmakers, the judges".[22] Those explanatory passages from *Comity of Errors* have been quoted because they constitute Watson's full description of factors internal to the Anglo-American legal tradition that account for that system's lack of engagement with interstate choice-of-law issues much before the turn of the nineteenth century.

The conclusory nature of Watson's explanations, and the brevity of the list they comprise, should be considered in light of his general view of causation in legal change:

> [*Comity of Errors*] is equally a case study on legal growth and the relationship of law to society ... [Law] is, to a considerable extent, autonomous from the society in which it operates. ... The early history of conflicts law in the United States was thus determined in its main outline by the legal culture of judges and scholars. There is little sign that general societal values had an impact ... Often a society has little impact on the legal rules it enforces, but frequently the law enforced has a great impact on the society.[23]

One would have thought that, if factors peculiar to an autonomous legal culture are to be credited more or less exclusively with responsibility for the lethargic development of a body of common law, a more robust and elaborate description of those distinctively professional factors would be provided. Indeed, one of the historiographical themes of this review essay is the limitations of source-driven comparative law as a vehicle for intellectual history. Historians of human migrations often think in terms of "push" and "pull" factors in emigration/immigration patterns. That rudimentary interpretive paradigm, with its emphasis on social context and human choice, is suggestive for histories of the migration of legal and other ideas.

(1961) 5 Am. J. Legal Hist. 265, with J. Story, *ibid. passim*. The vicissitudes of early case reporting are relevant to those comparative statistics, but Kent's general observation about the Anglo-American judiciary's comparatively late recognition of interstate conflicts issues remains apt. Compare E.C. Surrency, "Law Reports in the United States" (1981) 25 Am. J. Legal Hist. 48 at 49-58 and V.V. Veeder, "The English Reports, 1537-1865" in E. Freund, W.E. Mikell & J.H. Wigmore, eds., *Select Essays in Anglo-American Legal History*, vol. 2 (Boston: Little, Brown and Co., 1908) at 123.

[22]Watson, *supra* note 9 at 3, 47, 48, 57, 78.

[23]*Ibid.* at ix, 77, 80, 71. See also *ibid.* at 96-99, 122 note 1. See generally A. Watson, *Society and Legal Change* (Edinburgh: Scottish Academic Press, 1977) *passim*; A. Watson, *The Evolution of Law* (Baltimore: Johns Hopkins University Press, 1985) *passim*; A. Watson, *Sources of Law, Legal Change, and Ambiguity* (Philadelphia: University of Pennsylvania Press, 1984) *passim*.

Assistance in fleshing out institutional factors that hampered the development of common-law conflicts doctrine is available to Watson, on his own causal terms, from an earlier generation of American historians. Joseph Smith, Alexander Sack, William Crosskey, Herbert Johnson, and Carl Ubbelohde all noticed and commented upon the interstate conflict-of-laws gap in their pioneering descriptions of developing, Anglo-American legal institutions.[24] One popular explanation for the common law's choice-of-law weakness is based on adjudicative fact-finding processes and the role of juries. Because late-medieval and early-modern juries were relied upon to provide the facts of disputed events, litigants in cases with foreign elements were routinely instructed to recommence their suits where a jury in the relevant foreign locality could conveniently recall the facts in issue. Early rules of proof are therefore often said to have effected a procedural bar to common-law courts' consideration of interstate conflicts issues. And, because authority to find and apply law often also reposed in juries, juried courts that took jurisdiction over interstate choice-of-law questions produced no recorded reasons for deliberation and therefore generated no formal conflicts jurisprudence. Even juryless common-law courts are generally said to have limited their involvement in extraterritorial matters to the recognition of foreign judgments upon which local litigants could sue as simple contracts.

Anglo-American litigation involving foreign elements was, however, regularly entertained by prerogative courts like Star Chamber, Equity, Admiralty and the Curia Regis, as well as by specialized adjudicators like pie-power and staple courts. But most of those courts applied a blend of universal mercantile law, international maritime law, and the general law of nations. And eclectic Courts of Equity were able to act on the conscience of litigants within their jurisdiction, and therefore indirectly affect foreign assets or disputes. The relative homogeneity of prerogative and special courts' sources of law is therefore said to have obviated the need to integrate diverse systems of foreign law. Even after the expansive jurisdiction of those courts began to break down under popular political protest against the royal prerogative in the late-seventeenth and early-eighteenth centuries, common-law courts that assumed fragmenting prerogative jurisdiction analyzed law-of-nations issues in much the same way as their universally-oriented predecessors had reasoned. Aspects of international law, like the law merchant and maritime law, were merely recharacterized as components of England's centrally administered common law.[25]

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[24]See generally J.H. Smith, *Appeals to the Privy Council from the American Plantations* (New York: Columbia University Press, 1950); A.N. Sack, "Conflicts of Laws in the History of English Law" in A. Reppy, ed., *Law: A Century of Progress 1835-1935*, vol. 3 (New York: New York University Press, 1937) 342; W.W. Crosskey, *Politics and the Constitution in the History of the United States* (Chicago: University of Chicago Press, 1953); H.A. Johnson, *The Law Merchant and Negotiable Instruments in Colonial New York, 1604 to 1730* (Chicago: University of Chicago Press, 1963); C. Ubbelohde, *The Vice Admiralty Courts and the American Revolution* (Chapel Hill: University of North Carolina Press, 1960). A sweeping, chain citation seems appropriate, since the following five paragraphs in the text are largely synthetic of those publications, and more or less uncontroversial.

[25]See generally J. Oldham, *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century* (Chapel Hill: University of North Carolina Press, 1992); H.J. Bourguignon, *Sir William Scott, Lord Stowell, Judge of the High Court of Admiralty, 1798-1828* (Cambridge: Cam-

Another factor emphasized by institutional historians to account for common-law courts' comparatively late engagement with interstate choice-of-law issues is the frequency with which commercial disputes were, well into the nineteenth century, settled informally or referred to consensual arbitration. The unpredictability of juries and the doctrinal hostility of pre-industrial contract law to mercantile interests are typically said to have fueled an aversion on the part of commercial operators to official dispute resolution. Commercial transactions, a fertile breeding-ground for interstate conflicts issues, were thus largely removed from the purview of state courts. That removal is demonstrated, indirectly, by the importance of matrimonial and successorial disputes to the development of early conflicts law. The slow reconciliation of Anglo-American courts and commerce, which reintroduced multijurisdictional transactions to common-law decision-making, is generally described as a mid-nineteenth-century development.[26]

Approaching the issue from the perspective of interjurisdictional, rather than interstate, conflicts of law, historians like William Nelson have drawn attention to the range of English and colonial American litigants' choices among local courts as an important aspect of the Anglo-American choice-of-law enigma. In a judicial world populated by a plethora of central and lesser courts, superior courts asserted extensive powers to police substantive and procedural intercourt rivalries. Because jurisdiction was diffuse but rigidly-controlled by prerogative writs, choice-of-forum considerations became indistinguishably intertwined with choice-of-law issues. Determinations of jurisdiction therefore often subsumed substantive conflicts questions, and resolved choice-of-law issues. The result of that subsumption was substantial bodies of law on choice-of-forum criteria and the control of *ultra vires* judicial decision-making, but little choice-of-law doctrine.[27]

A final factor often advanced to explain the paucity of early interstate conflicts litigation, especially in the first British empire, is the colonies' extensive reception of imperial statutes and their tendency not to legislate on issues other than distinctively local ones unless they did so by following English statutory models. Legislative harmonization is therefore said to have combined with pro-

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bridge University Press, 1987) at 1-30, 52-242; S.M. Waddams, *Law, Politics and the Church of England: The Career of Stephen Lushington, 1782-1873* (Cambridge: Cambridge University Press, 1992) at 194-237.

[26]See generally B.H. Mann, "The Formalization of Informal Law: Arbitration Before the American Revolution (1984) 59 N.Y.U.L. Rev. 443; M.J. Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge: Harvard University Press, 1977) at 140-210; A.W.B. Simpson, "Innovation in Nineteenth Century Contract Law" (1975) 91 Law Q. Rev. 247.

[27]See generally W.E. Nelson, "The American Revolution and the Emergence of Modern Doctrines of Federalism and Conflict of Laws" in Colonial Society of Massachusetts, ed., *Law in Colonial Massachusetts 1630-1800* (Boston: Colonial Society of Massachusetts, 1984) 419; J.H. Baker, "Ascertainment of Foreign Law: Certification to and by English Courts Prior to 1861" (1979) 28 Int'l & Comp. L.Q. 141; S. Jay, "Origins of Federal Common Law: Part II" (1985) 133 U. Penn. L. Rev. 1231 at 1281-85, 1289-90; Sack, *supra* note 24 at 349-74. See also E.C. Surrency, "The Courts in the American Colonies" (1967) 11 Am. J. Legal Hist. 253, 347; E.G. Henderson, *Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century* (Cambridge: Harvard University Press, 1963) at 117-59.

cedural and jurisdictional factors to help minimize interstate conflicts of law in the Anglo-American legal tradition.[28]

That brief and decontextualized recital of institutional factors highlighted in secondary accounts of the common law's early-modern choice-of-law gap is neither good intellectual nor good social history. Nor is that recital a very complete institutional history, since it fails to describe explicitly how ideas about conflicts among judicial or governmental jurisdictions intermingled with notions of conflicts among geographic jurisdictions at any place or time. But even that breathless synthesis of institutionally-oriented secondary literature suggests Anglo-American choice-of-law historians have a better historiographical base upon which to build than that for which Watson allowed in writing *Comity of Errors*.

II. Federal Institutions and Conflicts of Law

A more fruitful way of orienting inquiries into the history of Anglo-American choice-of-law doctrine might be to ask about the altered institutional, cultural, or social circumstances of antebellum America that precipitated Story's systematic approach to interstate choice-of-law issues. Before inviting Story and his biographers to speak for themselves on those dimensions of the question, Watson should be permitted to offer his explanation for Story's 1834 publication of *Commentaries on Conflicts*. Although Watson emphasized Story's role in the larger American reception of a leading and controversial antebellum conflicts decision of the Louisiana Supreme Court, he also alluded to several general aspects of the new Republic's situation. Since the United States of the 1820s was "a federal nation" where "each [state] had an independent legislature ... uniformity of legislation could not be expected, [and] one State, Louisiana,

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[28]See generally E.G. Brown, "British Statutes in the Emergent Nations of North America, 1606-1949" (1963) 7 Am. J. Legal Hist. 95 at 96-112; Nelson, *ibid.* at 421-26. It has also been suggested that the homogeneity of the common law applied in the North American colonies of Britain's first empire helped minimize interstate conflicts of law among those colonies. In view of current controversy among colonial legal historians about the extent to which English common law was received and standardized, it seems imprudent to treat private-law uniformity as a factor that limited intercolonial conflicts of law. Compare J.M. Murrin, "The Legal Transformation: The Bench and Bar of Eighteenth-Century Massachusetts" in S.N. Katz, ed., *Colonial America: Essays in Politics and Social Development* (Boston: Little, Brown, 1971) 415; S.B. Presser, "An Introduction to the Legal History of Colonial New Jersey" (1976) 7 Rut.-Cam. L.J. 262; A.G. Roeber, *Faithful Magistrates and Republican Lawyers: Creators of Virginia Legal Culture, 1680-1810* (Chapel Hill: University of North Carolina Press, 1981) at 32-159. Suggestions of colonial common-law uniformity are also hard to reconcile with the French legal tradition of Quebec and Nova Scotia, New York's Roman-Dutch inheritance, and German legal influences felt in Georgia and the Carolinas. Compare E. Lareau, *Histoire du droit canadien depuis les origines de la colonie jusqu'à nos jours*, vol. 1 (Montreal: A. Périard, 1888-89); T.G. Barnes, "'The Dayly Cry for Justice': The Juridical Failure of the Annapolis Royal Regime, 1713-1749" in P. Girard & J. Phillips, eds., *Essays in the History of Canadian Law*, vol. 3 (Toronto: University of Toronto Press, 1990) 10; S.B. Kim, *Landlord and Tenant in Colonial New York: Manorial Society 1664-1775* (Chapel Hill: University of North Carolina Press, 1978); A.G. Roeber, "He read it to me from a book of English law: Germans, Bench, and Bar in the Colonial South, 1715-1770" in D.J. Bodenhamer & J.W. Ely, eds., *Ambivalent Legacy: A Legal History of the South* (Jackson, Miss.: University of Mississippi Press, 1984) 202.

had a legal system based on principles different from those of English common law". In view of "the centrality of conflicts law in a federal nation [and the absence of legislation on that subject] ... a theory of conflict of laws was vital to the America of the time". America of the 1820s and 1830s therefore resembled late-medieval Europe: "a practical need for [choice-of-law doctrine] became very apparent in continental Europe in the Middle Ages and later, because of the multiplicity of small states and local customs [where] governments were not sufficiently interested to lay down rules by legislation".[29]

It is difficult to determine from Watson's account whether the resulting "practical need" for conflicts-of-law rules in the early United States was a political one, an economic one, or a need particular to the legal profession in its management and application of doctrine. It is similarly hard to tell why Watson limited his analysis to interstate conflicts, since intergovernmental and interjudicial conflicts were also acutely felt in the new American union.[30] As will be seen, Joseph Story certainly thought he was responding to more varied factors than narrowly professional or technical ones in his articulation and promotion of American choice-of-law rules. And he distinguished, more or less clearly, among companion rules for resolving interstate, intergovernmental, and interjudicial conflicts of law.

It bears repetition that Watson treated Louisiana Judge Alexander Porter's 1827 decision in *Saul* v. *His Creditors* as the immediate cause of the common-law community's heightened early-nineteenth-century engagement with choice-of-law issues.[31] That decision provoked a lengthy, monographic criticism by losing counsel, Samuel Livermore, which dealt primarily with the universality of private rights and the scope of interstate comity.[32] Perhaps most significantly, in Watson's view, retired New York Chancellor and Columbia Law School professor James Kent read *Saul* and reviewed Livermore's *Dissertations* between the publication of the first edition of his well-known *Commentaries on American Law* (1826-30) and that of the second edition in 1832:

> In [Kent's] first edition the relevant treatment of conflict of laws is confused and short, and, indeed, is only incidentally about conflicts ... His treatment in the second edition is vastly different — much fuller and much less confused ... Story was much influenced by Kent ... Story did, indeed, dedicate his *Commentaries [on Conflicts]* to Kent; and he cited Kent with approval on comity.[33]

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[29]Watson, *supra* note 9 at 1, 57, 79, 74, 77. See also *ibid.* at 2.

[30]Various passages in *Comity of Errors* suggest that Watson conflated international, interstate, intercourt, and intergovernmental conflicts issues. While it would be acceptable to focus upon one type of early-American conflicts law, it seems risky to do so without first disentangling those four species of conflicts issues from the single genus they comprised in the antebellum legal mind. That admittedly presentistic separation is especially important to examinations of Story's choice-of-law thought, since he was a leading theorist of all four types of American conflicts of law. See Watson, *ibid.* at x, 1, 6, 45-48, 101 note 3, 101 note 4, 112 note 3.

[31]17 Martin 569 (La. 1827) [hereinafter *Saul*], reproduced in R. Phillimore, *Commentaries upon International Law, Private International Law or Comity*, vol. 4 (Philadelphia: T. & J.W. Johnson, 1854-61) at 734-51.

[32]*Dissertations, supra* note 19. See generally R. De Nova, "The First American Book on Conflict of Laws" (1964) 8 Am. J. Legal Hist. 136; M.J. White, "Samuel Livermore" in D. Malone, ed., *Dictionary of American Biography*, vol. 11 (New York: Scribner, 1933) at 308; Review (1829) 1 Am. Jur. 132.

[33]Watson, *supra* note 9 at 27, 28, 33. See also *ibid.* at 44, 87-89.

That circle of contacts was smaller than Watson observed. Story knew Livermore well as a turn-of-the-century colleague in the tightly-knit Essex County, Massachusetts bar, and was given a presentation copy of *Dissertations* by its author. In 1831 Story persuaded Livermore to bequeath his outstanding, four-hundred-volume foreign law library to the Harvard College Law School.[34] And Story's *Commentaries on the Law of Agency* relied heavily on Livermore's earlier *Law of Principal and Agent*.[35] Chancellor Kent and Judge Porter were also friends and regular correspondents. Porter's judgment in *Saul* v. *His Creditors*, referred to approvingly some two-dozen times in *Commentaries on Conflicts*, was the second-most-frequently-cited decision among nearly three-hundred American and about two-hundred British cases mentioned by Story in that treatise.[36] That was a small circle of personal influence.

For present purposes, neither the facts of *Saul*, nor Judge Porter's reasoning in that case, nor the details of Kent's or Story's response to Livermore is especially relevant. Story may, as the bulk of *Comity of Errors* is committed to demonstrating, have misstated the tenets of interstate choice-of-law method that came down to him through contemporary American legal literature from Huber's mid-seventeenth-century Dutch scholarship on conflict of laws.[37] But Watson would agree that *Commentaries on Conflicts* was not an indignant counterpoint to any choice-of-law theory rehearsed in the Anglo-American literature available to Story. Reduced to its bare bones, Watson's explanation for Story's production of *Commentaries on Conflicts* is therefore that choice-of-law issues had achieved general prominence in elite American legal culture as a result of contemporary publications by Porter, Livermore and Kent, and that there was an emerging technical need among lawyers in a federal republic for systematic ordering of interstate conflicts principles.

That two-pronged explanation fails to take account of the facts that Story's interest in conflicts of law was not limited to interstate conflicts, and that his concern about interstate choice-of-law issues did not originate in the period between 1827 and 1834. Watson appears to have recognized that, in his role as

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[34]See Newmyer, *supra* note 7 at 251, 436; C. Warren, *History of the Harvard Law School and of Early Legal Conditions in America*, vol. 2 (New York: Da Capo Press, 1970) at 80; Story, *supra* note 6, vol. 2 at 39-41. Livermore's law library, together with that of Story himself (which he sold to Harvard in instalments in 1829 and 1831), effectively became the early Harvard Law School Library.

[35]Compare J. Story, *Commentaries on the Law of Agency as a Branch of Commercial and Maritime Jurisprudence, with Occasional Illustrations from the Civil and Foreign Law* (Boston: Little, 1839) [hereinafter *Commentaries on the Law of Agency*] with S. Livermore, *A Treatise on the Law of Principal and Agent and of Sales by Auction* (Baltimore: Samuel Livermore, 1818).

[36]*Saul* was not cited in *Commentaries on Conflicts*, as Watson said, *supra* note 9 at 33, "far more often than any other case". See also *ibid.* at 38, where *Saul* was said to have "pride of place ... in [*Commentaries on Conflicts*] as a whole". *Blanchard* v. *Russell*, 13 Mass. 1 (Mass. S.J.C. 1816) [hereinafter *Blanchard*], was Story's most-cited case.

[37]Compare U. Huber, *Praelectiones Juris Civilis*, vol. 2 (Utrecht, Neth.: U. Huber, 1711) at 30-36. That portion of Huber's treatise was published in an edited and translated version by federalist commentator P.S. Du Ponceau as a note to *Emory* v. *Greenough*, 3 U.S. (3 Dallas) 369 (1797), and that translation was reproduced in (1831) 1 Carolina L.J. 449. See generally Watson, *ibid.* at 49, 115 note 1; K.H. Nadelmann, "Peter Stephen Du Ponceau" (1953) 24 Penn. Bar Ass. Q. 248.

First (New England) Circuit Court Judge and as Associate Justice of the United States Supreme Court from 1811 to 1845, Story decided a number of interstate conflicts cases.[38] However, he seems not to have appreciated the size of that corpus of judicial decisions, or to have noticed that many of them pre-dated *Commentaries on Conflicts* and the *Saul*, Livermore, Kent sequence.[39] Story's circuit-court responsibilities in Rhode Island, Massachusetts, Maine, and New Hampshire were especially important to his involvement in interstate conflicts issues, since the American Constitution's "diversity clause" made the seven federal circuit courts of original action and intermediate appeal the United States' principal forums for disputes about multijurisdictional transactions involving substantive state law.[40] Story's inaugural opinion on the Supreme Court, *United States* v. *Crosby*, was also a conflicts case, assigned to him in 1812 by Chief Justice John Marshall on the basis of his knowledge of comparative law and because he had previously written on the question in dispute.[41]

Perhaps most significantly, Story had demonstrated a scholarly interest in interstate conflicts problems long before Livermore and Kent highlighted *Saul*. Story's first academic work on choice-of-law issues appeared in his three-volume 1809 *Digest of Law* that included forty interstate conflicts decisions, compiled of fourteen English cases and twenty-six American ones drawn mostly from the courts of economically-advanced states like New York and Pennsylva-

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[38]Watson discussed several of Story's judicial decisions while dissecting footnotes to Kent (*supra* note 19) and concluded that Kent's selection of American case law to illustrate the principle of comity was "entirely arbitrary ... and inexplicable except on the basis that he was still not much interested in conflict of laws" (Watson, *ibid.* at 34, 109). Many of the American choice-of-law cases used by Kent were Story decisions, presumably commended to Kent by Story. Elsewhere, Watson cited one of those Story judgments as a "pre-Story" case (*ibid.* at 115 note 48). See also *ibid.* at 94, 112 note 3.

[39]Story wrote no less than eleven interstate conflicts decisions at the circuit-court level: *Babcock* v. *Weston*, 1 Gallison 168, 2 Fed. Cas. 306 (C.C.D.R.I. 1812); *Van Reimsdyk* v. *Kane*, 1 Gallison 371, 28 Fed. Cas. 1062 (C.C.D.R.I. 1812); *Mecker* v. *Wilson*, 1 Gallison 419 (1813); *Harvey* v. *Richards*, 1 Mason 381, 12 Fed. Cas. 746 (C.C.D. Mass. 1818) [hereinafter *Harvey* cited to Fed. Cas.]; *LeRoy* v. *Crowninshield*, 2 Mason 151, 15 Fed. Cas. 362 (C.C.D. Mass. 1820); *Hinkley* v. *Marean*, 3 Mason 88, 12 Fed. Cas. 205 (C.C.D. Mass. 1822); *Slack* v. *Walcott*, 3 Mason 508, 22 Fed. Cas. 309 (C.C.D.R.I. 1825); *Trecothick* v. *Austin*, 4 Mason 16, 24 Fed. Cas. 165 (C.C.D. Mass. 1825); *Picquet* v. *Swan*, 5 Mason 35, 19 Fed. Cas. 600 (C.C.D. Mass. 1828); *Bohlen* v. *Cleveland*, 5 Mason 174 (1828); *Titus* v. *Hobart*, 5 Mason 378, 23 Fed. Cas. 1312 (C.C.D. Mass. 1829). He also participated in at least thirty-one interstate conflicts cases in the Supreme Court, and wrote judgments in seven of them: *Brown* v. *U.S.*, 12 U.S. (8 Cranch) 110 at 129-54 (1814); *U.S.* v. *Crosby*, 11 U.S. (7 Cranch) 115 at 115-16 (1812); *Mills* v. *Duryee*, 11 U.S. (7 Cranch) 481 at 483-85 (1813); *Fairfax's Devisee* v. *Hunter's Lessee*, 11 U.S. (7 Cranch) 603 at 618-28 (1813); *Hoyt* v. *Gelston*, 16 U.S. (3 Wheaton) 246 at 299-333 (1818); *Armstrong* v. *Lear*, 25 U.S. (12 Wheaton) 169 at 175-76 (1827); *Boyle* v. *Zachariae*, 31 U.S. (6 Peters) 635 at 641-47, 654-60 (1828). See generally Horwitz, *supra* note 26 at 247-51; Nadelmann, "Joseph Story's Contribution", *supra* note 8 at 237-43; M.W. Janis, "The Recognition and Enforcement of Foreign Law: *The Antelope's* Penal Law Exception" (1986) 20 Int'l Law. 303.

[40]See U.S. Const. art. III, §2: "The juridical Power [of the United States] shall extend to Controversies between citizens of differing States". See generally W. Holt, "To Establish Justice: Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts" [1989] Duke L.J. 1421.

[41]*U.S.* v. *Crosby*, *supra* note 39. On Marshall's motivation for assigning that judgment to Story, see White, *supra* note 15 at 185.

nia.[42] His 1809 American edition of *Chitty on Bills of Exchange* and his 1811 annotation of *Lawes on Pleading in Assumpsit* also contain embryonic but prescient discussions of interstate conflicts issues, citing Huber in both instances.[43] Story's early periodical articles reflect a similar interest, as does his personal support for other antebellum American choice-of-law writers like Supreme Court reporter Henry Wheaton, New York law reporter Esek Cowan, and Massachusetts constitutionalist Nathan Dane. As early as 1815, Story urged Wheaton to find an enterprising New York City bookseller to publish a self-standing English translation of Huber's *De Conflictu Legum*.[44] And in his 1829 inaugural lecture as Dane Professor and Head of the Law School in Harvard College, Story announced:

> I shall venture far more than has been usual with publicists, into an examination of those general principles of jurisprudence which effect the contracts, govern the titles, and limit the remedies of the subjects of independent powers, who acquire rights or contractual obligations, or succeed to property, or are in any measure subjected to the municipal law in a foreign country. This will include a variety of delicate and interesting topics belonging to the operation of foreign jurisprudence or, as it is sometimes called, the *lex fori* and the *lex loci*.[45]

To that pattern of activity should be added the recollections of Story's juristically-accomplished son, William Wetmore Story, about his father's work on *Commentaries on Conflicts*: "none of his works interested him like [that book], and he threw upon it his whole weight and gave it all the time he could command".[46] It bears repetition that Story himself regarded *Commentaries on Conflicts* as his premier legal publication.

That thumbnail sketch of Story's prolonged engagement with interstate choice-of-law issues on judicial, scholarly, and pedagogical fronts strongly suggests that *Commentaries on Conflicts* was the culmination of long reflection, rather than a Kent-inspired, momentary response to a Louisiana decision and

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[42]See Nadelmann, ed., *supra* note 21 at 274-75. See generally Story, *supra* note 6, vol. 1 at 119-20.

[43]J. Chitty, *Practical Treatise on Bills of Exchange: New Edition, from the Second Corrected and Enlarged London Edition with the Addition of Recent English and American Cases by Joseph Story* (Philadelphia: William P. Farrand and Co., 1809) at 79; E. Lawes, *A Practical Treatise on Pleading, in Assumpsit, with the Addition of American Decisions by Joseph Story* (Boston: James W. Burditt and Co., 1811) at 580.

[44]See J. Story, "Review of the Laws of the Sea with Reference to Maritime Commerce during Peace and War – from the German of Frederick J. Jacobsen, Advocate, Altona, 1815", J. Story, "Address delivered before the Members of the Suffolk Bar, at their Anniversary, on the 4th September, 1821, at Boston", and J. Story, "Review of a General Abridgment and Digest of American Law, with Occasional Notes and Comments, by Nathan Dane, LL.D., Counsellor at Law", all reproduced in J. Story, ed., *The Miscellaneous Writings, Literary, Critical, Juridical, and Political, of Joseph Story, LL.D.* (Boston: James Monroe & Co., 1835) at 245, 405, 321 [hereinafter *The Miscellaneous Writings*]. See also E.F. Baker, *Henry Wheaton, 1785-1848* (Philadelphia: University of Pennsylvania Press, 1937) at 127-31; McClellan, *supra* note 7 at 289; Letter of Joseph Story to Henry Wheaton (5 September 1815), reproduced in Story, *supra* note 6, vol. 1 at 266-69.

[45]J. Story, "Discourse Pronounced upon the Inauguration of the Author, as Dane Professor of Law in Harvard University, August 25th, 1829", reproduced in Story, *The Miscellaneous Writings*, *ibid.* at 440. See also Letter of Joseph Story to Simon Greenleaf (16 February 1845), reproduced in Story, *supra* note 6, vol. 2 at 513-14.

[46]Story, *supra* note 6, vol. 2 at 142. See also *ibid.* at 107, 110, 140, 160, 572.

case comment of the late-1820s. Nor should it be forgotten that Story's work on interstate conflicts issues was complemented by his frequent adjudication on the Supreme Court of constitutionally-based conflicts over the scope of state and federal power, and statutory conflicts over the jurisdiction of state and federal courts.

Story's published conflicts writings contain numerous passages suggestive of their author's motives. Those texts can be placed in general perspective by the following programmatic remarks, in which Story touched in 1815 upon interjurisdictional and interjudicial American conflicts:

> Let us extend the national authority over the whole extent of power given by the Constitution. Let us have great military and naval schools; an adequate regular army; the broad foundations laid of a permanent navy; a national bank; a national system of bankruptcy; a great navigation act; a general survey of our ports, and appointments of port-wardens and pilots; Judicial Courts which shall embrace the whole constitutional powers; national notaries; public and national justices of the peace, for the commercial and national concerns of the United States. By such enlarged and liberal institutions, the Government of the United States will be endeared to the people, and the factions of the great States will be rendered harmless. Let us prevent the possibility of a division, by creating great national interests which shall bind us in an indissoluble chain.[47]

That centripetal and antisecessionist sentiment played itself out not only in Story's approach to internal improvements and the institutions of American commerce, but also in his attitudes towards the political division of constitutional powers, the institutional relationship of federal to state courts, and the economic problem of interstate private-law discord.

It bears emphasis that Story regarded constitutional divisions of power, judicial rivalry, and interstate legal pluralism as interrelated conflicts-of-law challenges. He thought he was dealing as directly with conflicts issues when he adjudicated division-of-power cases under the federal admiralty, commerce, or diversity headings of the Constitution as when he articulated interstate choice-of-law rules in *Commentaries on Conflicts*.[48] The same is true of Story's applications of the federal Judiciary Act of 1789, in which he endeavored repeatedly to circumscribe the uncoordinated activities of state courts. Story's constitutional, admiralty, commercial, and judicial-law jurisprudence are therefore relevant to *Commentaries on Conflicts* not merely because they offer helpful background material. That case law was an integral part of his conflict-of-laws thought. Looking back at Story through the lens of late-nineteenth-century

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[47]Letter of Joseph Story to Nathaniel Williams (22 February 1815), reproduced in Story, *ibid.*, vol. 1 at 253-54. See also Letter of Joseph Story to Henry Wheaton (13 December 1815), reproduced *ibid.* at 270-72.

[48]Constitutional provisions most relevant to interstate conflicts issues are the diversity clause (U.S. Const. art. III, §2), the full faith and credit clause (U.S. Const. art. IV, §1), the privileges and immunities clause (U.S. Const. art. IV, §2), the supremacy clause (U.S. Const. art. VI), the interstate commerce clause (U.S. Const. art. I, §8), the admiralty clause (U.S. Const. art. III, §2), and the fugitive slave clause (U.S. Const. art. IV, §2). For explicit links of those clauses to Story's choice-of-law rules, see Story, *supra* note 2 at 282, 508-09, 522, 531. For general discussion of those provisions, see E.F. Scoles & P. Hay, *Conflict of Laws* (St. Paul: West Publishing Co., 1984) at 79-148.

English conflicts scholarship, literature that was not written in a constitutionally-mandated federal state and did not have to grapple with the abundance of local courts eliminated by mid-nineteenth-century reforms of judicial law and civil procedure, modern observers like Watson have sometimes been misled to suppose that Story's concern about choice-of-law issues related chiefly to the interstate conflicts featured in *Commentaries on Conflicts.*

Interstate choice-of-law doctrine was, no doubt, an important aspect of Story's conflicts scholarship, and the controversies in which it was implicated in antebellum America were novel ones. Reflecting upon the situation that confronted the American Supreme Court of the 1820s, Story later recalled that it had to cope with "the jurisprudence of twenty-four states, essentially differing in habits, laws, institutions, and principles of decisions". In a second circumstance, he spoke of the "vast variety of local laws" in the new United States. On yet another occasion he enumerated six "systematical legal diversities" that prevailed among the states.[49] A similar issue was highlighted by Story's confidant and academic patron, Nathan Dane, who announced in 1823 that "[t]he evil to be feared in our country is, that so many sovereign legislatures, and as so many Supreme courts will produce too much law, and in too great a variety".[50]

Story regarded the American potential for interstate conflicts, both legal and political, as unique in the North Atlantic community:

> To no part of the world is [choice-of-law doctrine] of more interest and importance than to the United States, since the union of a national government with that of twenty-four distinct, and in some respects independent states, necessarily creates very complicated relations and rights between the citizens of these states, which call for the constant administration of extra-municipal principles. This branch of public law may be fitly denominated private international law, since it is chiefly seen and felt in its application to the common business of private persons, and rarely rises to the dignity of national negotiations or national controversies ... [Q]uestions upon the conflict of the laws of different states are the most embarrassing and difficult of decision of any, that can occupy the attention of courts of justice.[51]

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[49]J. Story, "The Life of Chief Justice Marshall" (1846) 6 Am. Jur. & L. Mag. 294; Letter of Joseph Story to Daniel Webster (4 January 1827), reproduced in Story, *supra* note 6, vol. 1 at 435-37; Story, "Address" in *The Miscellaneous Writings*, *supra* note 44 especially at 417-25. See also J. Story, *A Discourse on the Past History, Present State, and Future Prospects of the Law* (Edinburgh: Thomas Clark, 1835) at 75, reproduced in McClellan, *supra* note 7 at 325-49; Letter of Joseph Story to James John Wilkinson (26 March 1834), reproduced in Story, *supra* note 6, vol. 2 at 165-66; Story, *supra* note 2 at 154-58, 163, 170-76, 189-92, 224, 241, 246-48, 256-57, 261, 266, 282-83, 295, 318-27, 383, 475, 496.

[50]Dane, *supra* note 19, vol. 1 at xiv. Similar comments, from a wide variety of antebellum sources, are collected in C.M. Cook, *The American Codification Movement: A Study of Antebellum Legal Reform* (Westport, Conn.: Greenwood Press, 1981) at 48-55.

[51]Story, *supra* note 2 at 9, 151. For modern discussions of that antebellum American legal pluralism, see H.N. Scheiber, "Federalism and the American Economic Order 1789-1910" (1975) 10 Law & Soc'y Rev. 57 especially at 72-100; M.S. Arnold, *Unequal Laws Unto a Savage Race: European Legal Traditions in Arkansas, 1686-1836* (Fayetteville: University of Arkansas Press, 1985) at 43-208; G. Dargo, *Jefferson's Louisiana: Politics and the Clash of Legal Traditions* (Cambridge: Harvard University Press, 1975) *passim*; R.H. Kilbourne, *A History of the Louisiana Civil Code: The Formative Years, 1803-1839* (Baton Rouge: Paul M. Hebert Publications, 1987) *passim.* See also sources cited *supra* note 28.

The key feature of that passage, which was a recurrent organizing theme in Story's judicial and academic writing, is its author's conviction that individuals rather than nations or states are the primary repositories of rights. One challenge presented by American federalism was the "complicated relations and rights between citizens" of diverse states it created. Interstate choice-of-law doctrine, a partial response to that problem, "rarely rises to the dignity of national negotiations" and is mainly "felt in its application to the common business of private persons".

Story's *Commentaries on the Constitution* probably contains his clearest statement that individuals and not states were the building blocks of the Republic, and that national institutions like the federal courts and the Constitution were the principal guardians of those private rights.[52] In Story's view, states were sovereign only to the limited extent they had been delegated power by the American people through state and federal constitutions. His interstate choice-of-law rules were developed from the same premise that animated his constitutional jurisprudence: the primary purpose of those rules was to secure the rights of individuals operating across state lines in a federal system, and the promotion of comity among states was of secondary concern. Thus, Story usually called interstate conflicts cases ones of "mixed rights" or "harmonization", rather than disputes about mixed laws or comity. And he regularly characterized international and interstate threats to "private rights and contracts" as "despotic powers".[53] *Comity of Errors* does not address the relationship of Story's constitutional thought to his choice-of-law doctrine, and it does not probe the implications of Story's commitment to judicially-circumscribed state sovereignty for interstate conflicts rules.[54]

Britain's turn-of-the-nineteenth-century situation was not quite that of the early-American Republic, but Story was none the less struck that "much yet [remained] to be done to make [conflict of laws] what it ought to be in a country of such vast extent in its commerce, and such universal reach in its intercourse and polity". He reasoned that it was the empire-building initiatives of European commerce and religion that "had given an increased enterprise to maritime navigation, and a consequent importance to maritime contracts", and had thus fostered among continental civil-law scholars a "much more comprehensive philosophy" and a "more enlightened spirit" in interstate conflicts matters than that demonstrated by their Anglo-American counterparts.[55] Story concluded that, if

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[52]See J. Story, *Commentaries on the Constitution of the United States, with a Preliminary Review of the Constitutional History of the Colonies and States before the Adoption of the Constitution*, vol. 1 (Boston: Hilliard, Gray and Co., 1833) at 397-407 [hereinafter *Commentaries on the Constitution*]. Compare H.J. Powell, "Joseph Story's Commentaries on the Constitution: A Belated Review" (1985) 94 Yale L.J. 1285 especially at 1294-314; J.H. Kettner, *The Development of American Citizenship, 1608-1870* (Chapel Hill: University of North Carolina Press, 1978) at 131-247.

[53]See *e.g.* Story, *supra* note 2 at 3, 4, 6, 25.

[54]Watson, *supra* note 9 at 38-39, 101 note 4, 111 note 43, 118 note 29, dealt briefly with linkages between Story's conception of states' rights and his choice-of-law doctrine, but he did not do so in the context of Story's views about sovereignty.

[55]Story, *supra* note 2 at 4, 10. See generally E.-M. Meijers, "L'histoire des principes fondamentaux du droit international privé à partir du moyen âge" (1934-III) 49 Rec. des cours 547; A.D. Gibb, "International Private Law in Scotland in the Sixteenth and Seventeenth Centuries" (1927)

American common law failed to provide "scientific", "precise", and "symmetrical" choice-of-law rules to govern interjurisdictional commerce promptly, it would be:

> impracticable for [states] to carry on an extensive intercourse and commerce with each other. The whole system of agencies, purchases and sales, credits, and negotiable instruments, rests on this foundation; and the nation, which should refuse to acknowledge the common [conflicts] principles, would soon find its whole commercial intercourse reduced to a state, like that, in which it now exists with savage tribes, with the barbarous nations of Sumatra, and with the other portions of Asia, washed by the Pacific.[56]

That is strong but unsurprising language from an author who practised mercantile and admiralty law for New England's leading capitalists in bustling Essex County for a decade, who was appointed to the United States Supreme Court by President James Madison at the unrivalled age of thirty-two years to compensate for that Court's perceived weakness in commercial law, and who retained the presidency of the Merchants' Bank of Salem and the vice-presidency of the Salem Savings Institute during his years on the Court.[57] Those concerns also help to explain Story's allocation of three-quarters of *Commentaries on Conflicts* to choice-of-law issues in contract law, the law of real and personal property, the law of succession, and the legal enforcement of commercial judgments. Story's chapter on "Foreign Contracts", over one hundred pages in length, is by far the largest single component of *Commentaries on Conflicts*. When his chapters on real and personal property, that also deal almost exclusively with contractual exchanges of property, are added, the striking conclusion must follow that over half of Story's conflicts text deals with the law of exchange transactions.

The Continental Congress's Articles of Confederation, adopted in 1781, and the United States' Constitution of 1787, provided Story with an indigenous tradition of organic law applicable to intergovernmental and interstate conflicts. While those constitutional provisions are themselves evidence of early-American concern about federal-system values and choice-of-law issues, their legislative history is most relevant. Constitutional Convention debate on those texts by delegates such as James Iredell, John Marshall, and Patrick Henry revolved around commercial questions like the law to be applied to transactions affected by different interest rates among states, and that applicable to contracts connected to multiple jurisdictions. Those constitutional draftsmen concluded that more "time, reflection, and experience" would be necessary to frame comprehensive, interstate choice-of-law rules for American commerce. By way of

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39 Jur. Rev. 369; H.E. Yntema, "The Historic Bases of Private International Law" (1953) 2 Am. J. Comp. L. 297.

[56]Story, *ibid.* at 201-02. See also *ibid.* at 5, 2, v.

[57]On Story's Salem law practice, see Newmyer, *supra* note 7 at 45-72. For his appointment to the Supreme Court, see M.D. Dowd, "Justice Joseph Story and the Politics of Appointment" (1965) 9 Am. J. Legal Hist. 265. For Story's ongoing involvement in his Salem banks, see G.T. Dunne, "Mr. Justice Story and the American Law of Banking" (1961) 5 Am. J. Legal Hist. 205. On the relationship of New England commerce to the Massachusetts bar of the early-nineteenth century, see generally G.W. Gawalt, *The Promise of Power: The Emergence of the Legal Profession in Massachusetts, 1760-1840* (Westport, Conn.: Greenwood Press, 1979) at 81-197.

contrast, they seem to have been satisfied that they had dealt adequately with intergovernmental and intercourt conflicts in an anticipated national marketplace.[58] That blend of patience and confidence prevailed in spite of the fact that the conflicts-forestalling potential of the framers' own "full faith and credit" clause of the Constitution would not be recognized or exploited by American jurists, including Story, for another century.[59] *Commentaries on Conflicts* is only explicable on the basis that Story did not regard the conflicts provisions of the Constitution as dispositive of interstate choice-of-law issues.

III. Interstate Commerce and Constitutional Centrism

The commercial optimism and interstate choice-of-law apprehension of the Constitution's draftsmen found tangible representation for Story and his contemporaries in an increasingly integrated national commodities and credit market two generations later. Although Watson discussed in detail instances of the United States' slave trade revealed by case law, more commercial context than *Comity of Errors* provides is required to relate Story's choice-of-law doctrine to antebellum American market culture.

A central theme in the United States' economic history of the 1820s and 1830s is the re-emergence of a national market from the derangement of population, industry, and coastal commerce affected by the Revolution.[60] Facilitated by the proximity of early settlement to the Atlantic tidewater, the ease of coastal navigation, and in lesser measure by the colonial Court of Admiralty's broad jurisdiction to apply uniform legal doctrine to tidal commerce, something approaching a national market in which interstate conflicts of law occurred infrequently existed in the late-colonial period.[61] But that integrated colonial marketplace went into remission as population, capital, and industry began to move inland in the 1780s. It did not show signs of reappearance until the mid-1820s, when land-locked states were increasingly connected by roads,

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[58]See *e.g.* J. Elliot, *Debates in Convention on the Adoption of the Federal Constitution* (Washington, D.C.: Jonathan Elliot, 1827-30) vol. 2 at 397, 406, 488, vol. 3 at 532, 556-59, 583. Compare Watson, *supra* note 9 at 45-47. See generally Nelson, *supra* note 27 at 451-54; S. Jay, "Origins of Federal Common Law: Part One" (1985) 133 U. Penn. L. Rev. 1003 especially at 1034-39, 1093-111; Jay, *supra* note 27 especially at 1241-50, 1254-71.

[59]See U.S. Const. art. IV, §1: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State". See generally Story, *supra* note 2 at 508-09, 531; K.H. Nadelmann, "Full Faith and Credit to Judgments and Public Acts: A Historical-Analytical Reappraisal" (1957) 56 Mich. L. Rev. 33; D. Laycock, "Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law" (1992) 92 Colum. L. Rev. 249 especially at 289-310. But see Watson, *ibid.* at x.

[60]See *e.g.* D.C. North, *The Economic Growth of the United States, 1790-1860* (Englewood Cliffs, N.J.: Prentice-Hall, 1961); S.L. Engerman & R.E. Gallman, "United States Economic Growth, 1783-1860" (1983) 8 Res. in Econ. Hist. 1.

[61]See generally J.F. Shepherd & G.M. Walton, *Shipping, Maritime Trade, and the Economic Development of Colonial North America* (Cambridge: Cambridge University Press, 1972) at 27-90. See also F.B. Wiener, "Notes on Rhode Island Admiralty, 1727-1790" (1932) 46 Harv. L. Rev. 44; L.K. Wroth, "The Massachusetts Vice-Admiralty Court and the Federal Admiralty Jurisdiction" (1962) 6 Am. J. Legal Hist. 250 at 347; R. Bridwell, "Mr. Nicholas Trott and the South Carolina Vice Admiralty Court: An Essay on Procedural Reform and Colonial Politics" (1976) 28 S. Carolina L. Rev. 181.

bridges, steamboats, and canals.[62] Econometric historians have documented, in painstaking detail, annual increases in river shipment tonnage, steady decreases in inland freight rates, and the unprecedented population growth of land-locked forwarding centres in that era.[63] The resulting hum of American commerce in the early-1830s impressed literate European observers like Harriet Martineau and Alexis de Tocqueville more than any other feature of the new Republic.[64] And it moved Joseph Story to muse that inland commerce was the salutory historical force to which American law must adjust.[65]

Yet Story's conception of the relationship of legal rules to commercial development comprehended more than straightforward, instrumental linkages. In the words of his leading biographer:

> Story was a constitutional nationalist because he wanted to encourage the development of a national market. He wanted a national market because New England merchants (whose opinions he respected) called for it and because the manufacturing revolution in New England (which Story appreciated) required it. It must not be forgotten (because Story did not forget it) that he was New England's representative on the Supreme Court.[66]

For greater emphasis, and with a refined thematic cast, Story's view of antebellum legal statesmanship can be stated more elaborately. New England was the birthplace of the American Revolution. That Revolution substituted indigenous republican institutions and ideals for a despotic foreign monarch. New England was therefore the cradle of the new Republic and of republicanism in America. New England's commerce and industry were central to American federalism because they fostered republican values like self-reliance, enterprise, self-improvement, and civility. Story thought that the extension, and therefore the ultimate success, of the Revolution depended upon transferring New England's elite, meritocratic institutions to the whole Republic.[67] The Constitution facili-

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[62]Representative descriptions of those facilitative antebellum internal improvements can be found in: O. Handlin & M.F. Handlin, *Commonwealth: A Study of the Role of Government in the American Economy: Massachusetts, 1774-1861* (New York: New York University Press, 1947) *passim*; L. Hartz, *Economic Policy and Democratic Thought: Pennsylvania, 1776-1860* (Cambridge: Harvard University Press, 1948) at 37-180; M.S. Heath, *Constructive Liberalism: The Role of the State in Economic Development in Georgia to 1860* (Cambridge: Harvard University Press, 1954) at 231-335.

[63]See *e.g.* P.A. David, "The Growth of Real Product in the United States Before 1840: New Evidence, Controlled Conjectures" (1967) 27 J. Econ. Hist. 151; J. Mak & G.M. Walton, "Steamboats and the Great Productivity Surge in River Transportation" (1972) 32 J. Econ. Hist. 619; A.R. Pred, *Urban Growth and the Circulation of Information: The United States System of Cities, 1790-1840* (Cambridge: Harvard University Press, 1973) *passim*.

[64]See H. Martineau, *Society in America* (London: Saunders and Otley, 1837); A.C.H.M.C. de Tocqueville, *Democracy in America*, trans. H. Reeve (London: Saunders and Otley, 1835-40).

[65]J. Story, "Review of a Treatise on the Law of Insurance, by Willard Phillips", reproduced in Story, *The Miscellaneous Writings*, *supra* note 44 at 294. See also J. Story, "Discourse Delivered before the Boston Mechanics' Institute, at the Opening of their Annual Course of Lectures, November, 1829", reproduced in *ibid.* at 112.

[66]Newmyer, *supra* note 7 at 127. See also G.T. Dunne, "Joseph Story: The Salem Years" (1965) 101 Essex Inst. Hist. Coll. 307.

[67]Literature on the various strands of American republicanism in the early-federal period is impressive and growing. See *e.g.* N.O. Hatch, *The Sacred Cause of Liberty: Republican Thought and the Millennium in Revolutionary New England* (New Haven: Yale University Press, 1977); J.

tated that extension of the Revolution, especially by its entrenchment of principled judicial review of legislation and its provision for federal institutions. Together with the Judiciary Act, the Constitution therefore empowered and obliged federal jurists to impress uniformly the commercial practices and legal institutions of republican New England upon the Republic at large. And Joseph Story was not only New England's unique voice on the Supreme Court for thirty-four institutionally-formative years, but also the Republic's most prolific and consolidationist legal scholar of the antebellum period. The imperialistic imperatives of New England's commerce, law, and political culture were represented as powerfully in Story's choice-of-law scholarship as they were in his mainstream judicial work. Regrettably, *Comity of Errors* does not canvass the relationship of meritocratic republicanism to American legal harmony; nor does it examine the effect of the commercial or liberal dimensions of that ideology upon Story's voracious desire to limit state power.[68]

Story regarded interstate choice-of-law doctrine as a critical aspect of the municipal law of private rights and duties:

> Commerce is now so absolutely universal among all countries; the inhabitants of all have such a free intercourse with each other; contracts, marriages, nuptial settlements, wills, and successions, are so common among persons, whose domicils are in different countries, having different and even opposite laws on the same subjects; that without some common principles adopted by all nations in this regard there would be an utter confusion of all rights and remedies; and intolerable grievances would grow up to weaken all the domestic relations [of the states with each other], as well as to destroy the sanctity of contracts and the security of property.[69]

Because Story cast his private international law rules as guardians of contractual entitlements and proprietary interests, it seems prudent to situate those rules in his domestic mercantile jurisprudence. That commercial case law had several distinguishing features. Story interpreted property and contract rights expansively, he sought robust security in law for those enlarged rights, and he promoted national and sometimes international uniformity of mercantile legal doctrine.[70]

Eighteenth-century notions of property were extended in Story's local-law jurisprudence to include fisheries, franchises, inert natural resources, trees, and

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Appleby, *Capitalism and a New Social Order: The Republican Vision of the 1790s* (New York: New York University Press, 1984); D.R. McCoy, *The Last of the Fathers: James Madison and the Republican Legacy* (Cambridge: Cambridge University Press, 1989).

[68]Compare White, *supra* note 15 at 11-75, who emphasized the role of theories of cultural change in the antebellum desire to disseminate republican values. Because the prevailing view of history was built around natural cycles of birth, maturity and decay, many early federalists sought to forestall cultural aging by prolonging American society's mature period. It was thought that maturity could be extended by perfecting republican institutions.

[69]Story, *supra* note 2 at 5.

[70]There is an extensive secondary literature on Story's commercial-law jurisprudence, in which the most important entries include: S.I. Kutler, *Privilege and Creative Destruction: The Charles River Bridge Case* (New York: W.W. Norton and Company, 1978) at 85-132; R. Bridwell & R.U. Whitten, *The Constitution and the Common Law: The Decline of the Doctrines of Separation of Powers and Federalism* (Lexington: Lexington Books, 1977) at 61-114; Newmyer, *supra* note 7 at 115-54. The next three paragraphs are synthetic of that literature.

the sea-bed under tidal waterways where wharves were built. Story was also a forceful proponent of emerging "will theories" of contract. He therefore permitted common carriers and other bailees to limit their customary liability by agreement, and he suppressed "just price" theories of substantive equality in exchange. Although Story was not alone in that expansive and objective reconceptualization of contract rights, modern commentators like Morton Horwitz have credited him with a leading role in antebellum America's transformation to *laissez-faire* commercial interaction.[71] "Sanctity of contract and security of property" were watchwords Story pressed upon his fellow judges so frequently that instances of his use of that expression literally defy counting.

Optimal security of newly-expanded contract and property rights was promoted by Story in a number of distinctive ways. Competition among natural resource users, for example, litigated in private-law actions for nuisance or strict liability, was typically resolved by Story in favour of the first or oldest user of those resources. He also interpreted corporate, contractual, and other legislative grants liberally, which often led to resolutions of textual ambiguity in favour of grantees of those concessions and against the state. Story consistently held that business corporations took their identity from their corporators, which meant that they were entitled to robust private property rights and subject to limited regulation in the public interest.[72]

But Story's overriding aim in mercantile matters was "to build our commercial law, as much as possible, upon principles absolutely universal in their application".[73] Uniformity of private law was the cornerstone of Story's aspirations for secure property and sacrosanct contracts. On the judicial bench, he pursued that goal through generous interpretation of constitutional heads of federal judicial power over admiralty, interstate commerce, and diversity of citizen-

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[71]Horwitz, *supra* note 26 at 184, concluded that: "With the publication of Joseph Story's *Equity Jurisprudence* (1836), American law finally yielded up the notion that the substantive value of an exchange could provide an appropriate measure of the justice of a transaction". See also *ibid.* at 38-43, 55-56, 73, 181-84, 204-05, 224, 265.

[72]*Trustees of Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheaton) 518 (1819) [hereinafter *Dartmouth College*], in which Story wrote a concurring judgment, and *Charles River Bridge* v. *Warren Bridge*, 36 U.S. (11 Peters) 420 (1837) [hereinafter *Charles River Bridge*], in which Story dissented, are his best-known judgments on the scope and security of statal concessions sought to be protected by the contract clause of the Constitution (U.S. Const. art. I, §10: "No state shall pass any Law impairing the Obligation of Contracts"). In *Charles River Bridge*, *ibid.* at 608, Story would have implied a grant of monopoly in an ambiguous charter on the basis that:

> No man will hazard his capital in any enterprise, in which, if there be a loss, it must be borne exclusively by himself; and if there be success, he has not the slighest [*sic*] security of enjoying the rewards of that success, for a single moment. If the government means to invite its citizens to enlarge the public comforts and conveniences, to establish bridges, or turnpikes, or canals, or railroads, there must be some pledge, that the property will be safe; that the enjoyment will be co-extensive with the grant; and that success will not be the signal of a general combination to overthrow its rights and to take away its profits [through the chartering of competing enterprises].

It is also noteworthy that Story made extensive use of the contract clause to narrow or strike down local legislation. See generally B.F. Wright, *The Contract Clause of the Constitution* (Cambridge: Harvard University Press, 1938) at 27-88.

[73]Letter of Joseph Story to Sir William Scott, Justice of England's High Court of Admiralty (later Lord Stowell) (22 September 1828), reproduced in Story, *supra* note 6, vol. 1 at 559.

ship.[74] Story also promoted Harvard Law School and the federal courts as national institutions of legal consolidation, and worked towards private-law uniformity through codification and treatise-writing initiatives.[75] Story much admired the received wisdom about the Roman Empire, since that Empire's "dominion extended over so great a portion of the habitable world, that frequent cases of contrariety or conflict of laws could scarcely occur". He had similar goals for the dominion of the United States' federal courts, New England's commerce, and unified American common law.[76]

Story has routinely been described as the nineteenth century's "self-proclaimed champion of [American] federal admiralty jurisdiction". A contemporary squib often repeated in the Story literature is to the effect that "if a bucket of water were brought into his court with a corn cob in it, he would at once extend the admiralty jurisdiction of the United States over it".[77] The Constitution's federalization of maritime jurisdiction was invoked vigorously by Story in combination with the federal interstate commerce power to secure a central, and thus unifying, judicial forum for a wide range of commercial disputes. In *De Lovio* v. *Boit*, for example, he held that issues arising from maritime insurance contracts and torts lay within that admiralty jurisdiction, thereby extending substantially eighteenth-century English admiralty's limited and shrinking authority over collisions, salvage, seamen's wages, and bottomry bonds. He thus removed a significant cross-section of antebellum commercial questions from pluralistic state courts. As Story himself said, artfully, of his judgment in *De Lovio*, "the opinion is rather popular among merchants ... and in particular, the underwriters in Boston have expressed great satisfaction at the decision".[78]

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[74]See U.S. Const. art. III, §2: "The judicial Power [of the United States] shall extend to all Cases ... of admiralty and maritime Jurisdiction". See also U.S. Const. art. I, §8: "The Congress shall have Power to regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes". Again, there is an extensive secondary literature on Story's constitutional decisions related to the interstate commerce, admiralty, and diversity powers. See *e.g.* T.A. Freyer, *Forums of Order: The Federal Courts and Business in American History* (Greenwich, Conn.: JAI Press, 1979) at 19-98; G.L. Haskins & H.A. Johnson, *Foundations of Power: John Marshall, 1801-15* (New York: Macmillan, 1981) at 360-65, 388, 404, 451, 486-88, 538, 543-44, 565-66, 580-81, 600, 632; White, *supra* note 15 at 427-594; C.B. Swisher, *The Taney Period, 1836-64* (New York: Macmillan, 1937) at 306-447.

[75]See, below, text accompanying notes 83-114.

[76]Story, *supra* note 2 at 3-5, 463-64, 520. Story's commitment to legal nationalism was echoed by his support for other initiatives in American nationalism like the *Encyclopedia Americana*, the Library of Congress, and the Smithsonian Institute. See generally Story, *supra* note 6, vol. 1 at 496-97, vol. 2 at 26-27. He also authored popularly-oriented texts designed to promote constitutional nationalism: J. Story, *Commentaries on the Constitution of the United States. Abridged by the Author, for the use of Colleges and High Schools* (Boston: Hilliard, Gray & Co., 1833); J. Story, *A Familiar Exposition of the Constitution of the United States* (New York: Harper, 1840).

[77]Note (1903) Am. L. Rev. 916; Newmyer, *supra* note 7 at 207. See also Story, *supra* note 6, vol. 1 at 221-31, 263-70.

[78]2 Gallison 398, 7 Fed. Cas. 418 (C.C.D. Mass. 1815); letter from Joseph Story to Nathaniel Williams (3 December 1815), reproduced in Story, *supra* note 6, vol. 1 at 269-70. See generally Note, "From Judicial Grant to Legislative Power: the Admiralty Clause in the Nineteenth Century" (1954) 67 Harv. L. Rev. 1214; E.P. Deutsch, "Development of the Theory of Admiralty Jurisdiction in the United States" (1960) 35 Tulane L. Rev. 117; W.A. Fletcher, "The General Common Law

In *Gibbons* v. *Ogden*, Story ghost-wrote and concurred in a majority decision by Chief Justice Marshall that struck down a New York state patent that conferred a monopoly to operate steamboats on New York waters on the basis that the Livingston-Fulton patent in issue infringed the federal power over interstate and foreign commerce.[79] That federal jurisdiction was thus allowed to extend its reach, through the idea of navigability, into a sphere previously thought appropriate to state economic regulation. Story completed the trilogy of leading antebellum judicial decisions that provided scope for federal courts to develop uniform American common law with *Swift* v. *Tyson*.[80] Applying the Judiciary Act, Story narrowed the range of disputes in which the federal judiciary was bound by state law, and heightened federal courts' ability to create consistent commercial jurisprudence in the exercise of their diversity-of-citizenship jurisdiction. In so doing, he recast the relevant provision of that statute as a congressionally-enacted choice-of-law rule. By the turn of the twentieth century, there would be approximately thirty discrete categories of private law in which the United States' federal courts had developed national common law independent of fragmented state norms.[81]

The residual problems of private-law discord that perplexed Story were what to do about nondiversity conflict-of-laws cases litigated in state courts, and how to complete the unification of diversity law administered by federal courts. Those were the dilemmas to which he applied himself in *Commentaries on Conflicts*. The intended technical result of Story's interstate conflicts rules was that a homology would be achieved in the choice-of-law jurisprudence of state and federal courts, which would effectively subsume the interstate conflicts jurisdiction of the states under that of the federal judiciary. The scope for local interference in interstate commerce would thus be further limited by uniform choice-of-law principles.

Comity of Errors does not acknowledge the relevance of Story's private-law or constitutionally-based commercial jurisprudence to his work on interstate conflicts of law. Expressing that omission systemically, Watson did not canvass the relationship of an expanding federal common law to residual conflicts of law among the United States, or consider *Commentaries on Conflicts*

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and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance" (1984) 97 Harv. L. Rev. 1513 especially at 1538-77.

[79]22 U.S. (9 Wheaton) 1 (1824). See generally M.G. Baxter, *The Steamboat Monopoly: Gibbons v. Ogden, 1824* (New York: Knopf, 1972); F. Frankfurter, *The Commerce Clause under Marshall, Taney and Waite* (Chapel Hill: University of North Carolina Press, 1937) at 1-73.

[80]41 U.S. (16 Peters) 1 (1842). See generally T.A. Freyer, *Harmony and Dissonance: The 'Swift' and 'Erie' Cases in American Federalism* (New York: New York University Press, 1981) at 1-43; C.A. Heckman, "The Relationship of Swift v. Tyson to the State of Commercial Law in the Nineteenth Century and the Federal System" (1973) 17 Am. J. Legal Hist. 246.

[81]Story played a key role in the judicial occupation of that enlarged federal jurisdiction in his position as New England Circuit Court judge. See generally R.K. Newmyer, "Joseph Story on Circuit and a Neglected Phase of American Legal History" (1970) 14 Am. J. Legal Hist. 112. Compare M.K. Bonsteel Tachau, *Federal Courts in the Early Republic: Kentucky, 1789-1816* (Princeton: Princeton University Press, 1978); H.B. Zobel, "Pillar of the Political Fabric: Federal Courts in Massachusetts, 1789-1815" (1989) 74 Mass. L. Rev. 197; K.L. Hall & E.W. Rise, *From Local Courts to National Tribunals, The Federal District Courts of Florida, 1821-1990* (New York: Carlsen Publishing, 1991) at 5-29.

as a source of uniform American common law.[82] That kind of analysis seems central to understanding Story's goals for choice-of-law rules, since that was the architectonic perspective from which Story himself viewed the issue of interstate private-law discord.

IV. New England Legal Culture aud Normative Uniformity

Inquiries into Story's interstate choice-of-law doctrine can scarcely avoid considering the status of *Commentaries on Conflicts* as one of nine mutually-supportive legal treatises authored during a sixteen-year period by the Dane Professor in Harvard Law School. Similarly, because those monographs were written under the terms of Nathan Dane's endowment to facilitate Harvard's mission as a national institution of legal consolidation, the Law School's self-image during the Dane-Story period should be regarded as a causally-relevant factor in Story's emphasis upon interstate choice-of-law issues. Watson observed that "it is, indeed, only on the basis that Story believed there could be a common law for the United States, at least in large measure, that one can explain his range of treatises on American law".[83] But Watson neither developed that insight in the context of *Commentaries on Conflicts*, nor linked it to Harvard's antebellum contribution to the law and culture of American constitutional nationalism. That gap in *Comity of Errors* should also be addressed before selective examination of Story's interstate choice-of-law rules is undertaken.

Eight of Story's nine legal treatises dealt with antebellum America's emerging federal common law.[84] On his death in 1845, Story had two additional

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[82]But see Watson, *supra* note 9 at 39-40:

> if Story were deliberately manipulating [Huber's] doctrine of comity it would more likely be toward forming a common law for the United States ... [A]ny explanation that there was deliberate manipulation would have to show that Story felt that bis version of comity was preferable throughout the whole field of law. Yet Story's comity made the law much less certain than Huber's did, and I cannot find that it had any particular advantages.

Compare D.C.K. Chow, "Limiting *Erie* in a New Age of International Law: Toward a Federal Common Law of International Choice of Law" (1988) 74 Iowa L. Rev. 165; G.C. Hazard, "A General Tlieory of State-Court Jurisdiction" [1965] S. Ct. Rev. 241.

[83]Watson, *ibid.* at 39-40.

[84]See *Commentaries on the Law of Bailments, with Illustrations from the Civil and Foreign Law* (Cambridge: Hilliard and Brown, 1832) [hereinafter *Commentaries on Bailments*]; *Commentaries on Conflicts, supra* note 2; *Commentaries on Equity Jurisprudence, As Administered in England and America* (Boston: Hilliard, Gray & Co., 1836) [hereinafter *Commentaries on Equity Jurisprudence*]; *Commentaries on Equity Pleadings, and the Incidents Thereof, According to the Practice of the Courts of Equity of England and America* (Boston: C.C. Little and J. Brown, 1838); *Commentaries on the Law of Agency, supra* note 35; *Commentaries on the Law of Partnership, as a Branch of Commercial and Maritime Jurisprudence, with Occasional Illustrations from the Civil and Foreign Law* (Boston: C.C. Little and J. Brown, 1841) [hereinafter *Commentaries on the Law of Partnership*]; *Commentaries on the Law of Bills of Exchange, Foreign and Inland, as Administered in England and America: with Occasional Illustrations from tlie Commercial Law of Nations of Continental Europe* (Boston: C.C. Little and J. Brown, 1843) [hereinafter *Commentaries on the Law of Bills of Exchange*]; *Commentaries on the Law of Promissory Notes and Guarantees of Notes, and Checks on Banks and Bankers: with Occasional Illustrations from the Commercial Law of Nations of Europe* (Boston: C.C. Little & J. Brown, 1845) [hereinafter *Commentaries on the Law of Promissory Notes*].

private-law treatises in incomplete drafts that dealt likewise with federal admiralty and maritime law.[85] As one of his modern biographers noted, "[Story] was a master propagandist who was among the first law publicists in the United States to grasp completely the converting possibilities of the new print culture".[86] Story the constitutional-law judge provided the jurisdictional space for an expansive and uniform federal common law of commerce, admiralty and diversity of citizenship, while Story the legal publicist promptly capitalized upon that opportunity with seminal, national treatises. *Commentaries on Conflicts* was a pivotal point in that project, in so far as it sought to nationalize the private international law of state courts and assist in unifying diversity law applied by the federal judiciary. The revolution in American public law effected by the Constitution had, in Story's view, direct and potentially powerful implications for an integrated American common law. Optimal security, and thus sovereignty, for interstate traders required that private law be uniform, and an important step towards the integration of private law involved persuading states to compromise their local law when presented with private rights acquired out of state.[87]

Story came to treatise writing through the production of legal digests and abridgments, and by way of common-law codification initiatives. He took up the promotion of American nationalism in private law following the preparation of derivative English texts, and in the wake of comparative legal studies. There is thus a sense in which Story lived, in a single generation, an accelerated version of the nineteenth-century development of Anglo-American legal scholarship.[88] His early *Digest of Law* was designed as an American supplement to John Comyns's widely-used *Digest of the Laws of England*, an institutional work typical of the mid-eighteenth-century genre of enumerative surveys of common-law knowledge that lacked synthesis and abstraction.[89] Similarly, Story's American editions of *Abbott on Merchant Ships and Seamen*, *Chitty on Bills of Exchange*, and *Lawes on Pleading in Assumpsit* reflected the common law's early-nineteenth-century shift from descriptive but comprehensive institu-

[85]Story's lesser private-law texts, written before his Harvard appointment, include: J. Story & B. Perham, *American Precedents of Declarations* (Salem, Mass.: Barnard B. Macanulty, 1802); J. Story, *A Selection of Pleadings in Civil Actions, Subsequent to the Declaration, with Occasional Annotations* (Salem, Mass.: Macanulty, 1805); C. Abbott, *A Treatise Relative to the Law of Merchant Ships and Seamen: Second American from the Third English Edition, with Annotations by Joseph Story* (Newburyport, Mass.: E. Little and Co., 1810); C. Abbott, *A Treatise of the Law Relative to Merchant Ships and Seamen: in Four Parts, Fourth American from the Fifth London Edition, with Annotations Containing the Principal American Authorities by Joseph Story* (London: Butterworth, 1827).

[86]Newmyer, *supra* note 7 at 194. See also *ibid.* at 282.

[87]See generally J. Story, "American Law" (1834), reproduced in (1954) 3 Am. J. Comp. L. 9.

[88]See generally Newmyer, *supra* note 7 at 271-304; R. Pound, "The Place of Judge Story in the Making of American Law" (1914) 48 Am. L. Rev. 676; G.T. Dunne, "The American Blackstone" [1963] Wash. U.L.Q. 321.

[89]Compare Nadelmann, *supra* note 21, to J. Comyns, *Digest of the Laws of England* (London: H. Woodfall and W. Strahan, 1762-67). See generally A.W.B. Simpson, "The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature" (1981) 48 U. Chi. L. Rev. 632 especially at 639-41, 652, 655-58, 669; J.W. Cairns, "Blackstone, an English Institutist: Legal Literature and the Rise of the Nation State" (1984) 4 Oxford J. Legal Stud. 318 especially at 321-39.

tional works to systematic, increasingly abstract, monographic treatments of general principles in discrete fields of private law. Story's addition of American annotations to those metropolitan works was also typical of a short-lived North American style of derivative legal scholarship.[90] Less well known than his early institutional and derivative treatise productions are Story's unprecedented official consolidation of Massachusetts' statutes during the War of 1812 (with Nathan Dane and William Everett), and his Chairmanship of the Massachusetts Commission on Codification of the mid-1830s.[91] Story also produced a significant periodical literature, over the course of thirty years, that demonstrates moderate support for coordinated codification of state law as a way of addressing the problem of domestic legal pluralism.[92] Commercial law, criminal law, and judicial law were the fields he thought ripest for systematization and generalization in codal statements.[93] Commercial law, in Story's lexicon, included the law of agency, bailments, conflicts of law, insurance, partnership, guaranty, suretyship, and bills of exchange.

Story's pursuit of the unifying potential of a national legal treatise literature was informed directly by his participation in the abortive American codification movement. In structure, his treatises are near-codes, written around general principles presented as rules. *Commentaries on Conflicts*, for example, is comprised of six-hundred-and-forty-five consecutively-numbered paragraphs that state, in a slightly verbose manner, individual choice-of-law rules and the justifications for them.[94] And *Commentaries on the Constitution* was con-

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[90]Lawes, *supra* note 43; Chitty, *supra* note 43; Abbott, *supra* note 85. See generally Cook, *supra* note 50 at 204-09; M.W. Maxwell, "The Development of Law Publishing 1799-1974" in J. Burke & P. Allsop, eds., *Then and Now, 1799-1974* (London: Sweet and Maxwell, 1974) 121 at 122-27; E.C. Surrency, *A History of American Law Publishing* (Dobb's Ferry: Oceana Publications, 1990) at 111-27, 165-80.

[91]See also J. Story, ed., *The Public and General Statutes Passed by the Congress of the United States of America* (Boston: Wells and Lilly, 1828); J. Story, ed., *The Public and General Statutes Passed by the Congress of the United States of America* (Philadelphia: P.H. Nicklin and T. Johnson, 1837). See generally H.L. Stebbins, "Outline of Massachusetts Statute Law Publications" (1927) 20 Law Library J. 72 at 76-78; E.C. Surrency, "Revision of Colonial Laws" (1965) 9 Am. J. Legal Hist. 189; Cook, *ibid.* at 104-06, 173-81.

[92]See *e.g.* [J. Story], "Law, Legislation and Codes" in F. Lieber, ed., *Encyclopedia Americana*, vol. 7 (Philadelphia: Carey, Lea and Carey, 1830-33) at 581; J. Story, "Codification of the Common Law", reproduced in W.W. Story, ed., *The Miscellaneous Writings, Literary, Critical, Juridical, and Political, of Joseph Story, LL.D.* (Boston: C.C. Little and J. Brown, 1852) 715; J. Story, "Address", reproduced in Story, *The Miscellaneous Writings*, *supra* note 44 at 405. Since several of those articles were unsigned, J.C. Hogan, "Joseph Story's Anonymous Law Articles" (1954) 52 Mich. L. Rev. 869, can profitably be read together with them.

[93]See J. Story *et al.*, *Report of the Commissioners Appointed to Consider and Report upon the Practicability and Expediency of Reducing to a Written and Systematic Code the Common Law of Massachusetts* (Boston: Dutton and Wentworth, 1837); L.S. Cushing, "Codification of the Common Law in Massachusetts" (1836) 15 Am. Jur. & L. Mag. 111. Story also drafted national criminal legislation in 1812 and 1825, and national bankruptcy legislation (under U.S. Const. art. I, §8) in 1824 and 1840. See generally Newmyer, *supra* note 7 at 103, 105, 152, 172, 313, 329-31; M. Weisman, "Story and Webster, and the Bankruptcy Act of 1841" (1941) 46 Commercial L.J. 4; K. Preyer, "Jurisdiction to Punish: Federal Authority, Federalism and the Common Law of Crimes in the Early Republic" (1986) 4 Law & Hist. Rev. 223 especially at 258-65.

[94]Story, *supra* note 2 *passim*. On the conception and presentation of early Anglo-American treatises as near-codes, see Simpson, *supra* note 89 at 666-67; R.W. Gordon, Book Review (1983) 36

structed from nineteen maxims of "codal" interpretation.[95] Those techniques of systematic presentation were, in an important sense, a function of Story's aspiration for "scientific" legal knowledge. By scientific, he meant highly-structured but practically-applicable depictions of abstract principles, logically related to one another and to their common bases in universal or customary law.[96] Scientifically-ordered and principled American private law was thus provincial law divested of its disorganized and regional character. That divestment was intended by Story to make local law less vulnerable to attacks of parochialism when exported from New England to the Republic at large.[97] He was therefore careful to show in *Commentaries on Conflicts* that Massachusetts' choice-of-law rules were consistent with the jurisprudence of "the most polished and commercial states of Europe", reflected "universality", were in "perfect coincidence" with European doctrine and, when foreign conflicts rules were contradictory or otherwise unsatisfactory, that Massachusetts' choice-of-law doctrine "escaped from those incongruities".[98]

Of similar strategic importance was the fact that Story's self-confessed treatise-writing models were the late-eighteenth-century's spate of continental European legal texts, rather than those of his own, Anglo-American tradition:

> There is a remarkable difference, in the manner of treating juridical subjects, between the foreign and the English jurists. The former, almost universally, discuss every subject with an elaborate, theoretical fullness, and accuracy, and ascend to the elementary principles of each particular branch of the science. The latter, with few exceptions, write what they are pleased to call *practical* treatises, which contain little more than a collection of the principles laid down in the adjudged cases, with scarcely an attempt to illustrate them by any general reasoning, or even to follow them out into collateral consequences. In short, these treatises are but little more than full Indexes to the Reports.[99]

Vand. L. Rev. 431; C.H.S. Fifoot, *Judge and Jurist in the Reign of Victoria* (London: Stevens and Sons, 1959) at 8-30. Watson, *supra* note 9 at 4-17, is also strong on the civilian penchant for axiomatic legal reasoning, and the adoption of that method by Anglo-American jurists.

[95]Story, *supra* note 52, vol. 1 at 305-49, 382-83. See also Story, "Law, Legislation and Codes", *supra* note 92 at 583-85, where he provided twenty-one maxims for the interpretation of codified private law. Compare P. Stein, *Regulae Iuris: From Juristic Rules to Legal Maxims* (Edinburgh: Edinburgh University Press, 1966) at 153-79; F.P. Walton, *The Scope and Interpretation of the Civil Code of Lower Canada* (Montreal: Wilson & Lafleur, 1907) at 80-148; A.H.F. Lefroy, *The Law of Legislative Power in Canada* (Toronto: Toronto Law Book, 1897) at xvii-xlii.

[96]For discussion of the pre-Darwinian paradigm of knowledge in the natural sciences under whose influence Story was operating, see generally I.B. Cohen, *Revolution in Science* (Cambridge: Harvard University Press, 1985) at 273-366; H.N. Jahnke & M. Otte, eds., *Epistemological and Social Problems of the Sciences in the Early Nineteenth Century* (Dordrecht, F.R.G.: D. Reidel Publishers, 1981).

[97]The best modern descriptions of antebellum Massachusetts common law, around which Story constructed national, private-law doctrine, are: W.E. Nelson, *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830* (Cambridge: Harvard University Press, 1975) at 67-174; L.W. Levy, *The Law of the Commonwealth and Chief Justice Shaw* (Cambridge: Harvard University Press, 1957) *passim*; M. de W. Howe, "The Creative Period in the Law of Massachusetts" (1947-50) 69 Proc. Mass. Hist. Soc'y 237. See also Handlin & Handlin, *supra* note 62 at 113-72; Murrin, *supra* note 28.

[98]Story, *supra* note 2 at 118, 121, 354, 282. See also *ibid.* at 22, 107, 116-18, 263, 281-82, 287, 296-97, 323, 326, 350, 423, 431, 437, 459, 462, 508, 516-17, 522.

[99]Story, *Commentaries on Bailments*, *supra* note 84 at viii-ix. See also R.A. Ferguson, "The

Scientism in structure, abstraction in formulation, and internationalism in source material helped Story market New England circuit law in treatise form as unified American common law.

It bears emphasis that the prevailing genre of legal writing among Story's early-nineteenth-century North American contemporaries was exposition on the abridgment model.[100] To the extent that common-law scholars had begun to package legal knowledge in treatise form, their work also differed from Story's monographic publications in its perpetuation of writ or status-based categories of law, and its focus on small corners of special fields like the law of contingent remainders, ejectment, or bridges.[101] As the English historian Theodore Plucknett said two generations ago, when the history of the Anglo-American legal treatise is written, the name of Joseph Story will be conspicuous in it.[102] Story should be accorded that place of privilege because comprehensive generalization and systematization of common-law principles in a homogeneous and all-inclusive Anglo-American treatise literature was a phenomenon of the last quarter of the nineteenth century.[103] Later common-law publicists would extend and purify his approach to legal science.

Story's perception of the relationship of American legal pluralism to political and commercial insecurity, and his unprecedented sense of the centralizing potential of legal literature, has been captured nicely by his leading biographer:

> Codification confronted the problem of domestic [legal] conflict, as did Story in his treatises. But codification was dead and the unifying impact of treatise education was long-range at best ... [I]n Story's opinion the "sanctity of contracts and the security of property" and even "domestic [constitutional] relations" were increasingly in jeopardy ... Story the publicist [therefore] took over where Story the codifier left off.[104]

Story's eight American treatises on private law, collectively, went through over seventy editions. His 1833 public-law treatise, *Commentaries on the Constitution*, saw five editions before 1900, and the most recent version of it was published in 1987![105] If New Yorker David Dudley Field was antebellum America's

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Emulation of Sir William Jones in the Early Republic" (1979) 52 New Eng. Q. 3 especially at 19-25.

[100]Compare Kent, *supra* note 19 and Dane, *supra* note 19; Z. Swift, *A System of the Laws of the State of Connecticut* (New York: Zephaniah Swift, 1795-96); B. Murdock, *Epitome of the Laws of Nova Scotia* (Halifax: Joseph Howe, 1832-33). See generally D.W. Raack, "To Preserve the Best Fruits: The Legal Thought of Chancellor James Kent" (1989) 33 Am. J. Legal Hist. 320 especially at 350-65; A. Johnson, "The Influences of Nathan Dane on Legal Literature" (1963) 7 Am. J. Legal Hist. 28 *passim*; Girard, *supra* note 12 *passim*; White, *supra* note 15 at 81-111.

[101]See generally Simpson, *supra* note 89 at 663-68; P. Miller, *The Life of the Mind in America from the Revolution to the Civil War* (New York: Harcourt, Brace and World, 1965) at 239-69; K. Wallach, "The Publication of Legal Treatises in America from 1800 to 1830" (1952) 45 Law Library J. 136.

[102]T.F.T. Plucknett, *Early English Legal Literature* (Cambridge: Cambridge University Press, 1958) at 19.

[103]Compare D. Sugarman, "Legal Theory, the Common Law Mind, and the Making of the Textbook Tradition" in W. Twining, ed., *Legal Theory and Common Law* (Oxford: Basic Blackwell, 1986) 26; Simpson, *supra* note 89 at 663-68, 670-74; Gordon, *supra* note 94 at 452-58.

[104]Newmyer, *supra* note 7 at 296, 281.

[105]See *ibid.* at 302; K.H. Nadelmann, "Apropos of Translations (Federalist, Kent, Story)" (1959)

one-man private-law codifying machine, Massachusettsan Joseph Story was that era's one-man legal treatise-writing machine.[106] His monographs provided prototypes in scope, form, structure, and ideology for the late-nineteenth-century consummation of the Anglo-American treatise-writing tradition, a zenith that was itself a product of political imperialism and cultural nationalism. Story's legal texts therefore anticipated American federalists' emerging resolve to undercut, in political arenas, states' rights sentiment that threatened the dominance of federal institutions and national market culture.

All of Story's treatises were written at Harvard Law School as a condition of his occupancy of the Dane Professorship from 1829 to 1845. Dane's endowment had stipulated that linkage of pedagogy to scholarship and statesmanship, and Story himself saw the implications of a sparse Anglo-American legal literature for publicly-oriented, academic training in law.[107] College-based instruction, of sorts, in antebellum law could have occurred without private-law texts as teaching tools.[108] But Story conceived of his treatises, the Law School, and the federal courts as sister institutions that would help to cement the Republic, promote uniformity of private law, nurture a nationally-oriented bar, export Massachusetts' legal culture to other regions of the United States, and assist in securing a leading, non-partisan role for scientific lawyers and courts in the consolidation of American domestic policy.[109] Story's legal treatises were thus much more than mere teaching aids or repositories of lawyers' law. They were messianic tracts on a system of economic and political democracy that placed lawyers administering common-law and constitutional protections of private rights at the centre of a national polity closely linked to a consolidated credit and commodities market.

In his masterful study of Story's early Harvard Law School, Kent Newmyer described that School as "the nerve centre" of local legal culture and "the institution most responsible for spreading New England's version of law before

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8 Am. J. Comp. L. 204; J. Story, *Commentaries on the Constitution of the United States, with an Introduction by R.D. Rotunda and J.E. Nowak* (Durham: Carolina Academic Press, 1987).

[106]The description of Field as a one-man codifying machine was borrowed from Gordon, *supra* note 94 at 435. See also M.H. Bloomfield, *American Lawyers in a Changing Society, 1776-1876* (Cambridge: Harvard University Press, 1976) at 59-90; S.N. Subrin, "David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision" (1988) 6 Law & Hist. Rev. 311; Cook, *supra* note 50 at 185-200.

[107]See J. Story, "Review of a Course of Legal Study Respectfully Addressed to the Students of Law in the United States, by David Hoffman, Professor of Law in the University of Maryland", reproduced in *The Miscellaneous Writings*, *supra* note 44 at 223; "Discourse Pronounced upon the Inauguration of the Author, as Dane Professor of Law in Harvard University, August 25th, 1829", *supra* note 45.

[108]Compare J. Kent, "A Lecture, Introductory to a Course of Law Lectures in Columbia College, Delivered February 2, 1824", reproduced in P. Miller, ed., *The Legal Mind in America: From Independence to the Civil War* (Garden City, N.Y.: Doubleday, 1962) 92; D. Hoffman, *A Course of Legal Study: Respectfully addressed to the Students of Law in the United States* (Baltimore: Coale and Maxwell, 1817); T. Walker, *Introduction to American Law, designed as a First Book for Students* (Philadelphia: P.H. Nicklin & T. Johnson, 1837).

[109]See generally R. Story, *The Forging of an Aristocracy: Harvard and the Boston Upper Class, 1800-1870* (Middletown, Conn.: Wesleyan University Press, 1980) at 57-134; Haskins & Johnson, *supra* note 74 at 355-56, 515-17, 554-57, 597-98, 639-40, 645; White, *supra* note 15 at 927-75.

the Civil War and perpetuating it afterwards".[110] Although the prevailing method of legal training was law-office apprenticeships, Harvard's law school did not stand alone in the United States of the 1820s and 1830s as a university-based centre of legal education.[111] Nor was Story's school distinctive among the institutions of antebellum American legal culture in its express emphasis upon civic virtue and legal statesmanship.[112] Harvard was, however, unique in its country-wide recruitment of students and placement of graduates, its location in New England's literary, commercial and legal capital, and in the portable libraries of Story's treatises it distributed across the Republic in the luggage of its alumni. But most important, as Newmyer observed, was the penetrating insight upon which Story recast Harvard Law School as a national institution, namely that the apprenticeship system of law training aggravated centrifugal tendencies in American law and politics. Law-office study taught what most supervising lawyers practised: local and state law. Treatise-oriented, systematic instruction, supported by student access to an eclectic law library and based in a metropolitan university, was Story's response to parochial, politically-fragmenting, and commercially-retrograde legal apprenticeships. Like his eight other major treatises, *Commentaries on Conflicts* became a staple of law-school instruction, in Harvard's foundational property and commercial-law courses.[113]

Location in an urban centre was intended by Story to draw students from Boston's hinterland and spread metropolitan values throughout the interior of the United States in the minds and hearts of returning graduates. A humanistic curriculum offered in a university environment was designed to enable federally-oriented law-school graduates to dominate such diverse aspects of American life as business, politics, education, and the arts. Treatise-based education was meant to provide alumni with a shared culture of language and ideas that would identify them as members of an elite, and equip them to out-lawyer and out-politic their provincially-trained contemporaries. Those techniques of credentializing and exporting Story's Harvard law were supposed to ensconce that law as the unifying institution thought to be required by constitutional nationalists and commercial visionaries alike. It was fitting that Dane, following the example of Charles Viner's mid-eighteenth-century endowment of William Blackstone's Chair in Law at Oxford University, applied the revenues from his pioneering, nationally-oriented *General Abridgment* to a fund that underwrote

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[110]R.K. Newmyer, "Harvard Law School, New England Legal Culture, and the Antebellum Origins of American Jurisprudence" in D. Thalen, ed., *The Constitution in American Life* (Ithaca, N.Y.: Cornell University Press, 1988) 74. See also Warren, *supra* note 34, vol. 1 at 413-543, vol. 2 at 1-94; A.E. Sutherland, *The Law at Harvard: A History of Ideas and Men, 1817-1967* (Cambridge: Belknap Press, 1967) at 92-139.

[111]Compare M.C. McKenna, *Tapping Reeve and the Litchfield Law School* (New York: Oceana Publications, 1986); M.H. Bloomfield, "David Hoffman and the Shaping of a Republican Legal Culture" (1979) 38 Maryland L. Rev. 673; P.D. Carrington, "Teaching Law and Virtue at Transylvania University: The George Wythe Tradition in the Antebellum Years" (1990) 41 Mercer L. Rev. 673.

[112]Compare J.V. Matthews, *Rufus Choate: The Law and Civic Virtue* (Philadelphia: Temple University Press, 1980) at 105-91; D.W. Howe, *The Political Culture of the American Whigs* (Chicago: University of Chicago Press, 1979) at 23-42, 210-37.

[113]Compare Warren, *supra* note 34, vol. 1 at 436-37, vol. 2 at 86-88.

American common-law treatises like *Commentaries on Conflicts*, and subsidized Story's inauguration of a schooled, federalist bar.[114]

Although Watson alluded in *Comity of Errors* to the place of *Commentaries on Conflicts* among Story's other legal texts, he did not situate Story's treatise-writing initiatives in the vanguard of the nineteenth-century revolution in Anglo-American legal epistemology. Nor did he connect Story's programme of authoring national treatises to American political debates about constitutional divisions of power, or link it to the joint professional venture of antebellum legal science and entrepreneurial statesmanship. That revolution in legal epistemology was intimately involved in emerging conceptions of state formation and patrimonial sovereignty, both public and private. Allusions to that kind of political and intellectual context are indispensable to an understanding of Story's goals for American private law of all kinds, especially interstate choice-of-law doctrine.

V. Federalist Values and Choice-of-Law Methodology

One is now obliged to ask how, precisely, Story's interstate choice-of-law rules were informed by the antebellum context of intergovernmental conflicts, interjudicial conflicts, commercial integration, New England imperialism, and professional elitism in which *Commentaries on Conflicts* was written. And what does that interaction of context and text-writing reveal about Story's imperatives for private international law?

Commentaries on Conflicts was released in 1834, one year after Story's *Commentaries on the Constitution* and two years before his *Commentaries on Equity Jurisprudence*.[115] That sequence of publication was, as several reviewers of those books noted at the time, deliberate and telling.[116] *Commentaries on the Constitution* dealt primarily with frictions arising from constitutional delegations of power to federal and state governments, namely intergovernmental conflicts. *Commentaries on Equity Jurisprudence* not only expanded and positivized American equity, but also distinguished sharply between the jurisdiction of

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[114]See N. Dane, "To the President and Fellows of the Corporation of Harvard University" (2 June 1839), reproduced in Story, *supra* note 6, vol. 2 at 3-6. Compare H.G. Hanbury, *The Vinerian Chair and Legal Education* (Oxford: Blackwell, 1958) at 11-39.

[115]*Commentaries on Conflicts* went through eight subsequent editions, the first of which was prepared by Story (J. Story, ed. (Boston: Little, 1841); W.W. Story, ed. (Boston: Little, 1846); W.W. Story, ed. (Boston: Little, 1852); E.H. Bennett, ed. (Boston: Little, 1857); I.F. Redfield, ed. (Boston: Little, 1865); E.H. Bennett, ed. (Boston: Little, 1872); M.M. Bigelow, ed. (Boston: Little, Brown, 1883); (New York: Arno Press, 1972)). It was also republished twice in Britain within a year of its release (London: R.J. Kennett, 1834 and Edinburgh: T. Clark, 1835), and later produced in two Spanish translations (*Comentarios sobre el conflicto entre las leyes extranjeras y patrias*, trans. H.S. Gabilondo (Mexico City: Castillo Velasco, 1880) and *Comentarios sobre el conflicto de las leyes*, trans. C. Quiroga (Buenos Aires: F. Lajouane, 1891)). There are references in the Story literature to translation of *Commentaries on Conflicts* into French and German, but I have not been able to verify those claims. It was, however, reviewed deferentially in continental European legal periodicals.

[116]Compare (1834) 11 Am. Jur. & L. Mag. 365; (1835) 17 Am. Q. Rev. 303; (1840) 67 London Q. Rev. 32; (1841) 5 Jur. (O.S.) 562; (1834) 4 Legal Examiner & L. Chronicle 512; (1841) 4 Law Rev. 326; (1852) 2 Edinburgh L.J. 428. See also Story, *supra* note 6, vol. 2 at 167-73.

courts of equity and that of courts of law, with a view to minimizing intercourt conflicts on that frontier. Story was familiar with the long English experience of overlaps of law with equity that gave rise to the popular choice-of-law rule that equity should prevail in cases of conflict. *Commentaries on Conflicts* rounded out Story's treatments of choice-of-forum and intergovernmental conflicts-of-law issues by addressing interstate choice-of-law questions.

Commentaries on Conflicts admittedly had professional and narrowly-pedagogical vocations. But that text ultimately had a much grander mission. Written in a period of increasingly virulent states'-rights agitation that old-order federalists like Story regarded as an acute threat to the American Republic, *Commentaries on Conflicts* should be read together with *Commentaries on the Constitution*, and is best characterized as a heuristic, constitutional essay on the correlative scope of private and public sovereignty. As Story said repeatedly, his choice-of-law rules were designed to regulate the domestic behavior of states and nations, and thereby secure the mixed private rights of citizens operating in national or international markets that transcended political boundaries.

Georgia legislated in 1829 in flagrant violation of the United States' treaties with the Cherokee Nation, state courts regularly were refusing to enforce federal law, South Carolina convened a state assembly in 1832 to nullify national tariffs, and Virginian politicos were arguing with new intensity that because the Constitution was a compact among sovereign states it should be enforced by state legislatures rather than by the Supreme Court. Behind that institutional manœuvring lay larger issues related to international trade, slavery, the federal government's role in western development, and internal-improvements policy. In any case, that agitation scandalized Story, and drove him to expand his campaign against states' rights from constitutional venues into the arena of private international law.[117] Much as he would have liked to interpret states out of existence in division-of-powers litigation, he plainly could not do so. And no matter how broadly Story construed federal courts' admiralty, diversity and commerce jurisdictions, a core of local law applied by discordant state courts persisted. Since developing inland commerce made periodic conflicts among those residual bodies of local law increasingly likely, the technical issue that nascent American choice-of-law doctrine faced was three-fold. How could state courts adjudicating non-diversity conflicts cases be persuaded to compromise the sovereignty of their local law and apply another state's norms to preserve acquired private rights? How could the choice-of-law principles applied by state courts to select out-of-state law be rendered uniform nationally? And, how were federal courts exercising diversity jurisdiction on local-law issues to choose among competing bodies of state law? Expressed in an older conflict-of-laws language, Story's challenge was to articulate choice-of-law criteria that would displace choice-of-forum considerations as the governing factors in inter-

[117]See *e.g.* J. Story, "Lecture on the Science of Government, delivered before the American Institute of Instruction, August, 1834", reproduced in Story, *The Miscellaneous Writings*, *supra* note 44 at 147. See generally R.E. Ellis, *The Union at Risk: Jacksonian Democracy, States' Rights, and the Nullification Crisis* (New York: Oxford University Press, 1987) *passim*; J.J. Gibbons, "Federal Law and the State Courts, 1790-1860" (1984) 36 Rut. L. Rev. 399; White, *supra* note 15 at 485-594.

state conflicts cases. Ultimately, his conflicts rules were intended to be both grants of judicial jurisdiction and guidelines for exercising that power.

Similar issues were, of course, presented in the international setting. *Commentaries on Conflicts* was itself sub-titled "Foreign and Domestic", and Story referred to interstate and international conflicts interchangeably in that text. Recall, however, that Story thought that interstate choice-of-law doctrine was of "more interest and importance [to no part of the world] than to the United States", and that *Commentaries on Conflicts* was written under an academic endowment to consolidate American common law.[118] Situating a domestic, private-law problem in the context of international practice and the law of nations was partly a rhetorical flourish on Story's part, intended to add cachet and political acceptability to choice-of-law rules likely to be resisted by egocentric state courts.[119] Story had limited practical interest in transnational private-law discord, presumably because international legal pluralism did not present a direct threat to New England's commercial aspirations or federalists' constitutional nationalism. He was concerned about consolidating the United States' federal gains of the late-eighteenth century, rather than about promoting American imperialism through doctrines like manifest destiny. Story also knew very well that neither the Spanish American settlements nor the British North American colonies were significant overland trading partners of the United States in the antebellum period, and that its overseas trade with the West Indies and Europe was largely regulated by international maritime law.[120]

Commentaries on Conflicts is a five-hundred-and-fifty-seven-page monograph, in seventeen chapters. Its first two sections provide introductory remarks

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[118]Story, *supra* note 2 at 9. See also, above, text accompanying notes 107-14.

[119]Although Story was fond of adulation, the international adoption of his choice-of-law rules is best regarded as a welcome side effect of *Commentaries on Conflicts*. See *e.g. Hard* v. *Palmer* (1860), 20 UCQB 208 at 212 (C.A.), Robinson C.J. ("In Story's *Conflict of Laws* ... this point is more particularly treated than I have found it elsewhere"); *Warrener* v. *Kingsmill* (1851), 8 UCQB 407 at 425, Burns J. ("I accept the language of Mr. Justice Story"); *R.* v. *Wright* (1878), 17 N.B.R. 363 at 371, 375 (S.C.), Allen C.J. ("This doctrine is entirely sustained in subsequent cases ... Mr. Justice Story ... thus lays down the doctrine"). For use of *Commentaries on Conflicts* as a British North American teaching tool, see W.R. Riddell, *The Legal Profession in Upper Canada in its Early Periods* (Toronto: Law Society of Upper Canada, 1916) at 48; Mowat, *supra* note 18 at 5. For the importance of *Commentaries on Conflicts* to early Canadian academic writing on private international law, see Note, "Effect of Foreign Judgments" (1860) 6 Upper Can. L. J. 120; W.H. Trueman, "Extra-Territorial Jurisdiction" (1899) 19 Can. L.T. 185; W.W. Vickers, "Jurisdiction Founded on Domicile" (1899) 19 Can. L.T. 285. See also Watson, *supra* note 9 at 116 note 9; H. Valladão, "The Influence of Joseph Story on Latin-American Rules of Conflict of Laws" (1954) 3 Am. J. Comp. L. 27; Kegel, *supra* note 8 at 47-64.

[120]There are two references to Canadian trade in *Commentaries on Conflicts* (Story, *supra* note 2 at 242, 469), and none to Spanish American commerce. And none of the conflicts cases adjudicated by Story involved Canadian or Spanish American elements. With respect to overseas commerce, the traditional rule was that the applicability of international maritime law was determined geographically by the ebb and flow of the tide. By the mid-nineteenth century, the Supreme Court of the United States had sufficiently blunted the rule that federal courts' admiralty jurisdiction extended to commerce on such fresh waters as the Great Lakes, the Erie-Hudson system, and the Ohio-Missouri-Mississippi network. See *Peyroux* v. *Howard*, 32 U.S. (7 Peters) 324 (1833); *Propeller Genessee Chief* v. *Fitzhugh*, 53 U.S. (12 Howard) 443 (1851). See generally M. Conover, "The Abandonment of the 'Tidewater' Concept of Admiralty Jurisdiction in the United States" (1958) 38 Or. L. Rev. 34.

and general maxims, and the next two chapters deal with the connecting factor of domicile and the acquisition of juridical personality through the law of capacity. The following nine chapters, the core of Story's interstate choice-of-law scheme, are structured around legal relationships including contracts, property, testaments, and agency. The last four chapters of *Commentaries on Conflicts* deal with the adjectival or judicial law of jurisdiction, foreign judgments, and evidence. That construction of conflict-of-laws doctrine around legal relationships was a comparatively novel technique in the second quarter of the nineteenth century. Most of the European texts from which Story worked, and even the interstate conflicts cases in his *Digest of Law*, were organized into categories like personal, real, and mixed laws.[121] Story's structural reliance on private-law relationships was consistent with his abiding concern about personal sovereignty and the security of contractual and proprietary rights.[122] A similarly distinctive feature of *Commentaries on Conflicts* is that its author did not distinguish between statutory and common law. Story perceived all forms of official law to be will-based, which led to an easy acceptance by him that legislation and custom varied from jurisdiction to jurisdiction in accord with local experience and policy. Because Story did not regard common-law rules as immutable projections of natural law, there was no reason for him to treat those norms differently from popularly-willed legislation.

Commentaries on Conflicts is prefaced by a four-page biographical dictionary "of some of the more important authors whose works have been cited" that includes forty-two European scholars and three Anglo-American jurists. Story's justification for reliance upon continental conflicts texts echoed his prefatory remarks in *Commentaries on Bailments*:

> The jurists of continental Europe have with uncommon skill and acuteness endeavoured to collect principles, which ought to regulate this subject among all nations ... In the preparation of these Commentaries [on Conflicts] I have availed myself chiefly of the writings of [Achille] Rodemburg [*sic*], the Voets (father and son) [Paul and John], [Louis] Froland, [Louis] Boullenois, [Jean] Bouhier, and [Ulricus] Huberus, as embracing the most satisfactory illustrations of the leading doctrines. My object has not been to engage in any critical examination of the comparative merits or mistakes of the different commentators; but rather to gather from each of them what seemed most entitled to respect and confidence. ... My object is ... to use the works of the civilians, to illustrate, confirm, and expand the doctrines of the common law, so far at least, as the latter have assumed a settled form.[123]

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[121]Compare Nadelmann, ed., *supra* note 21; Henry, *supra* note 19; Livermore, *supra* note 19. See generally H.P. Glenn, *La capacité de la personne en droit international privé français et anglais* (Paris: Dalloz, 1975) at 140-51.

[122]See generally Story, *supra* note 2 at 11-18. Compare D. Kennedy, "The Structure of Blackstone's Commentaries" (1978) 28 Buffalo L. Rev. 205; P. Stein, *Legal Evolution: The Story of an Idea* (Cambridge: Cambridge University Press, 1980) at 69-98; G.E. White, *Tort Law in America: An Intellectual History* (New York: Oxford University Press, 1980) at 20-113.

[123]Story, *supra* note 2 at 27, 11 note 2, 17. See also, above, text accompanying note 55. Compare Story, *Commentaries on Bailments*, *supra* note 84 at viii-ix. Story was not a compulsive Europhile. He picked and chose more or less deliberately among continental sources:

> Writings [of continental conflicts scholars] are often of so controversial a character, and abound with so many nice distinctions (not very intelligible to Jurists of the school of

A complete list of civilian writers on interstate conflicts cited by the United States' first two choice-of-law treatise writers, Story and Livermore, would include about ninety names. Continental legal literature was generally available in leading American law libraries of the late-colonial and early-national periods, and was readily accessible to Story in Cambridge.[124] Perhaps most importantly, civil-law sources on a variety of topics were used regularly in American and English courts of the day, and had thus acquired currency in the common-law bar.[125] Like many other leading members of that bar, Story had well-developed linguistic skills in Latin, French and English, and relied upon friends to translate material to and from German. In a sense it was therefore natural that European texts should have been fixed upon as models of form and substance when Anglo-American jurists like Story commenced, in the early-nineteenth century, the production of indigenous treatises in emerging fields of commercial law like bailments, conflicts of law, agency, and partnership.[126]

But more than unaffected international sharing and modelling was at work, at least in Story's scholarship. His consent-based theory of sovereignty, and his enlightenment-oriented conception of the authority of reason, placed a premium on the demonstration of broad North Atlantic acceptance of particular choice-of-law rules. More prosaically, scientism in form, toward which even pre-codification European jurists had aspired for generations, and cosmopolitanism in source material were enlisted by Story to help package New England's conflicts law he managed on circuit as national choice-of-law doctrine. The "Index

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> the Common Law) and with so many theories of doubtful utility, that it is not always easy to extract from them such principles, as may afford safe guides to the judgment (Story, *supra* note 2 at vi).

See also *ibid.* at 10, 56, 57, 62, 128, 144, 233, 390, 399, 445, 484, 516. See generally M.H. Hoeflich, "John Austin and Joseph Story: Two Nineteenth Century Perspectives on the Utility of the Civil Law for the Common Lawyer" (1985) 29 Am. J. Legal Hist. 36 especially at 56-76.

[124]See generally H.A. Johnson, *Imported Eighteenth Century Law Treatises in American Libraries, 1700-1799* (Knoxville: University of Tennessee Press, 1978) especially at ix-xxvi, 59-64; Warren, *supra* note 34, vol. 2 at 77-78, 81; C. Sumner, *Supplement to the Catalogue of the Law Library of Harvard University* (Cambridge: Brown, Shattuck and Co., 1835) *passim*; "A Catalogue of the Law Library of Harvard University" (1841) 26 Am. Jur. & L. Mag. 254.

[125]See generally D.R. Coquillette, "Justinian in Braintree: John Adams, Civilian Learning, and Legal Education, 1758-1775" in Colonial Society of Massachusetts, ed., *supra* note 27 at 359 *passim*; H.W. Bryson, "The Use of Roman Law in Virginia Courts" (1984) 28 Am. J. Legal Hist. 135 *passim*; C.P. Rodgers, "Continental Literature and the Development of the Common Law by the King's Bench: c.1750-1800" in V. Piergiovanni, ed., *The Courts and the Development of Commercial Law* (Berlin, F.R.G.: Duncker and Humblot, 1987) 161 *passim*. See also G.B. Baker, "The Reconstitution of Upper Canadian Legal Thought in the Late-Victorian Empire" (1985) 3 Law & Hist. Rev. 219 at 239-62.

[126]See generally Simpson, *supra* note 26 at 250-57; Hoeflich, *supra* note 123; P. Stein, "The Attraction of the Civil Law in Post-Revolutionary America" (1966) 52 Va. L. Rev. 403; M.H. Hoeflich, "Roman and Civil Law in American Legal Education and Research Prior to 1930: A Preliminary Survey" [1984] U. Ill. L. Rev. 719 at 723-30; M.H. Hoeflich, "Transatlantic Friendships and the German Influences on American Law in the First Half of the Nineteenth Century" (1987) 35 Am. J. Comp. L. 599; C.P. Rogers III, "Scots Law in Post-Revolutionary and Nineteenth-Century America: The Neglected Jurisprudence" (1990) 8 Law & Hist. Rev. 205; R. Batiza, "Sources of the Field Civil Code: The Civil Law Influences on a Common Law Code" (1986) 60 Tulane L. Rev. 799; R.J. Rabalais, "The Influence of Spanish Laws and Treatises on the Jurisprudence of Louisiana: 1762-1828" (1982) 42 La. L. Rev. 1485.

to Cases Cited" of *Commentaries on Conflicts*, which lists about three-hundred United States conflicts decisions and another two-hundred English ones, shows that Story had a good supply of Anglo-American law upon which to build. But he thought those common-law sources were too often "loose and scattered", or "provincial and unusual".[127] It was none the less important for Story to compile those cases exhaustively, since his conflicts treatise was intended as a register of interstate and international custom.

The basis for Story's interstate choice-of-law rules was provided in *Commentaries on Conflicts*' general maxims. Citing Livermore's *Dissertations* and the 1816 decision of Massachusetts Chief Justice and Harvard law professor Isaac Parker in *Blanchard* v. *Russell*, Story announced that:

> the true foundation, on which the administration of [private] international law must rest, is, that the rules, which are to govern, are those, which arise from mutual interest and utility, from a sense of the inconveniences, which would result from a contrary doctrine, and from a sort of moral necessity to do justice, in order that justice may be done to us in return.[128]

That statement of private-law policy was preceded by three "axioms" of public international law:

> every nation possesses an exclusive sovereignty and jurisdiction within its own territory; ... no state or nation can, by its laws, directly affect, or bind property out of its own territory, or persons not resident therein; [and,] ... whatever force and obligation the laws of one country have in another, depends solely upon the laws, and municipal regulations of the latter, that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent.[129]

The open-ended character of Story's third axiom prompted Watson to write *Comity of Errors*. For Huber, who was cited by Story again in connection with that maxim, forum courts had little discretion in their application of foreign law, and were required to act consistently out of "strict" comity to enforce extraterritorial norms not otherwise binding in their territory.[130] Under Huber's comity principle "Tobago", as Reese would have said, "ruled the world".

Watson demonstrated persuasively in *Comity of Errors* that Story used the principle of comity in a different manner than that in which it was deployed by earlier conflicts theorists like Huber.[131] But he did so by reviewing the twenty pages of *Commentaries on Conflicts* that deal with a subject Story thought "properly belongs to a general treatise upon public law", without addressing directly the other five-hundred odd pages of his text that treat private international law.[132] The bulk of that treatise is comprised of approximately seventy

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[127]Story, *supra* note 2 at v, 121. See also White, *supra* note 15 at 858-64, who contrasted the disorganized character of the United States Supreme Court's interstate conflicts decisions rendered between 1815 and 1835 with the structural and doctrinal rigour of *Commentaries on Conflicts*.

[128]Story, *ibid.* at 34. See also *ibid.* at 4-5; *Blanchard*, *supra* note 36.

[129]Story, *ibid.* at 19, 21, 24.

[130]See Watson, *supra* note 9 at 7-10.

[131]See *ibid.* at 1-26.

[132]Story, *supra* note 2 at 23. Watson's treatment of Story's individual choice-of-law rules is limited to a summary analysis of the rule that the validity of a contract is determined by the law of the place where the contract was made, another of the law of capacity, and a third brief discussion

choice-of-law rules.[133] And it was the "municipal regulations" of each state or nation expressed in black-letter conflicts rules, rather than maxims of public international law, that were to determine on a case-by-case basis when and how much out-of-state law was to be applied.

Explicit discussions of comity, and the degree of discretion allowed forum courts by that public-international-law principle to apply foreign law, are few and far between in *Commentaries on Conflicts* after page thirty-eight of a much longer text.[134] Story wrote, for example, on the issue of juridical capacity that:

> Laws purely personal, whether universal or particular, extend themselves every where; that is to say, a man is every where deemed in the same state, whether universal or particular, by which he is affected by the law of his domicil ... Whenever inquiry is made as to the state and condition of a person, there is but one judge, that of his domicil, to whom the right appertains to settle the matter.[135]

Similarly, on the identity of the body of local law applicable to determinations of the validity of marriage, Story stipulated that "marriage is to be decided by the law of the place, where it is celebrated. If valid there, it is valid every where. It has a legal ubiquity of obligation. If invalid there, it is equally invalid every where"[136]. On the question of the law applicable to the validity of divorces, Story specified that "a divorce, regularly obtained according to the jurisprudence of the country, where the marriage was celebrated, and where the parties are domiciled, will be held a complete dissolution of the matrimonial contract in every other country".[137] In none of those three representative choice-of-law rules did Story mention a reservation based on repugnance or prejudice to local interests.

The issue that requires attention is therefore not so much whether or how antebellum American choice-of-law writers like Story came to misstate an early-modern European maxim of public international law upon which they purported to rely. The real question is why Story prefaced his choice-of-law treatise with a comity maxim "which constitute[s] the basis, upon which all reasonings on the subject must necessarily rest" that obliged forum courts to apply out-of-state laws only "so far as they do not prejudice the power or rights of other governments, or of their citizens", but then enumerated six-dozen choice-of-law

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of the rule that power over moveable property is governed by the law of the domicile of its owner. See Watson, *ibid.* at 23, 42-43, 93-95.

[133]See Story, *ibid.* at 96-99, 103-04, 112, 160-62, 168, 201-04, 213-19, 246, 254, 272, 275, 293, 307, 311, 334, 340, 357, 358, 363, 370, 378, 380, 383, 391, 398, 402-04, 410 414, 419, 432, 450, 463, 466, 470, 476, 481, 483, 492, 495, 499, 508, 516, 524, 527. It is important to locate Story's rules in his treatise with these pinpoint citations, since Story did not highlight his rules or otherwise distinguish comparative textual material from justification or norms.

[134]But see *ibid.* at 68, 95, 203, 253, 289, 346, 348, 421, 439, 452, 500.

[135]*Ibid.* at 51. See also *ibid.* at 65: "The ground, upon which this rule has been generally adopted, is doubtless that suggested by Rodemberg [*sic*], the extreme inconvenience, which would otherwise result to all nations from a perpetual fluctuation of capacity, state, and condition, and upon every accidental change of place or moveable property."

[136]*Ibid.* at 103-04. Story proceeded to list a series of exceptions to that rule, notably situations involving incest, polygamy and shams, but none of those exceptions is relevant to the general point that his rule allows little discretion to courts applying it.

[137]*Ibid.* at 168-69.

rules that are uncompromising in their applicability and typically allow forum courts little discretion to ignore prejudicial foreign laws.[138]

Two metaphors that can be attributed to Story with interpretive licence, help to explain the apparent discontinuity between his maxims of public international law and his black-letter choice-of-law rules.[139] In Story's view, individuals enjoyed inherent sovereignty over their lives, liberty, and property. Through contractual or political negotiation, portions of that personal sovereignty could be given to other individuals or to the state. Devolutions of private autonomy therefore occurred in every contractual exchange, and also happened when the former American colonists assigned collectively, through the Constitution, aspects of their personal sovereignty to the newly-created United States. Story thought that democratic nation enjoyed delegated and strictly-limited sovereign powers as an agent of its citizens. With regard to other nations, the United States could also claim sovereign status. Unlike its citizens, the United States enjoyed no inherent sovereignty *vis-à-vis* other nations, but only those powers conveyed to it by its citizenry in an express social contract. The constitutionally-circumscribed sovereignty of the United States and other liberal states was thus understood by Story by analogy to the model he used to describe the autonomy of individuals. Extrapolation from individuals to the nation-state was Story's first metaphoric leap in his description of interuational sovereignty.[140] In Story's mind, consensualism assumed the same central role in interstate and international relations that contractualism occupied in interpersonal relations.

A second illuminating image, which Story not only admired patriotically but with which he identified personally, is that of the participation of sovereigns in constitutional conventions.[141] Sovereign colonists, through their delegates in Philadelphia, negotiated the social compact called the United States' Constitution. For Story, the formulation of international choice-of-law rules, according to which states waived a portion of their otherwise exclusive jurisdiction over legal controversies within their territory, was similar to proceedings in a constitutional convention. States ceded a portion of their sovereignty to courts administering principles of private international law to secure, in exchange, protection of the mixed private rights of their citizens doing business across political frontiers. Choice-of-law doctrine, like other aspects of the law of nations, therefore

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[138]*Ibid.* at 19, 30.

[139]On the prevalence and perceived utility of political fictions in early-American debates about sovereignty, see generally E.S. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (New York: W.W. Norton, 1988).

[140]Story made a similar identification of the sovereignty of business corporations with that of individuals in cases like *Dartmouth College*, *supra* note 72, when he was required to determine the nature and scope of corporate powers. See generally J.W. Hurst, *The Legitimacy of the Business Corporation in the Law of the United States, 1780-1970* (Charlottesville: University Press of Virginia, 1970) at 13-57.

[141]Story was a delegate to the two-month Massachusetts Constitutional Convention of 1820, necessitated by the District of Maine's separation, that met to revise the state constitution of 1780. On the American sources of Story's social-compact theory, see generally T.W. Tate, "The Social Contract in America, 1774-1787: Revolutionary Theory as a Conservative Instrument" (1965) 22 Wm. & Mary Q. (3d) 375.

constituted a supranational constitution that simultaneously limited the authority of forum courts faced with interstate conflicts, empowered those courts to apply extraterritorial private law, and told them how to exercise that extraordinary jurisdiction.

The contractualism of sovereign states sitting in a constitutional convention to negotiate conflicts rules of universal application founders as a metaphor on the realities that no such conference occurred and that no constitutional text of choice-of-law provisions was produced. But Story may be deemed to have persisted with that analogy by adding imagery. Sovereign states had no inherent obligation to yield to the laws of one another, and they could not be commanded to do so. By the same token, no state had an intrinsic right to give its laws extraterritorial effect. Those were Story's conditions of international sovereignty. The express or tacit consent of nations was therefore required for domestic laws to have extraterritorial force.[142] That crucial acquiescence to particular choice-of-law principles was found by Story in the practice of nations, the acknowledgement by publicists of customary conflicts norms, and "by silent adoption [of] a generally-connected system".[143] Much like the signatories of the United States' Constitution, nations acceded to a circumscription of their juristic sovereignty in conflicts matters to provide institutional safeguards for the private rights of their citizens. But because choice-of-law doctrine "owes its origin and authority to the voluntary adoption and consent of nations", and since that circumscription of sovereignty was tacit rather than explicitly-recorded by signatures on a constitutional text, Story was required to be cautious about assuming voluntary assent to the "annihilation of sovereignty" entailed by the application of another state's local law: "[i]n the silence of any positive rule, affirming, or denying, or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy, or prejudicial to its interests".[144] The image of an international constitutional convention of sovereign states was so powerful in Story's mind, and the fiction of tacit signatures on a text of state conflicts practice so tenuous, that he was obliged to specify circumstances in which states would not be deemed to have surrendered their autonomy to choice-of-law principles that would compromise local norms. Tacit consent could hardly be found in the presence of contrary local legislation, nor could it easily be assumed in the face of repugnance to local interests.

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[142]See Story, *supra* note 2 at 8, 9, 23-24. See generally W.W. Cook, "The Jurisdiction of Sovereign States and the Conflict of Laws" (1931) 31 Colum. L. Rev. 368; H. Steinberger, "Sovereignty" in Max Planck Institute for Comparative Public Law and International Law, ed., *Encyclopedia of Public International Law*, vol. 10 (Amsterdam: Elsevier Science Publishers B.V., 1987) at 397, 403-08; G.D. Danilenko, "The Theory of International Customary Law" (1988) 31 Ger. Y.B. Int'l L. 9.

[143]Story, *ibid.* at 4, 25, 32, 36. See also H. Wheaton, *Elements of International Law: With a Sketch of the History of the Science* (Philadelphia: Carey, Lea, and Blanchard, 1836).

[144]Story, *ibid.* at 37. Compare F.S. Ruddy, *International Law in the Enlightenment: The Background of Emmerich de Vattel's "Le Droit Des Gens"* (Dobbs Ferry: Oceana Publications, 1975) at 33-216; H.-U. Scupin, "History of the Law of Nations 1815 to World War I" in Max Planck Institute for Comparative Public Law and International Law, ed., *supra* note 142, vol. 7 at 179; S. Jay, "The Status of the Law of Nations in Early American Law" (1989) 42 Vand. L. Rev. 819.

Sovereign states' motives for attending an international constitutional convention on choice-of-law issues were, however, different from the colonists' incentives to negotiate the United States' Constitution. Nation-states participated in Story's imaginary convention as agents of their citizens, authorized to compromise national independence in specific instances of interstate conflict to secure extraterritorial protection for the private rights of their citizens. Without such mutual concessions, represented in black-letter choice-of-law rules, "the most serious mischiefs and most injurious conflicts would arise", "there would be an utter confusion of all rights", and governments would have failed to act for their constituents from "an enlarged sense of national duty".[145] The mutual acknowledgment by states of Story's first two principles of international law, that all nations possess exclusive sovereignty and that none can bind persons or property beyond its territory, was a precondition of further mythical negotiations among those states on the issue of extraterritorial legal authority. But once the equality and independence of states was mutually recognized, the welfare of citizens operating across state and national frontiers dictated that agreement should be explicitly, tacitly, or silently reached among sovereign states to protect the property and liberty interests of those individuals through widely-adopted choice-of-law rules permitting extraterritorial application of municipal law in enumerated circumstances. That is the sense in which Story's third tenet of international law "flows" from his other two maxims.[146] The comity principle was an articulation of Story's understanding of the process of customary international law. It provided a test to determine which choice-of-law rules individual states should be deemed silently or tacitly to have accepted. In stark contrast to Huber, Story did not think there were choice-of-law principles that all states were bound to apply in conflicts situations.

The narrow point of difference between Story and Huber is that Huber regarded the ability of one state to have its laws applied in another as an incident of statehood, whereas Story regarded the ability of a state to resist applications of foreign law in its territory and to bargain with other states about the structure of choice-of-law rules as the relevant incidents of statehood. Expressing that contrast otherwise, Huber's choice-of-law doctrine is subsumed into public international law, while Story's rules comprise the independent category of private international law. That new category was necessary because Story's conception of statal and national sovereignty prevented him from admitting directly the universality of private rights. Comity was not a choice-of-law rule or method for Story, but a gauge of the voluntariness of a sovereign state's submission to another state's private law. Neo-classical political economy, and the American constitutional tradition, rendered him incapable of embracing a law

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[145]Story, *ibid.* at 5. See also *Harvey*, *supra* note 39 at 757, where Story said that:

> the common and spontaneous consent of nations, therefore, established [the rule that interstate succession to moveable property is governed by the law of the deceased's domicile] from the noblest policy, the promotion of general convenience and happiness, and the avoiding of distressing difficulties, equally subversive of the public safety and the private enterprise of all.

[146]Watson, *supra* note 9 at 3-8, was correct (at least in a narrow sense) to note that those three maxims belong to the *ius gentium* rather than the *ius civile*. Each of them has to do with the character of national sovereignty, a prerogative of public international law.

of nations built on anything other than consent. But Story was similarly indisposed to concede that individuals' inherent rights to life, liberty, and property should necessarily be subject to the vicissitudes of despotic out-of-state sovereigns merely because those citizens' meritorious commercial activities crossed political frontiers. Nor was it entirely helpful that Story's conception of state sovereignty was derivative of his idea of private autonomy. His comity maxim of international law became an uncomfortable aspect of doctrine precisely because it was a discursive arena in which popularly-willed political sovereignty collided head-on with divinely and experientially-given private autonomy. It also collided with the prevailing phenomenon of non-democratic states.

It bears repetition that, for Story, comity was not a value or policy relevant to the content of choice-of-law rules. By contrast, in Huber's scheme of interstate conflicts doctrine, comity was a substantive principle that provided an all-embracing rule which made detailed choice-of-law rules superfluous.[147] Huber's programme for private international law was thus capable of description in a mere fifteen paragraphs, whereas Story's treatise was forty times that length. In any case, as the American Law Institute has recently shown, a range of values has animated judicial practice and juristic commentary in Anglo-American conflicts matters over time. Comity, discretionary or mandatory, has not been a popular principle in that choice-of-law tradition.[148] Focussing as he did on the capacity of interstate conflicts rules to circumscribe the sovereignty of states in the interest of securing the mixed rights of individuals transacting across political boundaries, Story must be said to have valued safeguarding private expectations before other policies that could crystallize in choice-of-law doctrine. Stated otherwise, his interstate conflicts rules were based on goals like the protection of vested rights and the interstatal promotion of purposes underlying particular fields of local law.

Although no state or nation could be made to embrace Story's choice-of-law rules, he hoped that the authority of reason, the example of broad state practice, jurisprudential utility, and mutual commercial convenience would combine to produce general adoption of his rules. That subscription, based on reason, enlightened self-interest and ultimately upon custom, may be deemed to have been regarded by Story as analogous to the ratification by American state legislatures of the draft Constitution. Suasion, rather than command-and-control sanctions, was the technique Story used to commend his rules to state courts. His commitment to sovereignty prevented him from finding a nonconsensual duty in public international law for states to follow his rules. By contrast, Huber found that obligation in axiomatic logic and Roman tradition. Story was therefore required to manipulate earlier, natural-law approaches to the universality of

[147]Compare Watson, *ibid.* at 16.

[148]The A.L.I.'s 1971 summary of Anglo-American choice-of-law policies includes: needs of the interstate and international systems; relevant policies of the forum state; policies of other interested states; protection of justified expectations; policies underlying a particular field of law; predictability and uniformity of result; ease of determination and application of the relevant law; and, reciprocity of foreign courts. See *Restatement (Second) of Conflicts, supra* note 3, vol. 1 at 13-17. See also H.F. Goodrich, "Public Policy in the Law of Conflicts" (1930) 36 W. Va. L.Q. 156; E.E. Cheatham & W.L.M. Reese, "Choice of the Applicable Law" (1952) 52 Colum. L. Rev. 959.

private rights, represented in the principle of mandatory comity, to make them compatible with popular sovereignty. As Watson and others have shown, Huber's scheme of private international law probably had to be Story's starting-point because early-American interstate conflicts jurisprudence was based almost exclusively on Huber's writings: "part of Story's success was undoubtedly due to his apparent acceptance of Huber".[149] Reconciliation of natural-law and Cartesian inheritances with the dictates of neo-classical political economy was not a challenge uniquely encountered by Story in his work on interstate choice-of-law issues. That conciliatory task presented itself on numerous fronts of private and constitutional-law scholarship on which he worked.[150] Story hoped that rational consensus would produce a more broadly-based *jus commune* of private-international rights than the authoritative dictates of naturalism, logic, and appeals to Roman legal culture had been able to achieve. His interstate choice-of-law rules can be characterized as a disguised *lex mercatoria.*

VI. Choice-of-Interstate-Contract Law

Story's "favourite department" of domestic legal studies was commercial law, and he wrote extensively about such special contracts as mandate, partnership, loan, insurance, charterparty, hire, and bailment.[151] Conflicts doctrine applicable to interstate contracts therefore offers a suitable case study of the interplay of prudence, politics, and principle in *Commentaries on Conflicts.* Perhaps because Watson was most interested in the interstate law of capacity, he emphasized Story's treatment of slavery questions. But, as *Comity of Errors* properly notes, "slavery occupies very little space" in *Commentaries on Conflicts.*[152] Story's rules for choice-of-interstate-contract law, the scope and sources of which Watson canvassed summarily, are much more revealing of the roles of sovereignty and vested rights in *Commentaries on Conflicts.*[153]

Story's only treatment of contract law at large was a substantial entry prepared for Francis Lieber's *Encyclopedia Americana.*[154] His son, William, who

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[149]Watson, *supra* note 9 at 72. *Comity of Errors* is strong on pre-Story American reliance upon Huber's interstate choice-of-law methodology. Watson showed that Huber was the preferred authority in early-American interstate conflicts litigation, and that courts generally applied a more accurate version of Huber's comity axiom than the one utilized in *Commentaries on Conflicts.* See *ibid.* at 2-3, 16, 31, 34-37, 49-54. See also Story, *supra* note 2 at 37 note 3; K.H. Nadelmann, "Some Historical Notes on the Doctrinal Sources of American Conflicts Law" in H.G. Isele, ed., *Ius et Lex: Festgabe Zum 70. Geburststag von Max Gutzwiller* (Fribourg, F.R.G.: Basel, Helbing, and Lichtenhahn, 1959) 263; Weinstein, *supra* note 10.

[150]Compare [J. Story], "Natural Law" in Lieber, ed., *supra* note 92, vol. 9 at 150 and Story, *supra* note 2 at 71. See generally White, *supra* note 15 at 145-54; Horwitz, *supra* note 26 at 12-27; E.D. Dickinson, "Changing Concepts and the Doctrine of Incorporation" (1932) 26 Am. J. Int'l L. 239.

[151]See *e.g.* Story, *supra* note 35; Story, *Commentaries on the Law of Partnership, supra* note 84; Chitty, *supra* note 43; Story, *Commentaries on the Law of Bills of Exchange, supra* note 84; Story, *Commentaries on the Law of Promissory Notes, supra* note 84; Abbott, *supra* note 85; Story, *Commentaries on Bailments, supra* note 84.

[152]Watson, *supra* note 9 at 40.

[153]*Supra* note 132.

[154][J. Story], "Contract" in Lieber, ed., *supra* note 92, vol. 3 at 503. See generally Hogan, *supra* note 92.

would later update several of his father's treatises, published the first comprehensive American contracts text in 1844, and the old judge's influence is readily detectable in that treatise.[155] Most revealing of Story's conception of basic contract principles is chapter eight, "Foreign Contracts", of *Commentaries on Conflicts*. Although nominally structured around conflicts doctrine, that long essay deals primarily with theoretical issues in municipal contract law and almost incidentally with choice-of-law rules. That structural feature of Story's analysis of foreign contracts is, in itself, suggestive of the values that underlay his choice-of-interstate-contract rules. Those rules were extrapolated from Anglo-American contract law's emerging mandate to structure and enforce promissory expectations by converting them into proprietary entitlements.

Contract was, for Story, the premier mode of enlightened personal interaction, and that pre-eminence was "to be measured, neither by moral law alone, nor by universal law alone, nor by the laws of society alone, but by a combination of the three".[156] Because consensual exchange was a precept of natural law, international law, and most domestic legal traditions, "in every state it will be necessary to retain [contract] principles, since the idea of justice implanted in the human mind should not be violated".[157] On the basis of those kinds of testimonials to personal autonomy and the sanctity of contracts expressive of freely-willed market choices, Story offered moral and pragmatic justifications for extraterritorial enforcement of consensual obligations.

The close relationship of political to economic democracy erected in Story's mind a rebuttable ethical presumption that contractual entitlements should be universally recognized:

> [F]undamental maxims of a free government seem to require that the rights of personal liberty, and private property, should be held sacred. At least no court of justice in [the United States] would be warranted in assuming, that any state legislature possessed a power to violate and disregard them ... The people ought not to be presumed to part with rights, so vital to their security and well-being, without very strong and positive declarations to that effect.[158]

Story's prudential justification for systematic extraterritorial recognition of contractual entitlements assumed the vested character of those rights, and focussed upon procedural difficulties in their enforcement:

> [S]uppose a contract, valid by the laws of the country, where it is made, is sought to be enforced in another country, where such a contract is positively prohibited by its laws ... it is plain, that unless some uniform rules are adopted to govern such cases, (which are not uncommon,) the grossest inequalities will arise in the administration of justice between the subjects of different countries in regard to such

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[155]W.W. Story, *A Treatise on the Law of Contracts not under Seal* (Boston: C.C. Little & J. Brown, 1844). See also W.W. Story, *A Treatise on the Law of Sales of Personal Property* (Boston: C.C. Little & J. Brown, 1847). See generally M.E. Phillips, *Reminiscences of William Wetmore Story, the American Sculptor and Author* (Chicago: Rand McNally, 1897) at 56-87; W.S. Rusk, "William Wetmore Story", in Malone, ed., *supra* note 32, vol. 18 at 109.

[156]Story, *supra* note 52, vol. 2 at 249. Compare T.L. Haskell, "Capitalism and the Origins of the Human Sensibility" (1985) 90 Am. Hist. Rev. 339 at 547.

[157][Story], *supra* note 154 at 503.

[158]Story, *supra* note 52, vol. 3 at 268.

> contracts ... Innumerable suits must be litigated in the judicial forums of these countries and provinces, in which the decision must depend upon the point, whether the nature of a contract should be determined by the law of the place, where it is litigated; or by the law of the domicil of one or both of the parties; or by the law of the place, where the contract was made.[159]

Even if various local laws of contract could not be made uniform, standardized choice-of-law doctrine would assure the portability of most contractual entitlements, and minimize the transaction costs of "innumerable suits" involved in their interstatal and international recognition.

Expressed more precisely, the practical problem Story thought interstate-choice-of-contract law was required to address was that:

> Persons, capable in one country, are incapable by the laws of another; considerations, good in one, are insufficient or invalid in another; the public policy of one permits or favours certain agreements, which are prohibited in another; the forms, prescribed by the laws of one, to ensure validity and obligation, are unknown in another; and the rights, acknowledged by one, are not commensurate with those belonging to another.[160]

Story's solution to those dilemmas was to propose two choice-of-contract-law rules of broad application, and two complementary but narrower rules for special contracts. It bears repetition that the juridical practice and commercial preference in light of which those rules were framed was widespread reliance upon contractual choice-of-forum and choice-of-law clauses. Story was surrounded by evidence that interstate traders resisted the prevailing pluralistic character of official private law and dispute settlement.[161]

Story's controlling principle was that "the validity of a contract is to be decided by the law of the place, where it is made". A departure from that rule was warranted "where the contract is either expressly or tacitly to be performed in any other place", in which case "the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance". Story noted that with respect to those rules "there seems a universal consent of courts and jurists, foreign and domestic", but he added the potent caveat that contracts,

> which are in evasion or fraud of the laws of a country, or the rights or duties of its subjects, contracts against good morals, or religion, or public rights, or contracts opposed to the national policy or institutions, are deemed nullities in every country, affected by such considerations; although they may be valid by the laws of the place, where they are made [or are to be performed].[162]

Stated succinctly, those exceptions were said to amount to the proposition that "no man ought to be heard in a court of justice to enforce a contract founded

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[159]Story, *supra* note 2 at 6-7.

[160]*Ibid.* at 193-94. See also *ibid.* at 201.

[161]See *e.g.* S. Kyd, *A Treatise on the Law of Awards* (Dublin: J. Stockdale, 1791); W. Beawes, *Lex Mercatoria Rediviva: or, The Merchant's Directory* (London: J. Moore, 1752). See generally Note, "Commercial Arbitration in the Eighteenth Century: Searching for the Transformation of American Law" (1983) 93 Yale L.J. 135; W.E. Nelson, *Dispute and Conflict Resolution in Plymouth County, Massachusetts, 1725-1825* (Chapel Hill: University of North Carolina Press, 1981) at 3-44; Mann, *supra* note 26 especially at 456-79.

[162]Story, *supra*, note 2 at 201, 233, 202, 204. See also *ibid.* at 77-89, 103-04.

in, or arising out of, moral or political turpitude". Four subordinate rules were spun off by Story from his general principles. "All the formalities, proofs, or authentications of [contracts], which are required by the *lex loci*, are indispensable to their validity every where else"; "the law of the place of the contract is to govern, as to the nature, obligation, and interpretation of it"; "the effects of contracts ... like the validity of contracts, are dependent upon, and are to be governed by, the *lex loci contractûs*"; and, "a defence or discharge, good by the law of the place, where the contract is made, or is to be performed, is to be held in equal validity in every other place, where the question may be litigated".[163]

Contracts of debt, and those related to real estate, were exempted by Story from the application of his place-of-formation and place-of-performance rules: "contracts respecting ... debts, are now universally treated, as having no *situs* or locality; and they follow the person of the creditor in point of right ...; though the remedy on them must be according to the law of the place, where they are sought to be enforced". Conversely, "any title or interest in land or real estate can only be acquired or lost agreeably to the law of the place, where the same is situate".[164] Story thus turned an early-modern common-law rule of jurisdiction into a rule of substantive land law. That kind of transformation was not uncommon in early interstate conflicts thought. Even Huber's three maxims of private international law were derived from Roman-law rules of jurisdiction.

Although *Commentaries on Conflicts*' black-letter scheme for choice-of-interstate-contract law can thus be distilled into two short paragraphs, Story's justifications for those rules were elaborate. Scrutiny of those rules, and the reasons offered by Story for them, can be aided by a brief examination of contemporary, choice-of-interstate-contract-law methods.

At the distance of a century and a half Story's place-of-contracting and place-of-performance rules seem comparatively streamlined, but none the less appear to have become part of a transsystemic body of private international law. In this century it has become clear that the place of contracting need not be a significant jurisdiction of contact for the parties to a bargain, or for the mutual rights and duties brought into existence by it. Application of a body of local law on the basis of the mere act of accepting an offer need not ensure the enforcement of the largest number of contracts, nor will it necessarily comport with the expectations of contracting parties. Similarly, although the place of performance will always bear some relationship to the substance of an exchange transaction, a contract may call for performance in different states, or performance may occur in a state that otherwise has only slight connection to the parties or the transaction in issue. Story's interstate-choice-of-contract-law rules may thus be seen to have offered a degree of private-law standardization, rendered easier predictions of judicial result, and commenced interstate promotion of values like the liberation of individual will and the facilitation of self-legislation that animated neo-classical contract law. But his rules were probably too few in

[163]*Ibid.* at 215, 219, 227, 266, 272.

[164]*Ibid.* at 299, 302. See also *ibid.* at 358-90, 398-402, 404-05, 414-15, 450, 465; *Van Reimsdyk* v. *Kane*, *supra* note 39; *U.S.* v. *Crosby*, *supra* note 39; *Slack* v. *Walcott*, *supra* note 39.

number and all-embracing in scope to sanctify contract and secure property in the measure to which Story aspired throughout American private law. Domestic contract law itself was, however, only beginning in the early-federal period to be consolidated from diffuse principles applicable to particular kinds of transactions.[165] In view of the embryonic character of the antebellum common law of will-based obligations, it is unsurprising that private-international-law doctrine derivative of that local law was also rudimentary.

Reese's current *Restatement of Conflicts* eschews attempts to provide comprehensive choice-of-law doctrine for an undifferentiated field of exchange transactions. The American Law Institute is now promoting narrow rules specific to agreements like life-insurance contracts, contracts of debt, contracts of carriage, service contracts, and contracts of suretyship.[166] That splintering parallels domestic scholarship structured around the local law of contracts, rather than contract, and is based on emerging perceptions of dissimilarity among species of exchange transactions.[167] Modern fragmentation resonates with Story's work on interstate-choice-of-contract-law doctrine to the extent that the goal remains to give effect in Anglo-American private international law to values perceived to underlie the local law or laws of exchange transactions. The primary difference between contemporary and antebellum methodology is that the groundswell in domestic contracts scholarship in which Story participated was characterized by efforts to suppress the particularistic nature of the early-modern common law of interpersonal obligations. Doctrinal minimalism thus became the complementary order-of-the-day for the early private international law of contract.

Broadly speaking, four choice-of-law rules for interstate contracts have been deployed interchangeably by modern, common-law courts. The law of the place of performance has often been applied to the manner and details of performance, excuses for breach of contract, and the adequacy of performance. And the law of the place of contracting has normally governed the validity of

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[165]See *e.g.* J.J. Powell, *Essay upon the Law of Contracts and Agreements* (Dublin: Chamberlaine and Rice, 1790); R.-J. Pothier, *A Treatise on the Law of Obligations or Contracts*, trans. W.D. Evans (London: J. Butterworth and J. Cooke, 1806); S. Comyn, *A Treatise on the Law Relative to Contracts and Agreements not under Seal* (London: J. Butterworth and J. Cooke, 1807); D. Chipman, *An Essay on the Law of Contracts, for the Payment of Specific Articles* (Middlebury, Vt.: Daniel Chipman, 1822); G.C. Verplanck, *An Essay on the Doctrine of Contracts: Being an Inquiry How Contracts are Affected in Law and Morals, by Concealment, Error, or Inadequate Price* (New York: Carvill, 1825); J. Chitty, *A Practical Treatise on the Law of Contracts, Not under Seal: And Upon the Usual Defenses and Actions Thereon* (London: Butterworth, 1826). Story relied most heavily in *Commentaries on Conflicts* on municipal contracts scholarship by Chitty, Pothier, and Powell. See generally A.W.B. Simpson, "The Horwitz Thesis and the History of Contracts" (1979) 46 U. Chi. L. Rev. 533 at 589-99; P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press, 1979) at 398-505; P.A. Hamburger, "The Development of the Nineteenth-Century Consensus Theory of Contract" (1989) 7 Law & Hist. Rev. 241.

[166]See *Restatement (Second) of Conflicts*, *supra* note 3, vol. 1 at 576-632. See also W.L.M. Reese, "Choice of Law in Torts and Contracts and Directions for the Future" (1977) 16 Colum. J. Trans. L. 1.

[167]See *e.g.* I.R. Macneil, *The New Social Contract: An Inquiry into Modern Contractual Relations* (New Haven: Yale University Press, 1980); G. Gilmore, *The Death of Contract* (Columbus: Ohio State University Press, 1974); Atiyah, *supra* note 165 at 716-79.

a contract, and the nature of obligations arising from it.[168] Alternatively, the law of the state where most contacts relevant to a contract were grouped (the "proper law of the contract"), or the law of the place of performance, has been applied indiscriminately to all legal issues arising under an interstate contract.[169] Commentators upon that jurisprudential confusion have typically concluded that alternative application of competing rules flowed from Anglo-American courts' unarticulated desire to protect vested contractual rights, a goal that could be realized only by result-oriented deployment of different rules in various factual circumstances.[170] More specifically, twentieth-century scholars like Harvard law professor Joseph Henry Beale, Chief Reporter of the first *Restatement of Conflicts*, argued that the vested rights Anglo-American conflicts courts sought to protect would best be secured by application of the law of the state where the last event necessary to bring those legal rights and their corresponding duties into existence had occurred. However, because none of the four available choice-of-law rules was capable of consistently identifying and applying that body of local law, coexistent rules were maintained.[171]

By contrast, Story used "vested rights" in a non-positivistic, unofficial, almost common-sensical way to describe popular appreciations of natural entitlement and promissory expectation. His vested rights had more to do with the realistic presumptions of parties to a transaction, and with the policies perceived to underlie fields of private law about which he wrote, than with analytically-rigorous rights created by sovereigns, foreign or domestic.

Three examples should suffice to underline that point about Story's veneration of those common-sensical expectations. His rule for the enforcement of foreign judgments was based on the rights and duties parties to such judgments would think they enjoyed, rather than upon extraterritorial recognition of the jurisdiction of the foreign court whose judgment was in issue. It may be a small conceptual step from the vesting of rights in an official judgment to the judicial jurisdiction of a foreign sovereign and the occurrence of the last juridical event

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[168]See generally *Restatement of Conflict of Laws* (1934) at 395-451 [hereinafter *Restatement of Conflicts*].

[169]See generally A.A. Ehrenzweig, "Contracts in the Conflict of Laws. Part 1: Validity" (1959) 59 Colum. L. Rev. 973; J.A. Blom, "Choice of Law Methods in the Private International Law of Contract" (1978) 16 Can. Y.B. Int'l L. 230. See also M. Schmitthoff, "The Doctrine of the Proper Law of the Contract in the English Conflict of Laws" (1940) 28 Georgetown L.J. 447.

[170]See *e.g.* T.E. Holland, *The Elements of Jurisprudence* (Oxford: Clarendon Press, 1880) at 288 note 1:

> The theory of the text, it will be observed, assumes the foundation of this whole topic, whether it be described as "the application of foreign law," or the "extraterritorial recognition of rights," to be that of "vested rights;" a doctrine which, though usually identified with [Karl Georg von] Wächter, is as old as [Emmerich de] Vattel ..., and appears to the author to remain unshaken by the numerous attacks which have been directed against it.

See also Dicey, *supra* note 16 at 22; J.K. Beach, "Uniform Interstate Enforcement of Vested Rights" (1918) 27 Yale L.J. 656.

[171]See *e.g.* J.H. Beale, "Dicey's *Conflict of Laws*" (1896) 10 Harv. L. Rev. 168 at 169; J.H. Beale, *A Selection of Cases on the Conflict of Laws* (Cambridge: Harvard Law Review, 1900-07) at 1, 45; J.H. Beale, *A Treatise on the Conflict of Laws* (Cambridge: Harvard University Press, 1916) at 106.

necessary to bring those judgment-based rights into existence, but that was a step Story avoided.[172] Similarly, Story advocated comprehensive application of the local law of a creditor's domicile to interstate contracts of debt, even when usury laws of the forum would nullify those agreements. He reasoned that interest-rate regulations were part of the larger field of contract law, the purpose of which was to give effect to the properly-motivated promises and reasonable expectations of contracting parties. The vested rights that sprang from those promises should therefore override a forum state's usury laws.[173] Finally, Story justified his rule that contracts for interests in land were governed by the law of the place where the land was situated on the basis that parties to American real estate transactions had long relied upon the interplay of local requirements of writing and county-by-county systems of title registration, and that they distinguished investments in land from moveable or intangible property dealings on the basis of land's stationary character. Because parties to real-estate transactions would expect agreements in conformity with the law of the land's *situs* to be enforceable, Story exempted land-sale contracts from his overarching place-of-contracting and place-of-performance rules.[174] While that *lex situs* rule is about securing vested property rights, Story's focus was not that of Joseph Beale or Albert Venn Dicey, who fixed upon the occurrence of the last legal event necessary to bring a positive entitlement into existence. Because the approach of *Commentaries on Conflicts* to the interstate protection of vested rights was informed by common-sensical expectations and the values he perceived to underlie categories of private law, Story was much less interested than Dicey or Beale in the decrees of a national sovereign technically necessary to vest positive rights.

It is helpful to recall that assuring the security of expanded contractual and proprietary entitlements was also a cardinal value in Story's municipal jurisprudence on private-law issues.[175] His treatment of mixed or interstatal rights parallelled his approach to domestic entitlements to the extent that both kinds of rights were treated as products of commercial custom, natural expectations, economic exigency, and general judicial practice. Story was not constrained by analytically-rigorous, regional descriptions of positive legal rights. The law of the place where a bill of lading was drawn, for example, was promoted by him for the resolution of disputes arising under those bills on the basis that application of other bodies of law like that of the place where the relevant goods were situated would "most materially impair the confidence, which the commercial world have hitherto reposed in the universal validity of the title acquired under a bill of lading".[176] Similarly, Story advocated expansion of the European rule that transfers of moveable property should be governed by the law of the

[172]See Story, *supra* note 2 at 494. Compare *Restatement of Conflicts*, *supra* note 168, vol. 1 at 649-57.

[173]See Story, *ibid.* at 241-60. See generally T.A. Westen, "Usury in the Conflict of Laws: The Doctrine of the *Lex Debitoris*" (1967) 55 Cal. L. Rev. 123.

[174]See Story, *ibid.* at 358. See generally G.R. Haskins, "The Beginnings of the Recording System in Massachusetts" (1941) 21 B.U. L. Rev. 281.

[175]Compare, above, text accompanying notes 70-81.

[176]Story, *supra* note 2 at 327.

owner's domicile to include alternate application of the law of the place where the property was situated because "in the ordinary course of trade with foreign countries, no one thinks of transferring personal property according to the forms of his own domicil; but it is transferred according to the forms prescribed by the law of the place where the sale takes place".[177] The apparent goal was to frame a choice-of-law rnle protective of the natural expectations of parties to interstate transfers of moveable property and promotive of the general purposes underlying domestic contract law.

Story's express justifications for particular choice-of-law rules are widely dispersed in his judicial and academic writing, and tend to be hyperbolic. In his New England Circuit Court, for example, fourteen years before the publication of *Commentaries on Conflicts*, he counselled compression of multifarious, "nice if not evanescent" European rules for choice of law in contract into his place-of-contracting rule on the basis that "the convenience, nay, the necessities of the civilized and commercial world, rendered it indispensable, that this principle should be adopted in the earliest rational intercourse".[178] Story also argued that "the repose and common interest of all nations require each to observe towards all others the principles of reciprocal justice and comity; and those, as we have seen, are best subserved by the adoption of the general rule that the law of the place of contract and payment shall govern".[179] Comity in the public-international-law sense was regarded by Story as a function of the security of mixed private rights. Promotion of harmonious relations among states was thus subsumed under stabilization of interstate commercial intercourse.

In defense of his rule that special contracts for interests in land should be governed by the place where the land was situated, Story charged that jurists who posited other rules,

> seem wholly to have overlooked, on the other side, the inconvenience of a nation suffering property, locally and permanently situate within its territory, to be subject to be transferred by any other laws, than its own; and thus introducing into the bosom of its own jurisprudence all the innumerable diversities of foreign laws, to regulate its own titles to such property, many of which laws can be but imperfectly ascertained, and many of which may become matters of subtile controversy.[180]

In addition to the furtherance of values like certainty, ease of application, and the protection of popular expectations, that justification alludes to the protection of statal and national sovereignty. It is about the harmonization of commercial relations rather than the comity of nations. Not only do national sovereigns have a dominant interest in transactions affecting real estate situated within their political boundaries, they also have a special conceptual stake in the landed territory that describes their sovereignty in a more fundamental way than other attributes of state or nationhood. Story's rule requiring application of the law of

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[177]*Ibid.* at 18.

[178]*LeRoy* v. *Crowninshield*, *supra* note 39. See also Story, *ibid.* at 233, where he said that "in the common law all these niceties [of multifarious European interstate contracts rules] are discarded".

[179]Story, 2d ed., *supra* note 115 at 306.

[180]Story, *supra* note 2 at 373.

the place where immoveable property was situated to dealings with that land may thus be seen to be grounded simultaneously in notions of private and public sovereignty.[181] As he did in his local-law jurisprudence, Story defined immoveable property expansively to include fixtures, servitudes, usufructs, rents, and riparian rights.[182]

Paraphrasing Story's famous dictum in the *Charles River Bridge* case about the protection provided by the constitutional injunction not to make laws impairing contractually-based rights, his rules for choice-of-interstate-contract law may be said to reflect a perception that if a state means to invite its citizens to enlarge interstate commerce there must be a pledge by that state in the form of adoption of uniform conflicts rules that contractual entitlements will be held inviolate nationally and internationally.[183] Consensualism and natural law came crashing together in Story's internationalism through the inherent autonomy of individuals and the delegated sovereignty of their communities, namely states and nations.

Conclusion

Borrowing from contemporary American legal historian Lawrence Friedman, Watson quoted in *Comity of Errors*:

> Story was not one to wear his erudition lightly. In his seminal work on the conflict of laws (1834), which systematized a new field (at least in the United States) out of virtually nothing, one page (360) has three lines of French and six of Latin, and quotes from Louis Boullenois, Achille Rodemburg [sic], P. Voet, J. Voet, C. D'Argentre, and U. Huberus, names that the American lawyer would find totally mysterious.
> Story's erudition was not always so blatant; and this particular subject matter had hardly been treated by writers in English. Learning did not interfere with the main line of Story's argument, which proceeded clearly and stoutly, even gracefully at times.[184]

Watson continued under his own steam:

> For Friedman, Story was too obviously and unnecessarily learned: his erudition was "blatant", but "[l]earning did not interfere with ... Story's argument". The message is clear: we have no reason or need to follow Story in his erudition to understand the development of the law. ... Certainly, for Friedman, no purpose could be served for legal historians in reading people like Huber, "names that the American lawyer would find totally mysterious". Mysterious, therefore insignificant, and to be allowed to retain their mystery ... [Friedman] expresses his own view: Story's [erudition] was "stultifying pedantry".[185]

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[181]Compare H.F. Goodrich, "Two States and Real Estate" (1941) 89 U. Penn. L. Rev. 417; C. Staker, "Public International Law and the Lex Situs Rule in Property Conflicts and Foreign Expropriations" (1987) 58 Brit. Y.B. Int'l L. 151.

[182]See *e.g.* Story, *supra* note 2 at 378-79 and *Slack* v. *Walcott*, *supra* note 39. Compare, above, text accompanying notes 69-72.

[183]*Charles River Bridge*, *supra* note 72 at 636.

[184]Watson, *supra* note 9 at 97-98, quoting L.M. Friedman, *History of American Law*, 2d ed. (New York: Simon and Schuster, 1985) at 330.

[185]Watson, *ibid.* at 98.

Watson thus parodied Friedman sharply to demonstrate the prevailing unfashionability of doctrinal legal history, and the "smugly self-describing approach" to histories of legal ideas adopted by those who believe social needs alone determine normative outcomes. Although Watson is not alone in his plea for recognition of the autonomous tendencies of legal concepts, he is in a North American minority.[186]

The pathology of *Comity of Errors* is the extreme independence it accords juristic ideas, and the resulting lack of context it provides for Story's choice-of-law thought. "Lawyers' legal history" became a historiographical "whipping boy" during the last generation not so much because it was oriented to ideas, but because traditional histories of legal doctrine were often methodologically and epistemologically weak.[187] The solution to that lack of rigour consists not merely in reasserting the relative autonomy of legal ideas, but requires learning from impressive advances in the historiography of culture that have occurred in the last decade or two.[188] It also includes reclaiming terrain from analytical legal theory by insisting upon the time-and-place contingency of meaning and causation. However well-motivated or carefully-executed it is on its own terms, *Comity of Errors* furthers neither of those goals because it eschews the cultural, social, and institutional settings of antebellum choice-of-law thought.

In Story's conceptual universe, private autonomy, constitutional and common-law supremacy, commercial imperialism, and normative consolidation were intimately allied. American judges, especially federally appointed ones, had primary responsibility for elaborating and perpetuating that antebellum coalition. Neither the United States Constitution nor Story's emergent federal common law could apply itself; consolidation of norms depended upon principled human agency; translation of popular sovereignty from a conceptual construct to a way of life required vigilant scrutiny of partisan and potentially despotic political power; and commerce was at once an existential and cultural affair. Story was a dyed-in-the-wool Unitarian who regarded the primacy of human will to have been simultaneously revealed divinely, through custom, in the

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[186]Other well-known, recent pleas for historiographical recognition of the relative integrity of legal ideas can be found in: D. Sugarman, "Theory and Practice in Law and History: A Prologue to the Study of the Relationship between Law and Economy from a Socio-Historical Perspective" in B. Fryer *et al.*, eds., *Law, State and Society* (London: Croom, Helm, 1981) 70; R.W. Gordon, "Critical Legal Histories" (1984) 36 Stan. L. Rev. 57; M.V. Tushnet, "Perspectives on the Development of American Law" [1977] Wisc. L. Rev. 83.

[187]M.J. Horwitz, "The Conservative Tradition in the Writing of American Legal History" (1973) 17 Am. J. Legal Hist. 275 at 276; Watson, *supra* note 9 at 96 (citing the programme for the 1991 meeting of the American Society for Legal History).

[188]See *e.g.* R. Darnton, "Intellectual and Cultural History" in M. Kammen, ed., *The Past Before Us: Contemporary Historical Writing in the United States* (Ithaca: Cornell University Press, 1980) 327; M. Ermarth, "Mindful Matters: The Empire's New Codes and the Plight of Modern European Intellectual History" (1985) 57 J. Mod. Hist. 506; L. Hunt & A. Biersack, "Introduction: History, Culture, and Text" in L. Hunt, ed., *The New Cultural History* (Berkeley: University of California Press, 1989) 1; J.G.A. Pocock, "Introduction: State of the Art" in J.G.A. Pocock, ed., *Virtue, Commerce and History: Essays on Political Thought and History, Chiefly in the Eighteenth Century* (Cambridge: Cambridge University Press, 1985) 1; D. Owram, "Intellectual History in the Land of Limited Identities" (1989) 24:3 J. Can. Stud. 114.

municipal law of civilized communities, and in international diplomacy.[189] He routinely conceded that his judicial and scholarly activities had prudential, political and ethical aspects, but not partisan dimensions. Like many of his federalist contemporaries, Story was scandalized by the antebellum emergence of American political parties, and moved cavalierly between Federalist and Republican camps from one issue to the next. Politically-motivated, but non-partisan, federally-oriented judges and legal publicists were his guardians of the revolutionary grail.

Parochial, selfish, and surly states or regions of the United States were regarded by Story as internal threats to a federation that had been shown in recent memory to be similarly vulnerable to external aggression by military powers like Britain. He concluded that the best defense against those challenges to federalism was consolidation of institutions protective of personal sovereignty. Faced with rampant domestic legal pluralism, Story seized upon the possibility of uniform, interstate choice-of-law rules as one strategy to ameliorate that normative diversity. He hoped that proponents of normative regionalism would eventually become sufficiently enlightened not only to embrace voluntarily a *jus commune* of choice-of-law doctrine, but ultimately that they would also consent to adoption of an international common law of private rights. Story would probably be surprised that many of the choice-of-law rules intended by him as stop-gap measures to help make "science of cacophony" have persisted in a remarkably unaltered form for a century and a half.[190] But he might resign himself to the conclusion that local and partisan interests were even more virulent than he thought.

For Story to have produced the amount of published legal commentary he authored, in judicial, popular, scholarly and pedagogical forums, his pen must have been racing across pages. I could scarcely read and pretend to understand that writing in the time it took him to compose it. While it is helpful to notice, as Story's biographers typically have observed, that he was a voluble man in a talky age, Story was plainly driven by forces more powerful than social convention. Those impulses, with symbolic, instrumental, and inherent goals, put interstate choice-of-law doctrine in the front lines of Story's federalist troops. Scrutiny of that tactic of deployment, and the reasons for it, were omitted from *Comity of Errors*. One suspects that causal reflections of that kind are missing from Watson's book because he tried a little too hard to press Story's choice-of-law thought into his own trade-mark paradigm of accidental legal change.[191]

I have no particular fondness for Joseph Story or his early-federalist friends. The Revolution they idealized made refugees of several branches of my

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[189]Story's self-acknowledged theoretical bibles were few and unsurprising: W. Paley, *The Principles of Moral and Political Philosophy* (London: R. Faulder, 1785); E. Burke, *Observations on a Late State of the Nation* (Dublin: Leathy, Exshaw, Grierson, and Williams, 1769); H. St. J. Bolingbroke, *A Dissertation upon Parties: In Several Letters to Caleb d'Anvers* (London: R. Francklin, 1754). See generally F.W. Smith, *Professors and Public Ethics: Studies of Northern Moral Philosophers Before the Civil War* (Ithaca: Cornell University Press, 1956).

[190]Newmyer, *supra* note 7 at 388.

[191]Compare sources cited *supra* note 23.

family, and its patriots confiscated our homes in America.[192] But I am interested in the relationship of nineteenth-century state formation to normative consolidation. I have observed that the professional elitism of a self-governing occupational body of lawyers seated in Toronto was an important aspect of building the early-nineteenth-century Upper Canadian state.[193] I have also seen that the statutory and mercantile imperialism of mid-nineteenth-century Montreal's merchant princes and their lawyers in the local legislative bar were deliberate strategies designed to consolidate a commercial empire in the St. Lawrence and Great Lakes valleys by suppressing pluralistic, customary norms.[194] And I have examined how Britain's late-nineteenth-century projection of metropolitan common law responded directly to perceived colonial and imperial needs for a cultural link that would boost the "Little Englands" of British North America and supply an imperial adhesive alternative to military, political, and economic bonds.[195]

Story's choice-of-law thought was cut from the same bolt of cloth as the Law Society of Upper Canada's professional pretensions, Montreal commercial magnates' legislative utilitarianism, and Oxbridge law dons' made-for-export legal treatises. The suspension of regional eclecticism in the delivery of legal services, in marketplace relations, and through the veneration of metropolitan common law were regarded as indispensable handmaidens of nineteenth-century state formation in four North Atlantic communities whose elite lawyers had very different senses of the "constitution" to be nationalized. That is the perspective from which I prefer to view the federalist experiment in which Story perceived himself to be participating with his hyperanimated, choice-of-law

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[192]That may seem an unduly defensive or intimate remark, but I am keen to make clear that neither political renovation of Joseph Story nor celebration of the late-nineteenth-century *laissez-faire* constitutionalism he portended was among this review essay's goals.

[193]See G.B. Baker, "Legal Education in Upper Canada 1785-1889: The Law Society as Educator" in D.H. Flaherty, ed., *Essays in the History of Canadian Law*, vol. 2 (Toronto: University of Toronto Press, 1983) 49. Compare P. Girard, "The Roots of a Professional Renaissance: Lawyers in Nova Scotia 1850-1910" (1991) 20 Man. L.J. 148; D.G. Bell, *Legal Education in New Brunswick: A History* (Fredericton: University of New Brunswick, 1992); W.W. Pue, "Lawyers and the Constitution of Political Society: Containing Radicalism and Maintaining Order in Prairie Canada, 1900-1930" in D. Gibson & W.W. Pue, eds., *Canada's Legal Inheritances* (Toronto: McClelland and Stewart, forthcoming).

[194]See G.B. Baker, "Law Practice and Statecraft in Mid-Nineteenth-Century Montreal: The Torrance-Morris Firm, 1848 to 1868" in C. Wilton, ed., *Beyond the Law: Lawyers and Business in Canada 1830 to 1930* (Toronto: Butterworth, 1990) 45. Compare B. Young, "Positive Law, Positive State: Class Realignment and the Transformation of Lower Canada, 1815-1866" in A. Greer & I. Radforth, eds., *Colonial Leviathan: State Formation in Mid-Nineteenth-Century Canada* (Toronto: University of Toronto Press, 1992) 50; P. Girard, "Married Women's Property, Chancery Abolition, and Insolvency Law: Law Reform in Nova Scotia, 1820-1867" in Girard & Phillips, eds., *supra* note 28, vol. 3 at 80; K.M. Bindon, "Hudson's Bay Company Law: Adam Thom and the Institution of Order in Rupert's Land 1839-54" in D.H. Flaherty, ed., *Essays in the History of Canadian Law*, vol. I (Toronto: University of Toronto Press, 1981) 43.

[195]See Baker, *supra* note 125. Compare S. Normand, "Un thème dominant de la pensée juridique traditionnelle au Québec: La sauvegarde de l'intégrité du droit civil" (1987) 32 McGill L.J. 559; G. Marquis, "Doing Justice to 'British Justice': Law, Ideology and Canadian Historiography" in W.W. Pue & B. Wright, eds., *Canadian Perspectives on Law and Society: Issues in Legal History* (Ottawa: Carleton University Press, 1988) 43; Girard, *supra* note 12.

pen. *Commentaries on Conflicts* was a major American intellectual event of the antebellum period that offers a unique point of access to the federalist adventure of which it was part, and indirect access to companion experiments in North Atlantic state formation of the last century. It bears repetition that Watson is to be complimented for focussing unprecedented attention on Story's conflicts treatise.

The central historiographical conclusion to be drawn from this review essay is, however, that Bill Nelson, Kent Newmyer, Bruce Mann, Alex Sack, and Stewart Jay have provided a small but superb secondary literature critical to modern penetration of the role of antebellum choice-of-law doctrine in emerging Anglo-American cultures of private and public sovereignty, constitutional nationalism, and commercial imperialism.[196] Reese would have said their all-too-unheralded publications were "real Stutz-Bearcats, real sweet jobs!" It is upon those state-of-the-art essays that more sophisticated work on Story's choice-of-law thought must build. Future scholarship should also integrate much more of the extensive primary source material available for Story than was utilized in this review essay or in *Comity of Errors*.[197] In spite of Watson's care in tracing legal sources, I am not persuaded by his rather adventurous speculation that Story's misrepresentation of Huber caused the United States Supreme Court to decide *Dred Scott* v. *Sandford*[198] against antislavery sentiment in 1856, that the notorious *Dred Scott* decision assured the election of abolitionist President Abraham Lincoln in 1860, or that northern states would not have declared Civil War upon and ultimately vanquished the Confederacy in 1865 without Lincoln's personal fervour to preserve the union.[199] The relationship of legal or other intellectual transplants to social change must be more mysterious than that speculation suggests. In any case, source-driven comparative law of the kind represented by *Comity of Errors* will not fly as cultural history until it expands dramatically the range of sources in which it is interested, or limits radically the scope of historical conclusions it draws from narrowly-defined legal

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[196]See Nelson, *supra* note 27; Newmyer, *supra* note 110; Mann, *supra* note 26; Sack *supra* note 24; Jay, *supra* notes 27, 58.

[197]See *supra* note 13.

[198]60 U.S. (19 Howard) 393 (1856) [hereinafter *Dred Scott*].

[199]Watson, *supra* note 9 at 74-75:

> Ulrich Huber was the main authority on conflict of laws in England and the United States in the early nineteenth century. Joseph Story expressly purported to follow Huber but misrepresented him on the central doctrine of comity. A theory of conflict of laws was vital to the America of the time, but neither Huber's theory nor Story's version was embedded in the society. If Story had followed Huber as he claimed, Huber's version of comity would have been accepted. A case like that of *Dred Scott* could not have arisen on Huber's theory, certainly not so late. Without the furor created by the *Dred Scott* decision, Abraham Lincoln might not have become president. Without Lincoln's presidency, the Civil War might not have occurred when and in the way that it did ... For the South to have won, it need only not have lost. Its victory did not require the conquest of the North. But the conquest of the South was a mammoth task, and some northern generals showed a corresponding reluctance to undertake it, especially in the early days of the war. Without Lincoln's astonishing fervor to preserve the union, no matter the cost in American lives, the South might well have won. A northern triumph perhaps required the presidency of Abraham Lincoln.

authorities.[200] Again, as Reese would have said, "*maxima culpa*", Alan Watson.[201]

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[200]For a good example of comparative legal history grounded in a variety and number of sources suitable to its broad, social themes, see D.G. Allen, *In English Ways: The Movement of Societies and the Transferal of English Local Law and Custom to Massachusetts Bay in the Seventeenth Century* (Chapel Hill: University of North Carolina Press, 1981). For a similarly good example of comparative legal history whose themes were circumscribed in a manner sensitive to its legal sources' limitations, see F.J. des Longrais, *La conception anglaise de la saisine du XII^e^ au XIV^e^ siècle* (Paris: Société anonyme du recueil Sirey, 1925).

[201]For helpful commentary on earlier drafts of this review essay, I am grateful to Christopher S. Beach, John E.C. Brierley, Michael Byers, H. Patrick Glenn, Richard Janda, Nicholas Kasirer, Roderick A. Macdonald and Geneviève Saumier.

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Préface

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Le droit de la concurrence constitue un élément clé des politiques canadiennes en matière économique depuis la Confédération. En effet, l'*Acte à l'effet de prévenir et supprimer les coalitions formées pour gêner le commerce* du Canada de 1889 est entré en vigueur avant la loi *Sherman* des États-Unis qui est pourtant généralement considérée la première loi moderne de la concurrence. Cette histoire particulière du Canada n'est pas surprenante. Notre économie repose sur un petit marché intérieur exposé à la concurrence du marché américain, le plus grand du monde. Nous avons donc dû adapter nos politiques et institutions afin de trouver un équilibre entre la concurrence et le développement économique intérieur. Ce processus s'inscrit dans le cadre du grand défi qui bouleverse nos sociétés contemporaines : la conciliation de la liberté et de la discipline nécessaire à l'organisation sociale et plus spécifiquement la promotion de la liberté comme instrument de bien-être économique. Qu'il s'agisse pour la Russie d'évaluer le niveau de *glasnost* nécessaire pour encourager la *perestroïka* ou, pour le Canada de jauger le régime de réglementation requis afin de promouvoir un marché compétitif, les questions de base restent les mêmes. Ce numéro spécial sur le droit de la concurrence démontre que le débat sur l'adéquation de cet équilibre est même plus important aujourd'hui étant donnée la complexité d'une économie internationale qui est, de plus en plus, interdépendante.

Les articles présentés dans le présent numéro mettent en lumière les questions fondamentales que pose le droit de la concurrence : son importance pour

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le Canada et son développement économique dans l'avenir, les principaux besoins et les meilleures façons d'y répondre, l'évolution de la jurisprudence et des politiques gouvernementales, au Canada et ailleurs. Ils couvrent un éventail de perspectives, celles d'universitaires, de praticiens et de responsables de la réglementation, qui aident à comprendre les tensions inhérentes au système de réglementation de la concurrence.

Les auteurs font voir l'importance du droit de la concurrence, au-delà de son intérêt académique. Le Canada est perçu comme une puissance moyenne, tant au niveau de l'économie que de la sécurité internationale. Notre existence dans une économie mondiale et interdépendante signifie que nous ne pouvons fermer les yeux sur ce qui se passe à l'étranger ni sur le fait que des modifications à nos politiques affectent des intérêts à l'extérieur du pays. Ceci est particulièrement vrai en ce qui a trait au droit de la concurrence. Que le problème à régler soit le niveau de compétition opportun pour les mines de sel en 1871 ou le meilleur mécanisme pour contrôler les fusions de sociétés commerciales, les politiques canadiennes bénéficient de l'expérience des autres pays et doivent tenir compte des effets économiques des approches choisies ailleurs. Ce numéro spécial aide à comprendre l'impact sur le Canada des mécanismes utilisés par nos principaux partenaires commerciaux et à choisir des modes de réglementation qui répondent à notre situation de puissance économique moyenne.

Les auteurs identifient ensuite l'objet du débat fondamental en droit de la concurrence. La plupart des commentateurs s'accordent à dire que le but de ce droit est de promouvoir un environnement concurrentiel contribuant à minimiser les coûts aux consommateurs tout en maintenant les bénéfices à long terme pour les producteurs. Le cœur du débat porte sur les mécanismes qui permettent d'atteindre ce but. Certains suggèrent que le marché est le meilleur moyen de réaliser cet objectif, sans l'appui d'une réglementation complexe. D'autres prétendent que le maintien d'un marché libre exige un niveau important de réglementation.

Il s'agit aussi d'identifier les comportements qui menacent la compétition. La même forme de concurrence de prix peut être perçue par certains comme la preuve d'un marché en bonne santé et par d'autres comme signe avant-coureur de prix oligopolistiques.

Ces travaux font voir la grande complexité du domaine tant en raison de la matière elle-même qu'en raison de l'objet de la loi qui n'est ni de réglementer l'économie, ni de laisser libre cours à la concurrence au point de s'autodétruire, mais de la moduler de façon à en favoriser la pérennité à la fois dans l'intérêt du consommateur au niveau des prix, de la qualité et du choix des produits et des services, et dans l'intérêt du pays pour inciter à l'efficacité de la production et au meilleur usage des ressources. Cette complexité tient de la multiplicité de facteurs qui influent sur les décisions économiques. Elle rend d'autant plus délicate toute intervention des autorités gouvernementales, à la fois en raison de la difficulté de recueillir l'information pertinente aux décisions et celle de prévoir leurs effets.

La législation actuelle selon la réforme de 1986 et son interprétation qui en est à ses débuts reflètent un certain aboutissement de l'expérience acquise. Elle illustre l'adaptation des instruments traditionnels du droit que sont les recours criminels et civils, notamment par la consécration de la dualité des recours, de la possibilité de l'option, et les pouvoirs d'enquête et de poursuite du Directeur des enquêtes et recherches. Ceux-ci deviennent justement des instruments parmi d'autres entre les mains du Directeur, qui constitue un organisme relevant du droit administratif ou réglementaire, mais dont la fonction n'est pas de réglementer mais plutôt d'intervenir de façon ponctuelle pour redresser ou maintenir le cap sur une concurrence efficace.

Fidèle à l'esprit de libre entreprise, la législation laisse une large part à l'initiative des acteurs économiques, concurrents et consommateurs, par les plaintes qu'ils peuvent loger, les poursuites civiles qu'ils peuvent intenter et les informations qu'ils fournissent au Directeur. Tant la législation que la politique du Directeur sont particulièrement innovatrices par leur appel aux mesures incitatives qui sont privilégiées, la coercition étant une arme de second ressort. La confidentialité, même si elle n'est pas absolue, et une certaine immunité en retour de la divulgation volontaire de renseignements en sont des exemples susceptibles de larges retombées.

Les amendements de 1986 à la *Loi sur la concurrence* ont augmenté le nombre de mécanismes de sanction et d'incitation permettant de promouvoir la concurrence. Les auteurs relèvent certaines lacunes et proposent de nouvelles mesures visant à bonifier cette loi. Qu'il s'agisse de meilleurs modes de dédommagement en cas de dessaisissement suite à une fusion, de l'impact des divulgations volontaires de renseignements confidentiels, ou du contrôle de la collusion entre compétiteurs, les auteurs suggèrent un cadre pour atteindre l'objectif d'un marché compétitif. Ils touchent ainsi à tout l'éventail de peines et de sanctions juridiques. Ils retiennent les peines de nature criminelle à cause de l'impact moral de celles-ci tout en reconnaissant que les protections reconnues à l'accusé peuvent rendre les condamnations plus difficiles. Ils appuient également des recours civils dont les sanctions sont généralement moins sévères mais qui ont une plus grande chance de succès. Enfin, ils reconnaissent que l'éducation et les mesures incitatives peuvent s'avérer plus efficaces que toutes les contraintes juridiques pour encourager l'adoption de comportements recherchés.

En présentant les arguments en faveur de certains mécanismes visant à régir la concurrence, les auteurs soulignent la complémentarité et l'interaction des moyens disponibles. Les lois, la jurisprudence, les directives des organismes régulateurs, les travaux des juristes et l'expérience des praticiens font tous partie d'un processus complexe qui façoune le droit de la concurrence. Même si ses effets ne sont pas immédiats, cette interaction permet l'émergence d'un régime de promotion de la concurrence plus efficace et équilibré. Aussi longtemps que nous n'aurons su faire de l'économie l'objet d'une science exacte, cette interaction reste la meilleure façon de déterminer les moyens les plus opportuns d'encourager la concurrence.

Enfin, les auteurs se penchent sur l'avenir pour relever certains indices sur l'évolution probable du droit de la concurrence. Comme la Cour suprême du

Canada l'a énoncé dans *R.* c. *Nova Scotia Pharmaceutical Society*, la loi, pour éviter de pécher par imprécision, doit fournir un cadre suffisant pour instruire le débat juridique. Au-delà de cet apport législatif, le Directeur des enquêtes et recherches, les juristes et les praticiens remplissent un rôle important dans l'identification des comportements qui sont, ou qui ne sont pas, acceptables. Puisque la loi ne peut traiter de façon précise toutes les hypothèses possibles, il est primordial que ces agences et personnes spécialisées participent à cette entreprise afin de minimiser les effets potentiellement négatifs de l'interprétation de dispositions législatives de large portée sur des comportements qui favorisent la concurrence. Ce numéro apporte des éléments fort utiles à cette démarche complémentaire à la loi.

Les auteurs et les éditeurs ont su rassembler de façon heureuse des articles de fond et d'autres portant sur la pratique qui permettent de mieux saisir le cadre qui doit guider l'application et l'administration de la loi de même que la recherche de réponses aux questions qu'elle soulève. Nous nous devons de leur être reconnaissants de cette importante contribution à un domaine de pointe.