

CHOICE OF LAW AND THE FEDERAL-STATE SYSTEM

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In the great tradition of the festschrift, Professor Wolff uses his contribution to this volume to continue a debate with Professor Zachary Clopton over choice of law in the federal courts and the proper way to analyze and apply the Supreme Court's opinion in Klaxon v. Stentor Electric Manufacturing Company. Professor Wolff reiterates his call for a careful account of federal jurisdictional policy in choice of law disputes, particularly in cases that enter federal court through jurisdictional pathways other than the general diversity statute, and he responds to several criticisms Professor Clopton has levied at the analytical framework he has proposed.

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I. INTRODUCTION

A *Festschrift* is a singular event in the Academy, an occasion to honor a great scholar while carrying on the tradition of debate and engagement among colleagues that defines our work. The invitation to participate in this *festschrift* volume has particular meaning for me, as Linda Silberman has been the pivotal figure at every stage of my academic career. She was one of my first professors and my greatest intellectual inspiration in law school, an indispensable mentor throughout my early career, my co-author on the casebook that has been a guidepost for my work in the field of Civil Procedure, and, along with Professor Steve Burbank, my most brilliant interlocutor as I have developed as a scholar. It was Linda Silberman who gave me the conceptual grounding in the conflict of laws and federal-state relations that have undergirded all my work in those areas.

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That foundation, in turn, informs my contribution to this volume as we carry on the tradition of scholarly debate that a *fest-schrift* celebrates.

In an earlier article,¹ I developed an argument concerning choice of law in the federal courts and the role of federal jurisdictional policy in determining the application and limits of the doctrine of *Klaxon v. Stentor Electric Manufacturing*, the early post-*Erie*² case in which the Court held that a federal court sitting in diversity must apply the choice-of-law rules of the state where it sits.³ As Professor Silberman generously put it when offering commentary on that work, the article seeks to provide intellectual historical underpinning for suggestions she and others have made that *Klaxon* should not govern certain aspects of choice-of-law analysis when a case in federal court involving state-law claims does not depend on the general diversity statute for subject-matter jurisdiction.⁴ Another friend and colleague, Professor Zach Clopton, took the occasion of Steve Burbank's *fest-schrift* symposium to offer a contrary view, engaging with my work at length and explaining his belief that federal courts should apply the *Klaxon* doctrine "regardless of the basis of federal jurisdiction."⁵ Indeed Professor Clopton goes further, arguing that federal courts should always apply state choice-of-law rules to all aspects of a conflict problem in any case where state law plays a role, no matter the basis of the court's subject-matter jurisdiction or other structural features of the suit—"Klaxon all the way down," as he describes his proposal.⁶ He insists that the underlying principles of the *Erie* decision demand that result.

I will use this Essay to focus on two components of Professor Clopton's argument that I believe expose serious flaws in its foundation: the proposition that all aspects of a state's approach

1. See generally Tobias Barrington Wolff, *Choice of Law and Jurisdictional Policy in the Federal Courts*, 165 U. PA. L. REV. 1847 (2017).

2. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

3. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

4. Linda Silberman, *The Role of Choice of Law in National Class Actions*, 156 U. PA. L. REV. 2001, 2002 (2008) ("This Article suggests that a federal choice of law rule, rather than strict adherence to *Klaxon*, will better achieve the objections of [The Class Action Fairness Act of 2005], so long as the content of that federal choice rule is no different than the choice of law rule that would apply in individual litigation.").

5. Zachary D. Clopton, *Horizontal Choice of Law in Federal Court*, 23 U. PA. J. CONST. L. 2127, 2130 (2021).

6. *Id.* at 2132.

to conflicts questions are properly characterized as themselves constituting pure questions of state law; and the concern that litigants will engage in “jurisdiction shopping” to manipulate the applicable law if the basis for a federal court’s subject-matter jurisdiction has an impact on the resolution of state-law conflicts. The first proposition misunderstands the structure and operation of choice of law in our federal-state system. The second proposition incorrectly frames the role of federal jurisdictional policy in determining when federal law should provide a rule of decision in choice-of-law disputes.

II. CONFLICT RULES AND STATE LAW IN THE FEDERAL-STATE SYSTEM

The unqualified assertion that state choice-of-law rules “are expressions of substantive policies” pervades Professor Clopton’s proposal.⁷ He articulates this view in its most fully realized form in the following passage:

[S]tates have an interest not only in the application of their substantive law but also in the application of their choice of law. Or to say it another way, a state’s choice of law reflects state policy. . . . [T]he *Klaxon* Court acknowledged that states are free to make independent policy choices, and that those choices include the selection of another state’s laws.⁸

This postulate has an alluring rectitude and simplicity but in fact elides a set of distinct, layered concepts. Professor Clopton is correct that courts and commentators since *Klaxon* have frequently described all aspects of a state’s approach to choice of law as entailing questions of state law, but he is wrong to accept this proposition uncritically and to conclude that *Klaxon* itself lends strong support to the received wisdom.

States were still approaching choice of law as an exercise in jurisdiction-selecting rules grounded in vested rights at the time the Court issued *Klaxon* but the paradigm shift that would soon follow was already underway.⁹ That shift has not merely

7. *Id.* at 2134.

8. *Id.* at 2164.

9. As I explained in *Choice of Law and Jurisdictional Policy*: In 1942, Walter Wheeler Cook published *The Logical and Legal Bases of the Conflict of Laws*, his magnificent account of legal method and

been a change in the methods that are fashionable at a given time but a restructuring that was necessary to preserve analytical harmony and consistency in our federal-state system. States exercise legislative authority that is plenary in nature but also limited by federal authority, including the requirement of the Full Faith and Credit Clause that states give due effect to “the public acts, records, and judicial proceedings of every other state.”¹⁰ American choice of law doctrine traces its origins to private international law and the *lex mercatoria* where the application of another sovereign’s policies was always a matter of comity and grace.¹¹ That provenance is still discernible in some aspects of the doctrine today.¹² But the transplantation of those doctrines into a unified federal-state system meant that choice of law methods had to adapt to new structural demands.

Those demands went underspecified for a century and a half, with limits on choice of law characterized largely in terms of inherent features of sovereign authority and the territorial scope of legislative power.¹³ By the 1930s, the Court came to recognize the need to frame the constitutional limits on choice of law in a federal system in terms of the competing policies of

purposive interpretation in conflicts analysis. The work of Cook, his contemporary Ernest Lorenzen and successor David Cavers prefigured the more widely-credited work of Brainerd Currie, which would dramatically shift the paradigm of the field twenty years later.

Wolff, *supra* note 1, at 1849–50.

10. U.S. CONST. art. IV, § 1.

11. Friedrich K. Juenger, *American Conflicts Scholarship and the New Law Merchant*, 28 VAND. J. TRANSNAT’L L. 487, 490–492 (1995) (contrasting traditional approaches to the law merchant with legal positivist approaches).

12. *See, e.g.*, James A.R. Nafziger, *The Louisiana and Oregon Codifications of Choice-of-Law Rules in Context*, 58 AM. J. COMPAR. L. 165 (2010) (describing the codification projects of Louisiana and Oregon and noting throughout the persistence of private international law and the law merchant as sources of important norms).

13. In *Pennoyer v. Neff*, 95 U.S. 714, 722–723 (1877), for example, the Court explained that “it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is allowed by comity.” It further noted that “any direct exertion of authority upon [people outside a State’s territorial boundaries], in an attempt to give ex-territorial operation to its laws, or to enforce an ex-territorial jurisdiction by its tribunals, would be deemed an encroachment upon the independence of the State in which the persons are domiciled or the property is situated, and be resisted as usurpation.”

interested states.¹⁴ That shift in constitutional paradigm gave states “*de facto* encouragement to adopt approaches to choice of law in which the points of reference for selecting the applicable law would harmonize with the points of reference for determining whether the law selected was constitutionally permissible”¹⁵ and to focus more attention on whether and when the state actually sought to apply its laws to a multistate dispute. Professor Silberman has explained:

As those familiar with choice of law are all aware, and the survey of Professor Symeon Symeonides reminds every year, there continue to be different approaches to choice of law in the various states. However, most states—whether they do so under the rubric of “interest analysis” or the Restatement (Second)—now look to the policies of the competing laws as applied to the particular facts to determine which law ultimately should prevail.¹⁶

In a choice-of-law paradigm that looks to the policies of competing state laws, the fundamental structure of the analysis in a federal-state system is necessarily bifurcated. States are the authoritative expositors of the content of their own laws and that content includes the geographic scope of a state law’s reach. The question whether a state seeks to apply its policies to a set of facts that extend beyond its territorial borders is a question of state law, an element of the cause of action that the state has created.¹⁷ However, when two or more legitimately interested states compete to apply their laws and policies to a dispute extending beyond their territorial borders, no state is

14. See *Pac. Emp. Ins. Co. v. Indus. Accident Comm’n*, 306 U.S. 493, 499–500 (1939) (discussing conflicting Massachusetts and California statutes in context of the full faith and credit clause); *Alaska Packers Ass’n v. Indus. Accident Comm’n*, 294 U.S. 532, 547 (1935) (“[W]here the policy of one state statute comes into conflict with that of another . . . a rigid and literal enforcement of the full faith and credit clause . . . would leave to [an] absurd result.”).

15. Wolff, *supra* note 1, at 1884–85.

16. Linda J. Silberman, *Choice of Law in National Class Actions: Should CAFA Make a Difference?*, 14 ROGER WILLIAMS U. L. REV. 54, 60–61 (2009).

17. Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 290 (1990) (“A lawsuit with multistate contacts is still just a lawsuit: the plaintiff still alleges that because something happened, he is entitled to a remedy; the court must still determine whether the facts alleged are true, and whether, if these facts are true, some rule of positive law confers a right to recover.”).

the final source of authority for resolving that conflict. In a unified federal-state system, the resolution of competing exercises of state power is necessarily a federal question of interstate relations.¹⁸ As I have argued:

When two or more states extend their laws to cover a dispute—when the laws of multiple states overlap in geographic scope as well as subject matter—then there is a clash of authority within our federal system. The resolution of that clash implicates the administration of power among states. Left to their own devices, of course, states come up with ways of resolving those disputes. When they do, they are making interstate relations law in the absence of federal direction.¹⁹

Professor Clopton acknowledges this account of the structure of choice of law and the federal nature of conflicts among interested states but gives it short shrift with a conclusory dismissal in a footnote.²⁰ Instead, he insists, “the *Klaxon* Court acknowledged that states are free to make independent policy choices, and that those choices include the selection of another state’s laws.”²¹ In cases involving the resolution of conflicts among interested states, I believe Professor Clopton is mistaking desuetude in federal common lawmaking and a long practice of acquiescence in state rules of decision for a deeper underlying principle.

It is true that both components of choice of law—interpreting the scope and application of a state’s laws and resolving conflicts between the laws of interested states—have frequently been treated as presenting questions of internal state policy. The Court’s inattention to interstate relations and federal common law in *Klaxon* and *Griffin v. McCoach*²² has had a lasting doctrinal impact. The Court did come to a more

18. See Wolff, *supra* note 1, at 1883–88.

19. *Id.* at 1885.

20. See Clopton, *supra* note 5, at 2134 n.42 (“Professor Wolff suggested that this choice-of-law analysis should be divided into inquiries into the reach of a state’s law (which is a matter of state interest) and the resolution of conflicts among state laws (which, at least in federal court, is a matter of federal interest). But the resolution of conflicts among state laws is also a matter of state interest, reflected in state rules on choice of law (where they apply).”) (citations omitted).

21. *Id.* at 2164.

22. *Griffin v. McCoach*, 313 U.S. 498 (1941).

nanced understanding of these matters in the immediate years following *Klaxon* and *Griffin*, clearly articulating the distinctive structural features of choice of law in a federal-state system and developing an analytical vocabulary for describing how and when federal common law should adopt a state rule of decision by reference or, in certain settings, use a federal rule.²³ But since then the Court has largely failed to apply those insights to cases involving state-law claims where federal interests might call for a federal rule of decision in resolving a conflict of laws, leaving the reference to a state rule of decision as the presumptive requirement in such cases.²⁴ “This desuetude has occurred in the name of federalism, but it is a misplaced and unthinking species of federalism that has failed to give voice to significant federal interests.”²⁵ The result has been an accretion of practice that elides the distinction between state law as an ultimate source of authority and state law as a rule of reference in a question that is federal by nature.

In setting forth this critique, I acknowledge that I am guilty of some elision as well. Professor Clopton’s skeptical response to my work demands a careful account of the holding of *Klaxon* in relation to this question of state and federal policy in U.S. choice-of-law analysis. I characterized the doctrinal position the *Klaxon* Court embraced in the following terms:

Klaxon answered that balance of policies by incorporating forum-state choice of law by reference. As the Court had put the matter two years earlier, “the state law has been absorbed, as it were, as the governing federal rule not because state law was the source of the right but because recognition of state interests was not deemed inconsistent with federal policy.” In the case of *Klaxon*, the Court found the absorption of

23. See Wolff, *supra* note 1, at 1873–78 (discussing *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156 (1946) and *D’Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 455 (1942)); *id.* at 1868–71 (discussing federal common law and references to state rule of decision).

24. See, e.g., *Day Zimmermann v. Challoner*, 423 U.S. 3, 4–5 (1975) (rejecting argument for an exception to *Klaxon* in a general diversity case where the forum state was wholly disinterested in the dispute yet its choice-of-law rules would apply forum law).

25. Wolff, *supra* note 1, at 1882.

state law to be mandated by the policies of the general diversity statute.²⁶

This is a revisionist description, one that seeks to impose analytical clarity that is faithful to the goals and purposes attributable to the Court at the point in the unfolding of the *Erie* paradigm at which it decided *Klaxon*. That clarity, however, cannot be said to have constituted the express holding of the decision, as subsequent developments have made clear. *Klaxon* did not describe its holding as a federal common-law reference to a state rule of decision but simply as an unspecified preservation of the “local policies” of the state on the question of characterization at issue in the case.²⁷ The *Klaxon* Court had not yet achieved the analytical clarity in its emerging *Erie* jurisprudence to draw these distinctions.²⁸

III. FEDERAL INTERESTS AND JURISDICTIONAL POLICY

Professor Clopton also raises a practical concern: the prospect of jurisdictional manipulation. He invokes one of the motivating imperatives underlying *Erie*'s rejection of *Swift*²⁹—the ability of corporate litigants to shop into a state or federal forum and thereby secure the benefit of more favorable law—and describes tactics litigants might use to choose the basis for federal subject-matter jurisdiction if doing so would result in a different choice of law. “Importantly,” he argues, “the inconsistent choice-of-law treatment identified in this Article sometimes operates between . . . bases of federal jurisdiction,” demanding that we prevent litigants from “choos[ing] whether claims are litigated as diversity cases, [Class Action Fairness Act (CAFA)] cases, [Multi-District Litigations], or in bankruptcy” to shop for more favorable choice of law.³⁰ Such tactics, Professor Clopton warns, threaten to “permit[] the jurisdictional manipulation and resulting inequities that *Klaxon* sought to avoid.”³¹

26. *Id.* at 1886–87 (internal citations omitted).

27. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496–97 (1941).

28. Wolff, *supra* note 1, at 1878–82.

29. *Swift v. Tyson*, 41 U.S. 1 (1842).

30. Clopton, *supra* note 5, at 2131.

31. *Id.* at 2168.

As an initial matter, Professor Clopton appears to be reaching back to a pre-*Hanna*³² understanding of the *Erie* doctrine in framing this argument, one in which the imperative to avoid forum shopping and inequitable differences in the outcome of lawsuits between state and federal courts is not tied to the policies of the general diversity statute but instead has trans-substantive and quasi-constitutional dimensions. He emphasizes the “preference for symmetry in the law applied in state and federal courts” under *Erie* and concludes:

[W]hen *Erie* requires the application of state law, symmetry is achieved only by *Klaxon*—regardless of the basis of federal jurisdiction. Even if *Klaxon* were not your preferred rule on a clean slate, as long as *Klaxon* is the rule for diversity cases, then we need to extend *Klaxon* to other areas to avoid incentivizing jurisdiction shopping and the inequitable administration of the laws.³³

Framed in such grasping terms, the symmetry Professor Clopton urges has been lacking since the day *Klaxon* was decided. When the Court issued its ruling in *Sibbach v. Wilson*³⁴ and adopted its wooden formulation of the scope and operation of the Rules Enabling Act,³⁵ it set federal courts on a path that would produce massive asymmetries between state and federal proceedings with clear incentives to forum shop and substantial differences in the administration of lawsuits. Following *Sibbach*, a Federal Rule of Civil Procedure can displace laws that a state invests with significant policy weight so long as the Rule hews to questions of practice and procedure. Justice Frankfurter decried this consequence in his *Sibbach* dissent, emphasizing the “drastic change in public policy in a matter deeply touching the sensibilities of the people or even their prejudices as to privacy” and the “intrusion into an historic immunity of the privacy of the person” that he believed the

32. *Hanna v. Plumer*, 380 U.S. 460 (1965).

33. Clopton, *supra* note 5, at 2154.

34. *Sibbach v. Wilson*, 312 U.S. 1, 14 (1940) (holding that “the test” of the validity of a Federal Rule of Civil Procedure “must be whether a rule really regulates procedure—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.”).

35. 28 U.S.C. § 2072.

Court's application of Federal Rule 35 produced in that case.³⁶ The majority, unmoved, dismissed the concern.³⁷

As has been much discussed, the Court went on to exhibit confusion in the years between *Sibbach* and *Hanna* concerning the role of the *Erie* doctrine when a Federal Rule adopts a policy that differs substantially from state law.³⁸ *Hanna* helped restore the clarity that *Guaranty Trust*³⁹ had offered earlier, making clear that the imperative to eliminate improper incentives for forum shopping and substantial differences between federal and state courts in the administration of lawsuits are expressions of the jurisdictional policy of the general diversity statute, not free-floating constitutional imperatives that override all competing federal policies and demand expression whenever state law plays a role in a federal suit.

More broadly, the concern Professor Clopton expresses about the potential for litigants to jurisdiction-shop appears to betray a misconception about the role of federal jurisdiction in determining the appropriate resolution of conflicts among state laws. When courts speak of the "policy of federal jurisdiction" introduced by a statutory grant of subject-matter jurisdiction,⁴⁰ they are not describing a technicality of pleading that lies wholly within the power of litigants to control but rather a set of federal interests that are implicated whenever a lawsuit falls within the scope of a jurisdictional provision. "[S]tatutory grants of federal court jurisdiction embody congressional policies, just as statutes containing liability rules or regulations of primary conduct do."⁴¹ Litigants' pleading and joinder decisions determine whether a lawsuit will include a configuration of parties and claims that bring the suit within the reach of a jurisdictional statute and hence whether federal subject-matter jurisdiction over the case is available at all—the primary concern in most

36. *Sibbach v. Wilson*, 312 U.S. at 18 (Frankfurter, J., dissenting).

37. *Sibbach*, 312 U.S. at 14 ("If we were to adopt the suggested criterion of the importance of the alleged right we should invite endless litigation and confusion worse confounded.").

38. See, e.g., Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of Shady Grove*, 159 U. PA. L. REV. 17, 25–26 (2010) (describing the "mess" of the Court's Rules Enabling Act jurisprudence in the years between *Sibbach* and *Hanna*).

39. *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945).

40. *Id.* at 101.

41. Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. PA. L. REV. 2035, 2054 (2008).

lawsuits where subject-matter jurisdiction is a focus of attention. But when litigants join parties and assert claims that bring the resulting suit within the ambit of a federal jurisdictional statute, the congressional policies reflected in that statute are implicated and will shape the administration of the proceeding whether or not the litigants have chosen to include the statute as one of the express grounds for jurisdiction in their pleadings or papers.

To make the point concretely, suppose a plaintiff files a lawsuit asserting purely federal claims against a defendant who happens to be completely diverse and the plaintiff elects only to offer diversity as a basis for subject-matter jurisdiction in the complaint. If a dispute arises during the suit as to whether federal judge-made procedure or contrary state law should control some issue, the plaintiff cannot force the court to disregard the federal jurisdictional and institutional interests that the federal claims introduce. The suit implicates the jurisdictional policies of the federal question statute because the suit asserts federal claims, not because the plaintiff did or did not give the court permission to consider those policies by including 28 U.S.C. §1331 in the statement of jurisdiction. Likewise, if a plaintiff files a proposed class action in federal court that satisfies both the requirements of CAFA and the general diversity statute, the jurisdictional policies of CAFA are part of the policy landscape in that suit whether or not plaintiff includes a reference to CAFA in the class action complaint. Plaintiffs can foreclose federal subject-matter jurisdiction by crafting a suit that does not fall within the ambit of a jurisdictional statute and parties can waive the right to a federal forum by failing to properly invoke it, but they cannot foreclose a federal court from applying the policies of federal jurisdiction implicated by the suit they have crafted.

Professor Clopton also questions the conclusions I and others have drawn concerning the content of the jurisdictional policies that federal courts should ascribe to statutes like CAFA.⁴² That disagreement is fair game. While jurisdictional statutes can be important wellsprings of federal policy, they can also be underdetermined sources for the content of those policies. “Broadly crafted jurisdictional statutes have frequently been treated as congressional invitations to dialogue with the fed-

42. See, e.g., Clopton, *supra* note 5, at 2157–58.

eral courts, which have a capacity to assess the desirable metes and bounds of jurisdiction through adjudication over time that Congress may lack.”⁴³ CAFA provides a particularly strong case for a shift in federal jurisdictional policy, both in its express statements of purpose and in its structural features,⁴⁴ but the matter certainly is not free from doubt.

Professor Clopton, however, appears to deny any role for federal policies and interests in determining whether a federal rule of decision is called for in resolving conflicts of law among interested states. While acknowledging that “in theory, the basis of federal jurisdiction could give us a clue about the strength or content of the federal interest against which [a state’s interest in applying its rule] is balanced,” he dismisses such interests as having no weight, arguing that “once a federal court has gotten to the point of choosing among state laws, it has concluded that, on balance, state interests win out.”⁴⁵

This analysis conflates the question of whether substantive federal common law will displace state law on core questions of liability with the distinct question of whether federal policies call for a federal rule of decision in resolving conflicting sources of authority on other matters. Examples of the latter situation abound. Within the *Erie* line of cases, the Court has instructed that “affirmative countervailing considerations” call for a federal rule of decision in the application of some procedural common-law doctrines in cases otherwise governed by state law where the state rule would undermine an “essential characteristic” of the federal courts.⁴⁶ In the law of preclusion, federal law provides the rule of decision for measuring the effect of a judgment in a diversity action, even though state law defines the rights and obligations of the parties’ claims and defenses, if a federal rule is necessary to protect important procedural or

43. Tobias Barrington Wolff, *Ruth Bader Ginsburg and Sensible Pragmatism in Federal Jurisdictional Policy*, 70 OHIO ST. L.J. 839, 861 (2010).

44. See Wolff, *Nationwide Class Action*, *supra* note 41, at 2037–39 (exploring these arguments by delving into the substance and ramifications of CAFA); see also Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924 (2006) (analyzing CAFA as a shift in federal jurisdictional policy).

45. Clopton, *supra* note 5, at 2164.

46. *Byrd v. Blue Ridge Coop.*, 356 U.S. 525, 537 (1958); see also *Gasperini v. Ctr. for Humanities*, 518 U.S. 415, 431–32 (1996) (applying this principle).

institutional interests.⁴⁷ And in a case involving *American Pipe*⁴⁸ and the tolling of a statute of limitations following a federal class action, Professor Burbank and I have explained why a federal rule of decision should displace state tolling policies, even when the initial forum was proceeding under the general diversity statute and adjudicating state-law claims, if a federal rule is necessary to protect the purpose and function of Federal Rule 23 and other adjudicatory interests of the federal forum.⁴⁹

I infer that Professor Clopton would not see choice of law in the same terms as these examples because he views every aspect of state choice-of-law rules as embodying pure state substantive policy. Once one recognizes that the resolution of conflicting assertions of authority among interested states presents a question of interstate relations rather than local state policy, however, the case for a federal rule of decision becomes clear. In this connection, consider again the distinctive role of the full faith and credit paradigm in our federal-state system. Courts and commentators have long assumed that the Full Faith and Credit Clause gives Congress the power to enact federal choice-of-law rules.⁵⁰ But the assumption that Congress can specify a federal rule of decision for choice of law has never been taken to mean that Congress can use its full faith and credit powers to preempt state law on questions of purely local policy. Neither can Congress change the scope of state law to force its extraterritorial application where a state specifies that its laws will only apply locally. Congress can pass laws providing for the resolution of competing assertions of state law, but any attempt by Congress to dictate the scope and content of state law in the first instance would encounter serious objections from

47. *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 509 (2001). Professor Clopton discusses *Semtek* and proposes changing its approach. See Clopton, *supra* note 5, at 2175–76.

48. *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974).

49. Stephen B. Burbank & Tobias Barrington Wolff, *Class Actions, Statutes of Limitations and Repose, and Federal Common Law*, 167 U. PENN. L. REV. 1, 42–45 (2018).

50. See, e.g., Daniel A. Crane, *The Original Understanding of the “Effects Clause” of Article IV, Section 1 and Implications for the Defense of Marriage Act*, 6 GEO. MASON L. REV. 307, 322 (1998) (“A hortatory Full Faith and Credit Clause without a Congressional power to prescribe substantive choice of law rules would amount to nothing more than the prevailing practice among nations of selectively extending comity to the acts and judgments of other nations.”).

principles of state sovereignty.⁵¹ Similarly, during periods when there has been doubt concerning the power of Congress to use its Commerce Clause authority to regulate questions of tort and contract, those limitations never qualified the assumption that Congress could enact federal choice-of-law rules on such matters. Congress is not dictating the content of state law when it enacts choice-of-law rules; it is setting federal policy on matters of interstate relations. The same holds true when federal courts adopt such rules through their common law authority.

IV. CONCLUSION

At the heart of Professor Clopton's critique lies a plea for simplicity and predictability in federal choice-of-law analysis. These goals are much to be desired. But choice of law in our federal-state system is not a simple matter. Professor Burbank has described analyzing sources of authority and rules of decision in interjurisdictional disputes as the physics of U.S. law. Unifying the forces of the federal-state system may require engaging with unavoidable complexity. But the project is a worthy one and clarity of analysis is possible even where simplicity is elusive. For me, Linda Silberman's work remains a guiding star in this effort.

51. *See* *New York v. United States*, 505 U.S. 144 (1992) (holding that Congress cannot compel states to enact congressionally preferred policies as state law). As I have argued:

The geographic scope of state law is a matter of internal state policy and so is the sole prerogative of the states. This is the constitutional dimension of *Erie*, which recognizes the quasi-sovereign status of states and their role as authoritative expositors of their own substantive policies. The federal government has no power to alter the contents of those state policies. Federal law can constrain or displace state law in many ways, but it cannot modify the internal content of state law.

Wolff, *supra* note 1, at 1886.