

RESOLVING A TRUE CONFLICT BETWEEN STATE LAWS: A MINIMALIST APPROACH

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[This article proposes a new approach to resolving a true conflict between the statutes of different states. It is commonly suggested that this type of conflict should be resolved by applying the statute of the state with the 'closer connection' to the dispute. However, states will not legislate unless they have a legitimate interest in the subject matter, so searching for the 'closer connection' does not lend itself to any principled answer. Instead, this type of conflict can be resolved by (1) confining a 'conflict' between the statutes of different states to the situation when it is impossible to obey or give effect to both statutes; and (2) when there is an actual conflict between the statutes of different states, by giving effect to neither state's statute to the extent of the inconsistency. This minimalist approach promotes certainty and best gives effect to the equal legislative competence of the states.]

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I INTRODUCTION

The *Australian Constitution* contains a clear rule for resolving an inconsistency between Commonwealth and state statutes — the Commonwealth statute prevails by reason of s 109 — but it does not contain any similar rule for resolving an inconsistency (or ‘conflict’) between the statutes of different states.¹ Of course, as a practical matter, inconsistency between the statutes of different states is much less likely to arise than inconsistency between Commonwealth and state statutes. That is because, for the most part, the legislation of the different states is directed to geographically distinct parts of Australia. Even so, the extraterritorial legislative competence of the states creates the possibility that two or more states might attempt to legislate inconsistently with respect to the same person, thing or event. Consider the following examples:

- *Example A* (regulatory and penal laws): Canetowed Ltd (a Queensland company) releases pollutants into water in Queensland. Those pollutants cause environmental damage in New South Wales, and Canetowed is prosecuted in New South Wales for breaches of a New South Wales anti-pollution statute. The polluting activity was permitted by the Queensland environmental statute.²
- *Example B* (tort law): Sid (a New South Wales resident) and Melba (a Victorian resident) have a motor accident in New South Wales caused by Sid's negligence. Melba receives compensation from the Victorian Transport Accident Commission (‘TAC’) under the Victorian motor accidents scheme, which extends to accidents outside Victoria involving a Victorian-registered car. The TAC sues Sid in the Victorian Supreme Court to recover the amount

¹ This article does not address an inconsistency between state statutes and legislation enacted by a self-governing territory: see below n 36.

² See, eg, the facts of *Brownlie v State Pollution Control Commission* (1992) 27 NSWLR 78, although there was some doubt in that case whether the conduct was authorised by the Queensland statute: at 82–3 (Gleeson CJ).

that it paid to Melba. The accident also falls within the terms of the New South Wales motor accidents legislation.³

- *Example C* (contract law): Bernie (a Tasmanian resident) has a home mortgage with the South Australian State Bank (a South Australian statutory corporation). The mortgage contract provides that it is governed by the law of Tasmania. The South Australian State Bank Act provides that a court may rewrite any unconscionable contract to which the South Australian State Bank is a party. A Tasmanian statute provides that contracts concerning Tasmanian property are governed by the law of Tasmania. Bernie applies to the South Australian Supreme Court for an order rewriting the mortgage.⁴

The High Court has indicated that, in these situations, it would be necessary to resolve any conflict between the statutes of the different states.⁵ However, it has not yet been necessary for the Court to determine how this would be done. Several commentators have argued that a conflict between the statutes of different states should be resolved by applying the statute of the state with the closer connection to the subject matter of the dispute.⁶ I believe, however, that this ‘closer connection’ test should not be adopted. There are the familiar arguments that the closer connection test is too uncertain, and runs counter to the equal legislative competence of the different states. Of course, those arguments would carry little weight if there were no reasonable alternative method for resolving a conflict between the statutes of different states.

However, I do propose an alternative method, which I call the ‘minimalist’ approach. On that approach:

- 1 a conflict between state statutes would be confined as narrowly as possible, so that a ‘true conflict’ would not arise unless it was impossible to obey or give effect to both statutes simultaneously; and
- 2 in those exceptional situations when there is a true conflict between the statutes of different states, that conflict would be resolved by giving effect to *neither* state’s statute to the extent of the conflict.

³ See *Transport Accident Commission v Sweedman* (2004) 210 ALR 140 (‘*Sweedman*’). Ms Sweedman has been granted special leave to appeal to the High Court: Transcript of Proceedings, *Sweedman v Transport Accident Commission* [2005] HCATrans 153 (11 March 2005).

⁴ See *State Bank of New South Wales v Sullivan* [1999] NSWSC 596 (Unreported, James J, 14 July 1999), where the mortgagor made an unsuccessful cross-claim to have a mortgage contract concerning property in Queensland rewritten under the *Contracts Review Act 1980* (NSW). James J held that the New South Wales Act did not apply because the proper law of the contract was that of Queensland: at [220]–[224].

⁵ See *Port MacDonnell Professional Fishermen’s Association Inc v South Australia* (1989) 168 CLR 340, 374 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ) (‘*Port MacDonnell*’); *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1996) 189 CLR 253, 286–7 (McHugh and Gummow JJ); *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1, 34 (Gaudron, Gummow and Hayne JJ), 61 (Kirby J), 80–1 (Callinan J) (‘*Mobil Oil*’).

⁶ See, eg, Kathleen Foley, ‘The *Australian Constitution’s* Influence on the Common Law’ (2003) 31 *Federal Law Review* 131; Jeremy Kirk, ‘Conflicts and Choice of Law within the Australian Constitutional Context’ (2003) 31 *Federal Law Review* 247; Justice Bradley Selway, ‘The Australian “Single Law Area”’ (2003) 29 *Monash University Law Review* 30; Mark Leeming, ‘Resolving Conflicts between State Criminal Laws’ (1994) 12 *Australian Bar Review* 107.

Under the first proposition, many situations currently thought to give rise to a conflict between the statutes of different states do not involve a true conflict at all. Rather, in the majority of situations, the legislation of different states — even legislation directed at the same person, thing or event — can operate concurrently. However, when there is a true conflict between state statutes, the second proposition is that *both* statutes should be disregarded to the extent of the conflict. In other words, a true conflict would be resolved by applying any applicable Commonwealth statutes and the common law, together with any other state legislation not in conflict with another state's statutes. I suggest, perhaps counter-intuitively, that the best way to respect the equal legislative competence of the different states in cases of true conflict is to give effect to the statutes of neither state.

II WHEN IS THERE A TRUE CONFLICT BETWEEN THE STATUTES OF DIFFERENT STATES?

The first question is to determine when there is a true conflict between the statutes of different states. In *Port MacDonnell*, the High Court indicated that a conflict occurs when there are statutes of two or more states 'which, by their terms or in their operation, affect the same persons, transactions or relationships'.⁷

In *John Pfeiffer Pty Ltd v Rogerson*,⁸ the joint judgment of Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ contrasted a *conflict* of law and a *choice* of law. A 'choice of law' is said to describe the existence of a possibility of the application of one or other system of law to the facts of the case under consideration. A 'conflict of law', on the other hand, is said to describe an inconsistency between laws that leads to the invalidity of one of those laws to the extent of the inconsistency.⁹

Therefore, there seem to be two requirements for a conflict: first, the statutes of two or more states apply in their terms to the same person, thing or event; and second, those statutes are inconsistent with each other.

A *Statutes of Two States Apply in Their Terms to Same Person, Thing or Event*

The first requirement of a conflict (that both states' statutes apply in their terms to the same person, thing or event) raises two issues: most obviously, whether both statutes apply to the subject matter of the litigation, but also whether both statutes apply in the forum court.

1 *Both Statutes Apply to the Subject Matter of Litigation*

Determining whether both statutes apply to the subject matter of the litigation involves the familiar task of construing apparently general expressions against two statutory presumptions: (1) the presumption against extraterritoriality, and

⁷ (1989) 168 CLR 340, 374 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

⁸ (2000) 203 CLR 503 ('*Pfeiffer*').

⁹ *Ibid* 527.

(2) the related presumption that statutes do not apply to matters that, under choice of law rules, would be governed by another law area.¹⁰ The effect of these presumptions is that state statutes usually only apply to persons, things or events ‘in and of’ the state.¹¹

In many cases, applying these presumptions will avoid a conflict between the statutes of different states. However, as is well known, the presumption that state legislation only applies to matters ‘in and of’ the state can be overcome by sufficiently clear language. As far as constitutional power is concerned, a state can legislate extraterritorially as long as there is a ‘remote or general’ connection between the state and the subject matter.¹²

2 Both Statutes Apply in the Forum Court

Determining whether both statutes apply in the forum court has received less attention. There are some state provisions that can only apply to courts of that state — for example, a right of appeal from a single judge of the Supreme Court of South Australia to the Full Court of South Australia cannot be applied in a New South Wales court.¹³ However, even when a state provision *can* apply in courts in another state, there is still a question as to whether it *does* apply. On the one hand, there is a presumption that the statutes of one state only apply to courts in that state.¹⁴ On the other hand, the very notion of a conflict between the statutes of different states presupposes that courts in one state are capable of giving legal effect to the statutes of another state; otherwise, a conflict would never arise in practice.

It may seem like a basic question, but there is vigorous debate on exactly how the statutes of one state are applied or given effect by courts in another state (including courts exercising federal jurisdiction in the other state). Very broadly, there are two approaches to this issue. The traditional analysis for cases in state jurisdiction is that state statutes are applied in the courts of other states through

¹⁰ See, eg, Stuart Dutson, ‘The Territorial Application of Statutes’ (1996) 22 *Monash Law Review* 69; see also Stuart Dutson, ‘The Conflict of Laws and Statutes: The International Operation of Legislation Dealing with Matters of Civil Law in the United Kingdom and Australia’ (1997) 60 *Modern Law Review* 668.

¹¹ See, eg, *Interpretation Act 1987* (NSW) s 12(1)(b): ‘a reference to a locality, jurisdiction or other matter or thing is a reference to such a locality, jurisdiction or other matter or thing in and of New South Wales’; *Acts Interpretation Act 1901* (Cth) s 21(1)(b).

¹² See, eg, *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 14 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ); *Australia Act 1986* (Cth) s 2(1).

¹³ *Julia Farr Services Inc v Hayes* [2003] NSWCA 37 (Unreported, Spigelman CJ, Giles JA and Cripps AJA, 28 April 2003). The scope of a right of appeal may, however, be treated as ‘substantive’ in deciding whether differences of substantive law require the transfer of proceedings to another state’s court under the cross-vesting scheme: *BHP Billiton Ltd v Schultz* (2004) 211 ALR 523, 583–4 (Callinan J) (*‘Schultz’*). Some remedies are so interconnected with the venue that these remedies cannot be applied by other courts, whether courts in another state or federal courts in that state: *Pfeiffer* (2000) 203 CLR 503, 541–2 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); *Australian Securities and Investment Commission v Edensor Nominees Pty Ltd* (2000) 204 CLR 559, 593–4 (Gleeson CJ, Gaudron and Gummow JJ).

¹⁴ In *Anderson v Eric Anderson Radio & TV Pty Ltd* (1965) 114 CLR 20 (*‘Eric Anderson’*) the High Court held that Australian Capital Territory legislation removing contributory negligence as a complete defence only applied to courts in the Australian Capital Territory, not New South Wales. This aspect of *Eric Anderson* was not overruled by *Pfeiffer*.

the forum's choice of law rules.¹⁵ For cases in federal jurisdiction, a substantially similar position is reached by applying ss 79 and 80 of the *Judiciary Act 1903* (Cth) ('*Judiciary Act*'). This analysis seems to have been accepted in *Pfeiffer*,¹⁶ although the *Constitution* may affect the content of these choice of law rules.¹⁷

On the other hand, there is a longstanding dissenting view that statutes of one state are applicable in courts in other states by force of s 118 of the *Constitution*. There are two possible versions of this approach: (1) that s 118 itself directly applies the statutes of the other state if they are applicable in their terms (the so-called 'literal' or 'full effect' view);¹⁸ or (2) that s 118 compels a court to apply the statutes of another state that are applicable in their terms through the forum's choice of law rules.¹⁹ Although analytically distinct, these different versions of the constitutional approach lead to substantially the same outcomes.²⁰

My preferred view is that state statutes apply in courts in other states through the forum's choice of law rules,²¹ and that s 118 of the *Constitution* merely imposes some constraints on the content of those rules (briefly, those rules must be even-handed as between different law areas). However, the analysis below of how to resolve a conflict between state statutes does not depend on adopting this view. Therefore, I will not continue the debate between the 'choice of law approach' and the 'constitutional approach' in this part of the article.²² Instead, I will sketch the apparent consequences of the two approaches and draw out the differences in outcome that follow from adopting one approach rather than the other.

¹⁵ Here, a 'choice of law rule' means a rule under which the forum picks up and applies the content of the law of another law area (here, another state). Generally speaking, this choice is made by reference to 'connecting factors', such as (in the case of intranational torts) the place of the wrong.

¹⁶ (2000) 203 CLR 503, 535–6 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); see also 526–7 (state jurisdiction), 530 (federal jurisdiction).

¹⁷ For example, a choice of law rule cannot refuse to give effect to the law of another state on 'public policy' grounds. However, the *Constitution* does not *require* any particular choice of law rule (including the *lex loci delicti* rule for intranational torts): see Graeme Hill and Adrienne Stone, 'The Constitutionalisation of the Common Law' (2004) 25 *Adelaide Law Review* 67, 72–81.

¹⁸ See, eg, Kirk, above n 6; Stephen Gageler, 'Private Intranational Law: Choice or Conflict, Common Law or *Constitution*?' (2003) 23 *Australian Bar Review* 184.

¹⁹ See, eg, Selway, above n 6. The *Constitution* requires that Australia be treated as a single law area for the purposes of choice of law rules.

²⁰ If s 118 is given a 'literal' or 'full effect' construction, the conflict is treated as arising directly between the two (substantive) statutes of the different states, rather than between the forum's (substantive) statute and the forum's choice of law rule. However, if s 118 compels the forum to give effect to the other state's statute through its choice of law rules, then the conflict will arise between the forum's statute — either a substantive statute or a choice of law statute — and the constitutionalised choice of law rule (which picks up the content of the other state's statute).

²¹ For cases in federal jurisdiction, these choice of law rules are applied by either s 79 or s 80 of the *Judiciary Act*.

²² My preferred view is explained in the Appendix, below Part V.

3 *Consequences of the Different Approaches to How Courts in One State Apply Statutes of Another State*

(a) *The Choice of Law Approach*

If the statutes of another state apply through the forum's choice of law rules, then it follows that the only conflict that can arise is between the forum's 'substantive' statute²³ and the forum's choice of law rule (which picks up the content of the other state's statute). Two further consequences follow.

First, in practice, a conflict between statutes of different states is translated into a conflict either between a forum statute and the common law (if it is a common law choice of law rule), or between two statutes of the forum (if it is a statutory choice of law rule). It might be thought that on this approach the resolution of the conflict between different states' statutes depends on the form of the forum's choice of law rules, rather than anything to do with the substantive statutes of the different states said to be in conflict. However, as I will explain below, that need not be so.²⁴

Second, the choice of law approach does not seem to treat some situations as involving a 'conflict', even though the statutes of two states are expressed to apply to the same person, thing or event. In particular, a conflict usually arises on this approach because the forum's choice of law rule is to apply the law of *another* state. But what if the forum's choice of law rule is to apply the law of the *forum* — can the court ignore another state's statute that is also expressed to apply to that person, thing or event?

Consider Example B (Sid and the TAC — the New South Wales statute applies to New South Wales accidents and the Victorian statute applies to accidents involving Victorian residents). In a New South Wales Court, the New South Wales statute applies in its terms, and the choice of law rule is the law of the place of the wrong (also New South Wales). What happens to the Victorian statute? If the Victorian statute can properly be ignored in this latter situation, then it seems that the choice of venue could resolve an apparent conflict between statutes of different states. Again, as I will explain below, that need not be the case.²⁵

(b) *The Constitutional Approach*

By contrast, if the statutes of another state apply by force of s 118 of the *Constitution*, then a potential conflict will arise between the statutes of different states if they are both expressed to apply to the same person, thing or event,

²³ In the sense of a statute that 'affect[s] the existence, extent or enforceability of the rights or duties of the parties to an action': *Pfeiffer* (2000) 203 CLR 503, 543 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ). That can be contrasted with a 'procedural' statute and a choice of law statute.

²⁴ See below Part III(C)(2)(b). Briefly, a conflict between the statutes of different states is resolved by a constitutional rule, so this rule operates in the same way whether the forum's choice of law rule is common law or statutory.

²⁵ See below Part III(C)(2)(b). Briefly, even if the choice of law rule selects the forum statute, that forum statute is 'read down' to the extent of any actual contradiction with the statute of another state.

regardless of the forum's choice of law rules.²⁶ To this extent, the constitutional approach seems to *increase* the potential scope for a conflict between the statutes of different states.²⁷ On this approach, a conflict between statutes of different states will not be affected by the choice of venue.

Two further points about the constitutional approach may be noted. First, this interpretation of s 118 of the *Constitution* removes the need for choice of law rules in the intranational context. As noted in *Pfeiffer*, in intranational cases, the only practical significance of choice of law rules is to choose between the statutory law of different states.²⁸ However, if the constitutional approach is correct, then there is no room for a 'choice' because a court in one state is usually compelled by s 118 of the *Constitution* to apply the statute of another state if that statute is expressed to apply to the person, thing or event in question. Equally, this interpretation of s 118 would seem to make s 51(xxiv) of the *Constitution* unnecessary, because there seems to be no reason for the Commonwealth to enact legislation providing for the 'recognition throughout the Commonwealth of the laws [and] the public Acts ... of the States' if those state laws and public Acts are made directly applicable through s 118.²⁹

Second, on the constitutional approach, the only situation in which a court in one state may not be required to apply the statute of another state (even if it is expressed to apply to the person, thing or event) is when there is a true conflict between that statute and the statute of another state. In that situation, the applicable statute will be determined by whatever method the court uses for resolving a conflict between the statutes of different states. Significantly, s 118 of the *Constitution* itself does not provide any method for resolving that conflict — it simply requires courts to give full faith and credit to the law of *every* state.

(c) *Differences between the Two Approaches*

The two different approaches can be summarised as follows. On the choice of law approach, courts in one state will apply the statutes of another state unless the law of the forum provides otherwise (including choice of law rules, both common law and statutory).³⁰ However, on the constitutional approach, courts in

²⁶ This contrasts with Part II(A)(3)(a) above. If the forum's choice of law rule is statutory, even the constitutional approach would accept that there is a potential conflict between the forum's statutory choice of law rule and the substantive statute of the other state, as given effect by s 118. Therefore, the crucial difference between the choice of law approach and the constitutional approach is in the effect given to *common law* choice of law rules.

²⁷ This is because the two statutes will always be applicable in the forum court: cf above Part II(A)(2). However, if the conflict is resolved by a constitutional rule, the choice of law approach and the constitutional approach will lead to the same results in cases of true conflict.

²⁸ (2000) 203 CLR 503, 517–8 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ). That is because Commonwealth statutes apply nationally, and there is a single Australian common law.

²⁹ Note that statements in *Lipohar v The Queen* (1999) 200 CLR 485, 534 (Gaudron, Gummow and Hayne JJ) ('*Lipohar*') seem to suggest that there is some duplication between s 118 of the *Constitution* and Commonwealth legislation enacted under s 51(xxiv) in providing for the recognition throughout the Commonwealth of the *judgments* of the states: see below n 58 and accompanying text.

³⁰ This summary is suggested by *Borg Warner (Australia) Ltd v Zupan* [1982] VR 437, where the Victorian Supreme Court held that New South Wales workers compensation legislation (*Workers Compensation Act 1926* (NSW)) was not 'tort' legislation and therefore there was no reason not to apply it when the Victorian workers compensation legislation did not apply.

one state will apply the statutes of another state unless the statutes of the forum provide otherwise (including statutory choice of law rules).³¹ In the latter situation, there will be a ‘conflict’ that requires resolution.

The key difference between these two approaches, therefore, seems to be the effect given to common law choice of law rules. If this is the key difference, then perhaps the arguments underlying the constitutional approach for applying the statutes of another state only favour a reformulation of the common law, rather than the fashioning of a constitutional implication.³²

In practice, there has also been a second difference between the choice of law approach and the constitutional approach to applying the statutes of another state. Apart from the different effect given to common law choice of law rules, the two approaches have also been associated with different methods of resolving any conflict that does arise. Specifically, those advocating the choice of law approach have tended to assume that any conflict between the forum law and another state’s statute would be resolved by applying the law of the forum.³³ By contrast, those advocating the constitutional approach have contended for other methods of resolving a conflict — most commonly, a ‘closer connection’ test.³⁴

As will become apparent, however, the choice of law approach need not lead to the automatic application of the forum law whenever there is a difference between the statutes of different states. To begin with, it is necessary to determine whether there is any *inconsistency* between the forum’s substantive statute and the other state’s statute (as picked up by the forum’s choice of law rule).

B *The Statutes of Two States Are Inconsistent*

The second requirement of a ‘conflict’ between the statutes of different states is that the two statutes (both applying to the same person, thing or event) are inconsistent. This second requirement has perhaps not received sufficient attention — in particular, it should not be assumed that statutes of different states are inconsistent merely because they are *different*.

There is no single test for inconsistency between statutes. For example, the test for inconsistency between statutes of the same legislature (so-called ‘repugnancy’) is subtly different from the test for inconsistency between Commonwealth and state statutes (‘s 109 inconsistency’).³⁵ Four general propositions can be made about inconsistency between the statutes of different states (‘state–state inconsistency’).

³¹ For an example, see below n 119 below and accompanying text.

³² These arguments are considered below in Part V(B)(1).

³³ See, eg, *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1, 35–6 (Brennan, Dawson, Toohey and McHugh JJ) (*‘McKain’*), noting that the common law choice of law rules for intranational torts ‘are prima facie amenable to variation by the forum legislature’.

³⁴ See, eg, Kirk, above n 6; see also the approach advocated by Deane J in *Breavington v Godleman* (1989) 169 CLR 41, 129 (*‘Breavington’*), as modified in *McKain* (1991) 174 CLR 1, 46, 53.

³⁵ This issue has arisen recently in considering the operation of s 79 of the *Judiciary Act*: see, eg, *Northern Territory v GPO* (1999) 196 CLR 553, 579–80, 588 (Gleeson CJ and Gummow J) (*‘GPAO’*); *Austral Pacific Group Ltd (in liq) v Airservices Australia* (2000) 203 CLR 136, 144 (Gleeson CJ, Gummow and Hayne JJ), 154 (McHugh J) (*‘Austral Pacific’*).

First, state–state inconsistency concerns two statutes of equal status, in the sense that state legislatures derive their authority from the same ultimate source (ss 106–8 of the *Constitution*) and there is no hierarchy as between the states.³⁶ This fact favours a relatively narrow test of inconsistency that preserves the operation of both statutes as far as possible.

Second, the fact that the two statutes are drafted by different legislatures means that it is inappropriate to minimise actual contradiction by attempting to ‘read together’ the statutes.³⁷ If one legislature enacts two apparently contrary statutes but does not make one expressly subject to the other, then the legislature must have considered that the statutes were not inconsistent. There is no reason to suppose, however, that the statutes of two different states were intended to stand together.³⁸

Third, no significance should be given to a legislative intention to exclude the operation of other statutory law. Consequently, an inconsistency only arises when it is impossible to obey or give effect to both statutes simultaneously.

Finally, a mere *potential* for the statutes of different states to operate inconsistently over the same person, thing or event does not give rise to a conflict between those statutes.

The first two propositions should be uncontroversial, but the final two require further elaboration.

1 *No Significance Should Be Given to an Intention to Exclude Other Statutes*

As noted above, one general proposition is that the test for state–state inconsistency should not attach any significance to a legislative intention to exclude other statutory law. By comparison, it is appropriate to ask, in the context of s 109 of the *Constitution*, whether the Commonwealth statute was intended to ‘cover the field’ and so on. This is because s 109 of the *Constitution* indicates which legislative intention is to be implemented — namely, the Commonwealth’s. In the case of state–state inconsistency, however, there is no basis for deciding which state’s legislative intention should prevail. For example, if both Victoria and New South Wales intended that their motor accidents legislation should operate to the exclusion of other states’ statutes on that topic, these respective legislative intentions would cancel each other out.³⁹ It may also be noted, by way of analogy, that the test of repugnancy (which, like state–state

³⁶ See, eg, Brian Opeskin, ‘Constitutional Dimensions of Choice of Law in Australia’ (1992) 3 *Public Law Review* 152, 166, 184. Inconsistency involving legislation enacted by a self-governing territory raises different issues because the territories ultimately derive their legislative authority from Commonwealth legislation (the *Northern Territory (Self-Government) Act 1978* (Cth) and the *Australian Capital Territory (Self-Government) Act 1988* (Cth)). Therefore, a state–territory inconsistency is really a species of s 109 inconsistency. However, a territory–territory inconsistency, although unlikely, would raise similar issues to those raised by state–state inconsistency.

³⁷ See *Re Maritime Union of Australia; Ex parte CSL Pacific Shipping Inc* (2003) 214 CLR 397, 411–12 (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

³⁸ See further below Part III(A)(1).

³⁹ Even if only *one* state expressed an intention to exclude the operation of other states’ statutes, that intention should not be given effect to. It is only legally possible to exclude laws that are somehow subordinate — ie, in the case of state legislation, delegated state legislation or the common law.

inconsistency, is concerned with two statutes of equal status) concentrates on the extent to which the two statutes can *operate* together, rather than any intention to exclude other statutes.⁴⁰ Of course, it is still necessary to construe the statutes of both states, and legislative intention will be relevant to this task.⁴¹ The only legislative intention that should be disregarded is the intention to operate to the exclusion of the statutes of other states.

(a) *When Does Inconsistency Depend on an Intention to Exclude Other Laws?*

If a legislative intention to exclude the operation of other states' statutes is disregarded, what types of inconsistency does that preclude? In answering this question, it is helpful to consider the various situations that have been recognised as giving rise to a s 109 inconsistency:⁴²

- 1 one statute requires what the other forbids;
- 2 one statute takes away a right conferred by another;
- 3 the state statute would alter, impair or detract from the Commonwealth statute;
- 4 the Commonwealth statute is intended to deal exhaustively with a particular subject matter and the state statute purports also to deal with that subject matter; or
- 5 'operational' inconsistency.

Obviously, the fourth situation ('covering the field' inconsistency) depends on a Commonwealth intention to operate to the exclusion of state law. Therefore, it is inappropriate to apply this test when determining whether there is state-state inconsistency.⁴³ Less obviously, the second and third situations also depend on a Commonwealth intention to operate to the exclusion of state law, even though they are often labelled as examples of 'direct' inconsistency. This is because inconsistency will only arise in these situations if the Commonwealth statute confers a positive right. Conversely, there will not be any inconsistency if the Commonwealth statute is intended to operate within the setting of the general law.⁴⁴ Therefore, I would argue that there is no constitutional inconsistency

⁴⁰ See, eg, *Austral Pacific* (2000) 203 CLR 136, 144 (Gleeson CJ, Gummow and Hayne JJ): 'The question is whether the operation of [one statute] would so reduce the ambit of the [other statute] that the provisions of the [first statute] are irreconcilable with the other [statute]'. Admittedly, in *resolving* a repugnancy between statutes of the same legislature, the court will favour the 'specific' statute over the 'general', which could be analysed as giving effect to an intention to exclude other statutes. However, that principle rests on an assumption that the legislature did not consider that the statutes were inconsistent, and that assumption is inapplicable when the statutes are drafted by different legislatures: see below Part III(A)(2).

⁴¹ For example, a statutory intention that the Act should *not* apply would be relevant: see below Part II(B)(3)(b).

⁴² See, eg, *BGC Contracting Pty Ltd v Construction Forestry Mining and Energy Union* [2004] FCA 981 (Unreported, French J, 29 July 2004) [78]–[80]. French J also referred separately to the situation where the state statute imposes an obligation greater than that for which the Commonwealth statute has provided. However, that seems to be included in either situation two or three.

⁴³ See Kirk, above n 6, 287.

⁴⁴ See, eg, *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237, 246 (Stephen J), 260 (Mason J), 280 (Aickin J, in dissent); *Commercial Radio Coffs Harbour*

between the statutes of different states merely because one state's statute takes away a right conferred by the statute of another state, or because one state's statute alters, impairs or detracts from the operation of another state's statute. That leaves only the situation when one statute requires what another statute forbids — that is, it is impossible to obey or give effect to both statutes simultaneously.

(b) *Analogy with the Commonwealth 'Clearing the Field'*

This conclusion — state-state inconsistency is confined to the situation when it is impossible to obey or give effect to both statutes — is consistent with the High Court's analysis of the extent to which a Commonwealth statute can preserve the concurrent operation of state statutes. In *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation Australia*, Mason J (with whom Barwick CJ, Gibbs, Stephen, Murphy and Aickin JJ agreed) stated:

It is of course by now well established that a provision in a Commonwealth statute evincing an intention that the statute is not intended to cover the field cannot avoid or eliminate a case of direct inconsistency or collision, of the kind which arises, *for example*, when Commonwealth and state laws make contradictory provision upon the same topic, making it impossible for both laws to be obeyed.⁴⁵

It might be thought that the use of 'for example' in this passage indicates that the Commonwealth cannot legislate to prevent *any* type of direct inconsistency from arising. However, it is possible that Mason J only meant to leave open the possibility that a general Commonwealth provision preserving the operation of state statutes may sometimes be qualified by other provisions in the Commonwealth Act.⁴⁶ In principle, the Commonwealth should be able to legislate so that a s 109 inconsistency only arises when there is what Mason J terms a 'contradictory provision upon the same topic' — in other words, when it is impossible to obey or give effect to both the Commonwealth and state statutes simultaneously.⁴⁷

Ltd v Fuller (1986) 161 CLR 47, 50 (Gibbs CJ and Brennan J), 56–8 (Wilson, Deane and Dawson JJ). The 'alter, impair or detract from' test of inconsistency depends on an 'intention underlying the Commonwealth law ... that it should operate to the exclusion of any state law having that effect': *New South Wales v Commonwealth* (1983) 151 CLR 302, 330 (Mason J) ('*Hospital Benefits Case*'). These inconsistency issues were discussed at length in *APLA Ltd v Legal Services Commissioner (NSW)*: Transcript of Proceedings, [2004] HCATrans 492 (7 December 2004).

⁴⁵ (1977) 137 CLR 545, 563 (emphasis added).

⁴⁶ Consider, for example, ss 2C and 75 of the *Trade Practices Act 1974* (Cth) ('*TPA*'). On the one hand, s 75 preserves the concurrent operation of state and territory fair trading legislation. On the other hand, s 2C provides that the Commonwealth is only liable under the *TPA* when it carries on a business. Section 2C would override s 75 if a state or territory fair trading statute purported to impose consumer protection liabilities on the Commonwealth when it was not carrying on a business.

⁴⁷ Indeed, provisions such as *Corporations Act 2001* (Cth) s 5G are explicitly designed to preserve the operation of state legislation to the extent that it is constitutionally possible. For a discussion of s 5G, see *DPP (Vic) v Tat Sang Loo* (2002) 42 ACSR 459, 573–5 (Ashley J); *HIH Casualty & General Insurance Ltd (in liq) v Building Insurers' Guarantee Corporation* (2003) 202 ALR 610, 642 (Barrett J).

Equally, if it is correct that the test of state–state inconsistency should disregard any intention to exclude the operation of other law, then there will only be an inconsistency between two state statutes when there is an actual contradiction between those statutes. In fact, in the next section, I argue that it may be possible to narrow the meaning of inconsistency even further.

2 Potential Conflict Can Be Dealt with by Using ‘Operational’ Inconsistency

The final proposition about state–state inconsistency is that a mere *potential* for the statutes of different states to operate inconsistently over the same person, thing or event does not, in itself, create a conflict between those statutes.⁴⁸ Instead, I suggest, situations of potential conflict can be dealt with using doctrines analogous to ‘operational’ inconsistency.

(a) Operational Inconsistency

In relation to s 109 of the *Constitution*, ‘operational’ inconsistency describes an inconsistency that results from the particular operation of a Commonwealth and a state statute.⁴⁹ This might occur, for example, when a Commonwealth statute confers powers that do not ‘cover the field’ but are intended to be exhaustive once exercised.⁵⁰ On this example, the state law is only inoperative once the Commonwealth power is exercised, and even then is inoperative only in relation to the particular person, thing or event over which Commonwealth powers are exercised.⁵¹ The position is similar when Commonwealth and state statutes penalise the same conduct: unless the Commonwealth statute is intended to be exhaustive, there is no s 109 inconsistency between the two statutes and a person can be prosecuted under either statute (but not both).⁵²

Applying that reasoning to state–state inconsistency, the fact that the statutes of different states are *capable* of applying inconsistently to the same subject matter does not in itself create an inconsistency. Rather, the inconsistency only arises if it is sought to apply both statutes to the same person, thing or event.

(b) Res Judicata, Autrefois Acquit and Autrefois Convict

This argument can be taken one step further. Once legal proceedings relying on one state’s statute are concluded, doctrines such as *res judicata* or *Anshun* estoppel⁵³ (in civil cases) or *autrefois convict* and *autrefois acquit* (in criminal cases) should bar any later legal proceedings that seek to rely on the other state’s

⁴⁸ See *Mobil Oil* (2002) 211 CLR 1, 61 (Kirby J); *Port MacDonnell* (1989) 168 CLR 340, 374 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

⁴⁹ *Commonwealth v Western Australia* (1999) 196 CLR 392, 417 (Gleeson CJ and Gaudron J) (*‘Mining Act Case’*).

⁵⁰ *Ibid* 439–40 (Gummow J); *Victoria v Commonwealth* (1937) 58 CLR 618, 631 (Dixon J) (*‘Kakariki Case’*).

⁵¹ In the *Mining Act Case*, for example, Commonwealth defence regulations made provision for the Commonwealth executive to make further instruments authorising defence activities on defence practice areas, while the state mining legislation made provision for the state to grant exploration licences. A majority of the Court held that a s 109 inconsistency would only arise once both the Commonwealth and state powers were exercised over the same land: (1999) 196 CLR 392, 417 (Gleeson CJ and Gaudron J), 443 (Gummow J).

⁵² See, eg, *McWaters v Day* (1989) 168 CLR 289; *Lipohar* (1999) 200 CLR 485, 534 (Gaudron, Gummow and Hayne JJ); and below n 59 and accompanying text.

⁵³ See *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589.

statute in respect of the same person, thing or event.⁵⁴ Of course, *res judicata*, *autrefois acquit* and *autrefois convict* would only be relevant to the extent of the *overlap* between the statutes of the different states — for example, *autrefois acquit* and *autrefois convict* may not provide a complete bar to prosecution if a person is charged later in state B with an offence that has broader elements than an offence in state A with which the person has already been charged.⁵⁵ Even so, the operation of *res judicata*, *autrefois acquit* and *autrefois convict* should mean that a conflict is unlikely to arise unless parties seek to rely on both state statutes in the one legal proceeding.

It might be thought that common law principles such as *res judicata*, *autrefois acquit* and *autrefois convict* cannot stand against a legislative intention to apply a state statute to a person, thing or event. There are two responses to this. First, statutes are usually intended to operate against the background of these common law principles. For example, if a person sues at common law in respect of certain subject matter, then any statute that operates on the same subject matter would not ordinarily be construed as permitting the person to sue again in respect of the same matter.⁵⁶ So the question is not so much whether there is a clear intention to *preserve* the operation of common law principles such as *res judicata*, but whether there is a clear statutory intention to *override* these principles.

Second, these common law principles may be given additional effect by the requirement that full faith and credit be given throughout the Commonwealth to the judgments of state courts. This derives from a combination of s 118 of the *Constitution* and Commonwealth legislation enacted under s 51(xxiv) of the *Constitution*.⁵⁷ In *Lipohar*, Gaudron, Gummow and Hayne JJ indicated that this full faith and credit requirement provides a ‘constitutional footing’ for the doctrines of *autrefois acquit* and *autrefois convict* in their application to the judgments of other state courts.⁵⁸

⁵⁴ In civil cases see, eg, *McKain* (1991) 174 CLR 1, 39–40 (Brennan, Dawson, Toohey and McHugh JJ). Under the former *Phillips v Eyre* (1870) LR 6 QB 1 rule, a judgment in one Australian law area would extinguish any causes of action arising in the other Australian law areas. In criminal cases, see *Lipohar* (1999) 200 CLR 485, 535–6 (Gaudron, Gummow and Hayne JJ).

⁵⁵ *Lipohar* (1999) 200 CLR 485, 535–6 (Gaudron, Gummow and Hayne JJ). However, a person could not be *punished* twice to the extent of the overlap: see *Pearce v The Queen* (1998) 194 CLR 610, discussing overlapping New South Wales offences.

⁵⁶ See, eg, *Angel v National Australia Bank Ltd* [2001] ATPR ¶41-832, 43 281 (Carr J). In this case it was held that a decision by the Western Australian Supreme Court that the bank was entitled to vacant possession meant that the applicants were precluded from arguing that the bank’s conduct (which had been relied on as a defence in the Western Australian Supreme Court) founded an action for unconscionable conduct under s 51AA of the *TPA*. Conversely, in *Trawl Industries of Australia Pty Ltd (in liq) v Effem Foods Pty Ltd* (1992) 36 FCR 406, 418–22, aff’d (1993) 43 FCR 510, Gummow J held that the dismissal of a claim for misrepresentation relying on s 52 of the Commonwealth *TPA* created a ‘cause of action’ (*res judicata*) estoppel against a later claim for negligent misrepresentation. For a discussion of when there will be the necessary ‘identity’ between causes of action for the plaintiff’s rights to merge in the judgment, see Spencer Bower, A K Turner and K R Handley, *The Doctrine of Res Judicata* (3rd ed, 1996) ch 21.

⁵⁷ See *Evidence Act 1995* (Cth) s 185: ‘All public acts, records and judicial proceedings of a state or territory that are proved or authenticated in accordance with this Act are to be given in every court, and in every public office in Australia, such faith and credit as they have by law or usage in the courts and public offices of that state or territory.’

⁵⁸ (1999) 200 CLR 485, 534.

In general, however, there is nothing to prevent a state from *supplementing* common law principles, such as *res judicata*, *autrefois acquit* and *autrefois convict*, by enacting statutory provisions that deal expressly with an overlap in the operation of the statutes of that state and another state. By analogy, s 4C(2) of the *Crimes Act 1914* (Cth) prevents a person from being punished twice for the same act or omission under the statutes of the Commonwealth and a state.⁵⁹ There may be other ways of improving the coordination between different states — for example, by introducing a notification requirement for criminal cases that involve an interstate element, similar to the notification of constitutional issues required by s 78B of the *Judiciary Act*.⁶⁰

3 *Examples where It Is Impossible to Obey or Give Effect to Both Statutes*

The general propositions set out above greatly reduce the situations in which the statutes of different states are found to be in ‘conflict’. Under these propositions, a court would determine whether there is a conflict by asking two related questions:

- First, can a person comply with both statutes simultaneously (especially when there are said to be conflicting *obligations*)? If a person cannot obey both statutes, then there is a conflict.
- Second, can the court give effect to both statutes (especially when there are said to be conflicting *rights*)? Even if the court cannot give effect to both statutes, there may be a mere operational inconsistency that can be resolved through the plaintiff choosing between alternative rights.⁶¹

This general approach can be tested by considering the examples set out earlier.

(a) *Regulatory and Penal Laws*

In Example A, a Queensland company (Canetowed) is prosecuted in New South Wales for a breach of a New South Wales anti-pollution statute, when the polluting activity took place in Queensland and was permitted by the Queensland statute. Assume that both the Queensland and the New South Wales statutes apply to Canetowed’s activity, and also that the Queensland statute can apply in a New South Wales court. Are the Queensland and New South Wales statutes inconsistent?

The earlier analysis suggests that the Queensland and New South Wales statutes will only be inconsistent if Canetowed cannot comply with both statutes simultaneously. Significantly, there will not be any inconsistency simply because the Queensland statute *permits* an activity that the New South Wales statute prohibits. It is true that, in this situation, the New South Wales statute takes away a right conferred by the Queensland statute, and will ‘alter, impair or detract

⁵⁹ However, comparable state legislation tends only to prevent a person from being punished twice under the law of that state (including under the common law): see, eg, *Interpretation of Legislation Act 1984* (Vic) s 51.

⁶⁰ See Leeming, above n 6, 117.

⁶¹ In civil cases, there will usually be a correlation between a ‘right’ and an ‘obligation’.

from⁶² the Queensland statute. However, neither of these types of inconsistency can be taken into account in assessing state–state inconsistency because they depend on a legislative intention to operate to the exclusion of other statutory law.

Therefore, there will only be an inconsistency between the regulatory or penal laws of different states if one state *requires* (and not merely authorises) an activity that another state prohibits. This type of actual contradiction will probably be unusual, but is not impossible.

- *Example D*: Imagine that in the course of determining a custody dispute, the Family Court of Western Australia issues a subpoena to a South Australian social worker, Adelaide, ordering her to provide evidence obtained in confidence of the identity of a person who has sexually abused a child of the marriage. The Western Australian statute provides that a witness must respond to a subpoena and answer the questions put, while the South Australian statute prohibits a social worker from disclosing to a court any information obtained in confidence.⁶³ In this situation, the Western Australian statute seems to require what the South Australian statute prohibits.

I will consider in Part III how this conflict between the Western Australian and South Australian statutes might be resolved.

(b) *Tort Law*

Example B involved a car accident in New South Wales between a Victorian resident (Melba) and a New South Wales resident (Sid) that was caused by Sid's negligence. The accident falls within the terms of both New South Wales and Victorian motor accidents statutes, which provide for different compensation schemes. The New South Wales statute expressly preserves the right to common law damages in a negligence action,⁶⁴ but limits the amount of damages that can be recovered.⁶⁵ The Victorian statute provides an injured person with a statutory right of compensation from the TAC for non-serious injuries.⁶⁶ The TAC is given a derivative right to recover that amount from the person who caused the loss suffered by the injured person.⁶⁷

In this case, the TAC sues Sid in the Victorian Supreme Court to recover the money that it paid to Melba. Again, assume that both the Victorian and New South Wales statutes apply in their terms (in particular, that the Victorian statute

⁶² See above Part II(B)(1)(a), the third test of s 109 inconsistency.

⁶³ See *GPAO* (1999) 196 CLR 553, although note that *GPAO* concerned a potential inconsistency between a subpoena issued under Commonwealth law and a prohibition on disclosure contained in Northern Territory law.

⁶⁴ *Motor Accidents Act 1988* (NSW) s 6. Motor accidents in New South Wales occurring since 1999 are governed by the *Motor Accidents Compensation Act 1999* (NSW).

⁶⁵ *Motor Accidents Act 1988* (NSW) pt 6.

⁶⁶ See *Transport Accident Act 1986* (Vic) pt 3. A person may recover damages for a 'serious injury': s 93.

⁶⁷ See *Transport Accident Act 1986* (Vic) ss 104 (indemnity) and 107 (proceedings to recover damages).

authorises the TAC's derivative action against Sid)⁶⁸ and that the Victorian Supreme Court is capable of giving effect to the New South Wales statute. It would seem that Sid can 'comply' with both the New South Wales and Victorian statutes by not driving negligently. The real issue here therefore seems to be whether a court could give effect to both statutes.

(i) *Statutes Are Alternatives and Are Not Inconsistent*

Although the New South Wales and Victorian statutes provide Melba with different claims for compensation, I would argue that these claims are alternatives and are not inconsistent with each other. There is no logical contradiction in a single event giving rise to rights and liabilities arising from different sources.⁶⁹

Most obviously, it is well recognised that there can be overlapping common law and statutory claims. For example, a misrepresentation might give rise to a statutory action under the *TPA* (or equivalent state or territory legislation),⁷⁰ as well as a common law action for negligent misrepresentation or passing off. The fact that the trade practices claim is not made out (say, the misrepresentation was not made in trade and commerce) does not necessarily prevent the common law claim from succeeding.⁷¹ Ultimately, the question is whether the plaintiff can establish any of his or her claims. However, the plaintiff will not recover twice if he or she is successful on both the trade practices and the common law claims. It is only in this sense that the claims are inconsistent.

Equally, there can be overlapping *statutory* claims. For example, there could be a general statutory prohibition on misleading and deceptive conduct in trade and commerce, and a separate statutory prohibition on misleading or deceptive conduct in issuing company prospectuses. A misrepresentation in a company prospectus could potentially fall within both prohibitions.⁷² Although in practice this overlap may be dealt with expressly, the overlap could be resolved even without an express provision. It is highly likely that each statute would be intended to confer 'once and for all' compensation for any loss arising from the misrepresentation.⁷³ In this sense, a court could not give effect to both statutes

⁶⁸ In *Sweedman*, the Victorian Court of Appeal concluded that, as the *Transport Accident Act 1986* (Vic) expressly permitted a Victorian resident to recover for an accident outside Victoria, the TAC's rights to recover from a tortfeasor must also extend to accidents outside Victoria: (2004) 210 ALR 140, 148, 149–50, 153, 154–5 (Nettle JA), 142 (Callaway JA).

⁶⁹ For a similar analysis in determining the applicable law in federal jurisdiction, see Bernard O'Brien, 'The Law Applicable in Federal Jurisdiction' (1976) 1 *University of New South Wales Law Journal* 327, 345–6.

⁷⁰ See, eg, *Fair Trading Act 1987* (NSW).

⁷¹ On the other hand, the statutory and common law claims might both fail for the same reason, such as a lack of reliance on the representation: see, eg, *Townsend v Collova* [2005] WASC 4 (Unreported, Le Miere J, 14 January 2005).

⁷² Cf *Fraser v NRMA Holdings Ltd* (1994) 52 FCR 1, 17–18 (Gummow J), observing that a misrepresentation in a company prospectus could potentially be contrary to s 995(2) of the *Corporations Law*, as well as s 52 of the *TPA*. This observation was referred to with apparent approval on appeal: *NRMA Holdings Ltd v Fraser* (1995) 127 ALR 577, 579 (Black CJ, von Doussa and Cooper JJ).

⁷³ For example, in *Sweedman* (2004) 210 ALR 140, 144, Callaway JA held that s 104 of the *Transport Accident Act 1986* (Vic), by implication, 'does not enable the same amount to be recovered twice, once as damages [paid to the plaintiff] and once by way of indemnity [paid to the TAC]'. The Court held more generally that neither the plaintiff nor the TAC could recover twice from the defendant: at 150–3 (Nettle JA), 143–4 (Callaway JA).

simultaneously, because neither statute would permit the payment of compensation if the plaintiff had already been compensated for the loss from another source. Consequently, the plaintiff would need to elect between these statutory rights.⁷⁴

Similar reasoning would seem to apply to the New South Wales and Victorian motor accidents statutes. It is likely that a court could not give effect to both statutes simultaneously, in the sense that Melba would not recover under both statutes.⁷⁵ However, the mere *potential* for the Victorian and New South Wales statutes to operate inconsistently in relation to the same motor accident does not create a conflict between those statutes. A conflict will only arise if an attempt is made to apply both statutes to the one accident. Therefore, if Melba applies for compensation under the Victorian statute, the fact that she *might* have sought compensation under the New South Wales statute is immaterial — she can elect between these inconsistent statutory rights. Once the TAC has recovered the amount of compensation from Sid in the Victorian Supreme Court, that judgment would create a *res judicata* defence if Melba were then to apply for compensation under the New South Wales statute.⁷⁶

However, the position would have been different if Sid could not have complied with both statutes. If two statutes impose conflicting *obligations* on a defendant, that inconsistency cannot be resolved by the plaintiff choosing between inconsistent *rights*.

(ii) *What if One Statute Confers No-Fault Compensation?*

Admittedly, this analysis does not cover the situation when Melba makes an application under the New South Wales statute before the TAC has obtained judgment under the Victorian statute. Even if the TAC had paid compensation to Melba at that point, Melba's right to compensation (unlike the TAC's right to

⁷⁴ By analogy, the common law doctrine of election provides that, 'if a person has two alternative but inconsistent legal rights, his satisfaction of one of those rights leads to the destruction of the other, preventing him from subsequently seeking to enjoy the other': D W Greig and J L R Davis, *The Law of Contract* (1987) 1254; *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, 641–2 (Stephen J), 655–6 (Mason J).

⁷⁵ However, it is possible that a statute could intend to confer rights that supplement any other rights that a person has. For example, insurance benefits and gifts may have been intended to supplement any damages a plaintiff could receive from the defendant. It would therefore be unjust for the defendant to receive the benefit of these payments (in effect) through a discount in the damages awarded: *Sweedman* (2004) 210 ALR 140, 151 (Nettle JA).

⁷⁶ Although the Victorian Supreme Court proceedings are between the TAC and Sid (not Melba and Sid), a *res judicata* still arises because the TAC's cause of action is derivative on Sid's liability to Melba. For a recent discussion of these sorts of issues, see, eg, *QBE Workers Compensation (NSW) Ltd v Dolan* [2004] NSWCA 458 (Unreported, Mason P, Beazley and Tobias JJA, 15 December 2004). In *Sweedman*, however, the court held that there was no inconsistency between the New South Wales and Victorian statutes, because the *Motor Accidents Act 1988* (NSW) provided for 'damages', but s 104 of the *Transport Accident Act 1986* (Vic) provided for a 'statutory quasi-contractual remedy': (2004) 210 ALR 140, 158 (Nettle JA). However, the Court also appeared to accept that a plaintiff could not recover under both the *Motor Accidents Act 1988* (NSW) and the *Transport Accident Act 1986* (Vic): see above n 73 and accompanying text. If that is so, then to that extent the statutes do cover the same 'field' (although an inconsistency does not arise unless a person attempted to recover under both the New South Wales and Victorian Acts in respect of the same event).

indemnity or damages) is not dependent on anyone being liable to Melba.⁷⁷ The TAC's decision to pay compensation therefore says nothing about Sid's liability to Melba, which in turn means that the decision does not give rise to a *res judicata*-type defence.⁷⁸ However, even then there are various methods for dealing with a potential overlap between the New South Wales and Victorian statutes:

- 1 The Victorian statute might expressly require a person to repay any compensation paid under the Victorian statute if the person later receives compensation for that accident under the law of another state.⁷⁹ As a practical matter, that Victorian provision would prevent Melba from receiving double compensation.
- 2 Alternatively, the New South Wales statute might not permit the recovery of compensation if the person had already received compensation from another source. Even without an express provision, it might be possible to draw an implication to this effect (for example, if it appears that the compensation was intended to be 'once and for all').⁸⁰
- 3 If the TAC had already commenced proceedings in the Victorian Supreme Court (but had not received judgment), Sid could apply to have Melba's proceedings under the New South Wales statute either stayed, or consolidated with the TAC's proceedings under the Victorian statute.

Therefore, with the law of obligations (such as tort), statutes of different states will usually provide alternative, rather than inconsistent, rights and obligations. A person may recover under either state's statute, but not both.⁸¹

(iii) *Converse Obligations Are Not Inconsistent*

However, it will not always be the case that tort statutes confer rights or obligations on the one person. There could be situations where one state's statute confers an obligation on one person, and another state's statute confers a converse obligation on another person. Depending on how these obligations are expressed, the obligation under one statute may, in effect, be cancelled out by the obligation under the other statute.

- *Example E*: Imagine that a Queensland statute imposes an obligation on a Queensland employer to pay employees for any wages lost by a 'lock out', but a New South Wales statute imposes an obligation on employees who are residents of New South Wales to pay an employer for profits lost by reason

⁷⁷ See the eligibility criteria in the *Transport Accident Act 1986* (Vic) pt 3, div 1. By way of comparison, *Transport Accident Act 1986* (Vic) ss 37(1)(g), 38A provide specifically that the TAC is not liable to pay compensation if a person is entitled to compensation under workers compensation legislation (including that of other jurisdictions).

⁷⁸ Issue estoppel is not limited to decisions of a court of record: see, eg, *Kuligowski v Metrobus* (2004) 208 ALR 1, 7 (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ), citing *Papua and New Guinea v Daera Guba* (1973) 130 CLR 353, 453 (Gibbs J). It is a difficult issue as to whether this common law principle can apply to federal administrative bodies and federal courts: see, eg, *Miller v University of New South Wales* (2003) 132 FCR 147.

⁷⁹ See *Transport Accident Act 1986* (Vic) s 42.

⁸⁰ See above n 73.

⁸¹ But see above n 75.

of industrial action. Canetowed initiates a lock out at its factory in Tweed Heads, which prompts its employees (all of them residents of New South Wales) to picket Canetowed's factory. In that situation, Canetowed could be liable to employees under the Queensland statute, but the employees could also be liable to Canetowed under the New South Wales statute.

Even if these converse obligations cancel each other out in practice, a court can still give effect to both statutes. There is no *legal* contradiction in making orders that Canetowed recover under the New South Wales statute and the employees recover under the Queensland statute.⁸² Moreover, Canetowed and its employees can comply with both statutes (Canetowed by not instituting the lock out, and the employees by not picketing Canetowed's factory). In this situation, it may well be the case that each state's statute alters, impairs or detracts from the other state's statute. However, as already explained, this does not give rise to a constitutional inconsistency.

There is an important difference between Example E and Example B (involving Sid and Melba). In Example B, I suggested that both statutes were probably intended to confer a 'once and for all' compensation so that, once Melba recovered under one statute, the other statute would not be intended to apply. Inconsistency in the operation of these statutes could therefore be avoided by giving effect to this legislative intention. In Example E, it might be assumed that both Queensland and New South Wales intended that the value of their statutory rights (conferred on the employees and employer) should not be reduced by the other party to the industrial dispute receiving compensation from another source. In this situation, inconsistency in the operation of these statutes can only be avoided by *not* giving effect to this legislative intention. The reason for this difference is that, in Example B, each state has an (implied) intention about when *its* statute should not apply; by contrast, in Example E each statute has an intention about when *another* state's statute should not apply. For the reasons already given, the latter type of legislative intention cannot be given effect when resolving state-state inconsistency.

(iv) *Contradictory Obligations*

Tort obligations will be contradictory if doing an act would attract a liability, but *not* doing that act will also attract a liability. In that situation, the statutes will be inconsistent.

- *Example F*: Melba requires blood transfusions after the accident, but she refuses to consent to those transfusions for religious reasons. Under a New South Wales statute, a doctor who fails to provide life-saving medical treatment in New South Wales can be sued by the family of the deceased, even

⁸² See, eg, *Scott v Beneficial Finance Corporation Ltd* (Unreported, Federal Court of Australia, Hill J, 17 December 1993). Beneficial Finance Corporation ('BFC') argued that an earlier decision of the New South Wales Supreme Court, holding that Mr Scott was liable to the company under a guarantee, prevented Mr Scott from arguing in the Federal Court that BFC was liable to Mr Scott for an equivalent amount of damages under the *TPA*. Hill J rejected that argument, stating that 'I cannot see why a claim on the guarantee and a claim for damages under the [*TPA*] are in any way inconsistent with each other. They are certainly not contradictory. Nor do they appear to declare rights which are inconsistent in respect of the same transaction': at [27].

when the deceased did not consent to the treatment. Under a Victorian statute, however, a doctor who gives blood transfusions to a Victorian resident without his or her consent can be sued by the patient, even when the transfusion was given to save a life. Melba's doctor, Dr Albury, decides not to provide blood transfusions to Melba, who dies.

In this situation, there is a contradiction in the obligations imposed on Dr Albury: she can be sued by Melba's family under the New South Wales statute if she does *not* provide the blood transfusion, but she can be sued by Melba under the Victorian statute if she *does* provide the transfusion.⁸³ A possible means of resolving this conflict is explained in Part III below.

(c) *Contract Law*

Example C involved a mortgage contract between a Tasmanian resident (Bernie) and the South Australian State Bank, which was expressed to be governed by the law of Tasmania. The South Australian statute permits a court to rewrite an unconscionable contract to which the South Australian State Bank is a party; the Tasmanian statute provides that a contract concerning Tasmanian property is governed by the law of Tasmania. Bernie applies to the South Australian Supreme Court for an order under the South Australian statute rewriting the mortgage contract.

In resolving conflicts between contract statutes, it is likely that there will be more emphasis on whether the courts can *give effect* to both states' statutes, rather than whether a person can *comply* with both statutes.⁸⁴ Unlike regulatory and tort statutes — where the emphasis is on the liability of the accused or defendant — contract statutes are concerned with the mutual obligations of both parties to the contract.⁸⁵ Consequently, it may be more likely for a contradiction to occur when statutes of different states operate on a single contract. In tort, there is no legal contradiction in a defendant having a defence to one claim but not to another, and therefore being liable to the plaintiff for only one claim. In contract, however, a single contract cannot be both valid and invalid.

In Example C, it may well be the case that a court cannot give effect to the South Australian and Tasmanian statute simultaneously. If Tasmania has not modified the common law of unconscionability, the Tasmanian statute provides Bernie only with the remedies allowed by the common law (as picked up by the Tasmanian statute). By contrast, the South Australian statute permits an unconscionable contract to be rewritten. Even so, the relevant rights provided for by the Tasmanian and South Australian statutes are both conferred on Bernie. He

⁸³ We will assume for these purposes that the Victorian statute is intended to extend to the treatment of a Victorian resident outside Victoria.

⁸⁴ However, there could conceivably be situations where the statutes of different states imposed conflicting *obligations* on one party to the contract, so that doing an act was a breach of contract under one statute, and not doing that act was a breach of contract under the other statute. In that situation, each state's statute would be inoperative to the extent that it attempted to impose a liability on conduct that was required to avoid a liability under the other state's statute.

⁸⁵ Of course, there will be situations where tort statutes might impose liabilities on different persons (see Example E above), and the primary question will be whether a court can give effect to both statutes.

should therefore be able to elect between these inconsistent statutory rights (as with Example B).

- *Example G:* Imagine now that the Tasmanian statute provided that unconscionability was not to be a ground for invalidating or otherwise affecting the validity of a contract concerning Tasmanian land. The South Australian statute still provides that a court may rewrite an unconscionable contract to which the South Australian State Bank is a party.

In this revised situation, there would seem to be a constitutional inconsistency between the South Australian statute and the Tasmanian statute. The South Australian statute confers a right on Bernie to have an unconscionable contract rewritten, but the Tasmanian statute confers a right on the South Australian State Bank to enforce an ‘unconscionable’ contract. It is not possible to give effect to both of these rights simultaneously. Moreover, unlike Example C, it is not possible to make an election between these inconsistent statutory rights because the rights are held by people with opposing interests. I will consider in Part III below how this conflict between the South Australian and the Tasmanian statutes might be resolved.

4 *A Possible Objection to the Proposed Inconsistency Test*

Before considering how to resolve a conflict, I should address a possible objection to my proposed test of inconsistency. The test would largely confine inconsistency to situations when it is impossible to obey or give effect to both statutes. It might be objected that this proposed test of inconsistency gives too much opportunity to one state to frustrate the legislative policies of another state. Using the examples given earlier, any permission given by the Queensland statute to engage in an activity in Queensland is effectively negated if a New South Wales statute can penalise that activity. Similarly, a decision by New South Wales that the rights of persons injured in motor accidents in New South Wales should be limited is, at least partly, frustrated if a Victorian injured in New South Wales can recover under a Victorian statute instead. There are, however, several answers to this objection.

First, the objection presupposes that one state will have a ‘primary’ connection with the person, thing or event, usually on the basis of a closer territorial connection.⁸⁶ However, a conflict may arise precisely because the different states have a relatively equal connection with the subject matter. For example, if activities in Queensland have an effect in New South Wales, it is not self-evident that one state has a clearly stronger connection than the other. In this situation, it seems appropriate to preserve the operation of both statutes as far as possible by narrowing the area of inconsistency.

⁸⁶ For example, Mark Leeming accepts that *autrefois convict* and *autrefois acquit* will often prevent a conflict arising in practice between the criminal statutes of different states, but argues that the prosecution should be carried out by the state with the closest connection to the offence: Leeming, above n 6, 115. However, cases such as *Lipohar* run counter to the suggestion that only one state has authority to prosecute: (1999) 200 CLR 485, 499–500 (Gleeson CJ), 535–6 (Gaudron, Gummow and Hayne JJ).

Second, the situation when one state clearly does have a stronger connection to the subject matter than another state can be dealt with in other ways. Most obviously, a state cannot legislate with extraterritorial effect unless there is a connection (albeit a remote or general one) with the state.⁸⁷ In addition, an implication can be drawn from the federal structure that one state cannot legislate to interfere with another state's capacity to exercise its governmental functions, which might be called 'state-state governmental immunity'.⁸⁸ These doctrines reduce the scope for conflict between the statutes of different states by limiting the power of one state to legislate on matters that are the responsibility of another state. Therefore, even if it were accepted that there is too much opportunity for one state to encroach upon another state's area of responsibility, adopting a broader meaning of state-state inconsistency is not the only response. An alternative response would be to develop the doctrines of extraterritoriality and state-state governmental immunity, which could prevent a conflict between the statutes of different states arising in the first place.

Finally, there are political means of responding to a state that encroaches on another state's area of responsibility.⁸⁹ In particular, the fact that the major political parties in Australia are organised on a national basis offers a means by which one state can exert political pressure on another state — through the intervention of the federal branch of the political party, if necessary. The weaker the connection between a state and the subject matter, the stronger these political pressures are likely to be.

C Summary

Part II has proposed a definition of when a conflict arises between the statutes of different states. The proposed definition greatly reduces the area in which the statutes of different states are in 'conflict', although there will still be situations when a conflict will arise. In summary:

- 1 A conflict between the statutes of different states requires, first, that both statutes apply in their terms to the same person, thing or event. The likelihood of this happening is greatly reduced by the statutory presumption that state statutes apply to matters 'in and of' the state.
- 2 Even when the statutes of more than one state do apply in their terms to the same person, thing or event, there will not be 'conflict' between those statutes unless they are *inconsistent*.
- 3 As a general matter, the statutes of different states will not be inconsistent unless it is impossible to obey or give effect to both statutes simultaneously.

⁸⁷ See above n 12.

⁸⁸ *Mobil Oil* (2002) 211 CLR 1, 25–6 (Gleeson CJ). In *Schultz*, there was an argument that it was contrary to state-state intergovernmental immunity for the courts of one state to sit in another state. Although the Court did not need to deal with this argument, Hayne and Callinan JJ expressed some doubt about whether a state court could exercise coercive powers in another state: (2004) 211 ALR 523, 566 (Hayne J), 569 (Callinan J); cf 545 (Gummow J).

⁸⁹ See, eg, Peter Nygh, 'Full Faith and Credit: A Constitutional Rule for Conflict Resolution' (1991) 13 *Sydney Law Review* 415, 432: 'if a state clearly and deliberately uses its extraterritorial power in conflict with a statute of another state, *the issue should be resolved by the political rather than the legal process*' (emphasis added).

There is no conflict merely because one state's statute impairs or detracts from a right conferred by another state's statute.

- 4 In addition, the statutes of different states will not be inconsistent merely because these statutes *could* operate inconsistently on the same person, thing or event. Rather, a true conflict will usually arise only when it is sought to apply both statutes in the one legal proceeding. Even then, it may be possible to resolve this conflict through the plaintiff choosing between inconsistent rights.

III HOW SHOULD A CONFLICT BETWEEN THE STATUTES OF DIFFERENT STATES BE RESOLVED?

Once it is determined that there is a conflict between the statutes of different states, the second question is how that conflict should be resolved. Before considering two possible rules for resolving state–state inconsistency, I will briefly explain, and reject, two other possible approaches.

A Two Approaches that Should Be Disregarded

1 Tests for Resolving Repugnancy between Statutes of the Same Legislature

One argument is that state–state inconsistency can be resolved by applying the tests for resolving a repugnancy between statutes of the same legislature.⁹⁰ On this approach, the court would apply the more 'specific' statute or, as a last resort, apply the statute that is later in time.⁹¹ However, neither of these is appropriate for resolving a state–state inconsistency.⁹²

When two statutes are enacted by the same legislature, applying the more specific statute gives effect to the apparent legislative intention that the statutes can coexist. However, there is no reason to suppose that the statutes of different states were intended to coexist.

Alternatively, when two statutes are enacted by the same legislature and cannot otherwise be reconciled, applying the later statute gives effect to parliamentary supremacy, because one parliament cannot bind its successors. As between themselves, however, state legislatures are of equal 'supremacy'.

2 Applying the Statutes of the Forum

A second argument is that a state–state inconsistency could be resolved by the court applying the forum's statute. There are obviously some practical difficulties associated with this approach. What if neither of the conflicting statutes is enacted by the forum? And what if the forum's choice of law rule is statutory rather than common law — is the court simply to apply the more specific, or the later, forum statute? That result would create a curious disincentive to enact choice of law rules: the forum's substantive statute would *always* trump a

⁹⁰ As suggested by Gageler, above n 18, 188.

⁹¹ On the tests for resolving repugnancy, see, eg, D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (5th ed, 2001) 205–12.

⁹² Kirk, above n 6, 287.

common law choice of law rule (that picks up the other state's statute), but there remains at least a possibility that the forum's statutory choice of law rule could prevail over the forum's substantive statute.

Of course, it is true that existing statutory provisions for the transfer and stay of proceedings would ensure that a plaintiff could not determine the outcome simply by choosing the venue.⁹³ However, by putting such conclusive weight on the venue in determining the applicable law, this approach would preclude a court from responding to other factors that could otherwise influence the choice of venue (such as residence of parties and witnesses, the availability of expedited procedures that benefit both parties, and so on).⁹⁴ To this extent, this suggested approach to resolving state–state inconsistency might prevent a court from achieving the fairest outcome between the parties.

There are also conceptual difficulties with attempting to resolve state–state inconsistency by applying the forum statute. The joint judgment in *Pfeiffer* described a 'conflict of laws' as an inconsistency between the statutes of different parts of the federation that leads to the invalidity of one of those statutes to the extent of the inconsistency.⁹⁵ The reference to a statute being invalid (presumably in the sense of inoperative) suggests that this conflict is resolved by a constitutional rule, because the statute of one state cannot be invalidated by the statute of another state — or by the common law, for that matter.⁹⁶

Therefore, the better view seems to be that there is an implication drawn from the *Constitution* itself that the statutes of different states cannot be inconsistent with each other.⁹⁷ There are two possible sources of this implication.

First, there is a coherent argument that a constitutional prohibition on state–state inconsistency derives from territorial limits on state legislative power.⁹⁸ In Canada, for example, the provinces have a severely limited power to

⁹³ In superior courts, cases can be transferred to the more appropriate court under the general cross-vesting scheme: see, eg, *Jurisdiction of Courts (Cross-Vesting) Act 1987* (NSW) s 5. On the operation of that provision, see *Schultz* (2004) 211 ALR 523. In inferior courts, cases can be stayed when the court's jurisdiction over the defendant depends on service outside the jurisdiction and another court is more appropriate: *Service and Execution of Process Act 1992* (Cth) s 20.

⁹⁴ For a recent discussion of the factors that influence whether a transfer of proceedings under the general cross-vesting scheme is 'in the interests of justice', see, eg, *Ewins v BHP Billiton Ltd* [2005] VSC 4 (Unreported, Gillard J, 12 January 2005).

⁹⁵ (2000) 203 CLR 503, 527 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

⁹⁶ Kathleen Foley argues that a conflict between the statutes of different states can be resolved by a common law choice of law rule that chooses the law of the state with the closer connection: Foley, above n 6, 163–4. However, if the forum's substantive statute is expressed to apply to the person, thing or event, it is difficult to see how a *common law* rule could direct the application of another state's statute.

⁹⁷ Indeed, Justice Gummow, in extra-curial writing, has referred to state–state inconsistency as 'constitutional conflict': see Justice William Gummow, 'Full Faith and Credit in Three Federations' (1995) 46 *South Carolina Law Review* 979, 1012–13. Kirby J also has indicated in obiter dicta that the means for resolving a conflict between the statutes of different states 'must ultimately be found in the Australian *Constitution*': *Lipohar* (2000) 200 CLR 485, 553. See also *Schultz* (2004) 211 ALR 523, 557–8 (Kirby J).

⁹⁸ Sometimes Deane J seemed to be making this argument: see *Breavington* (1989) 169 CLR 41, 128–9; but see at 136, stating that it is not necessary to assign matters that are connected with more than one state exclusively to one state.

legislate with extraterritorial effect.⁹⁹ This limit largely removes the possibility of a conflict arising between the statutes of different provinces. In Australia, however, it is well established that the states can legislate with extraterritorial effect, including with effect in another state. Moreover, a territorial limit would lead to some practical difficulties, as only one state would ever have power to legislate with respect to any given person, thing or event.

Second, a more widely-accepted argument is that a single legal system cannot contain contradictory commands.¹⁰⁰ Although Australia is a federation with a federal judicial system, the High Court is the ultimate court of appeal for all matters. Partly for that reason, Australia has a single legal system for these purposes. This prohibition on contradictory commands could be seen as an aspect of the rule of law, which has limited constitutional status.¹⁰¹ Although the rule of law is a notoriously uncertain concept, this particular requirement — an absence of contradiction — seems uncontroversial.

If the *Constitution* impliedly prohibits a contradiction between the statutes of different states, it is highly doubtful that the constitutional rule for removing that contradiction would depend on the existence of legal proceedings. Consider the position with s 109 inconsistency. Cases such as *University of Wollongong v Metwally*¹⁰² have emphasised that inconsistency between Commonwealth and state statutes arises directly from the *Constitution* itself — that is, s 109 operates quite independently of any steps being taken by, or in, a court.¹⁰³ Like s 109 inconsistency, the reason that state–state inconsistency must be resolved is to ensure that citizens are not subject to valid but inconsistent commands.¹⁰⁴ It follows that applying the forum’s statute is an unsuitable method for resolving state–state inconsistency, because this approach would not be capable of resolving an inconsistency until legal proceedings had been instituted.¹⁰⁵

For these reasons, a conflict between the statutes of different states cannot be resolved by applying the tests for resolving repugnancy, or by applying the

⁹⁹ See generally Peter Hogg, *Constitutional Law of Canada* (4th ed, 1997) 324–32.

¹⁰⁰ See, eg, David Kelly and James Crawford, ‘Choice of Law under the Cross-Vesting Legislation’ (1988) 62 *Australian Law Journal* 589, 599; Foley, above n 6, 162. See also Kirk, above n 6, 269, who bases a constitutional implication in part on the rule of law. However, it does not follow that the rule of law requires that someone be able to predict which (non-inconsistent) state’s statute will be applied by the forum’s choice of law rule: see below Part V(B)(1)(d).

¹⁰¹ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193 (Dixon J) (‘*Communist Party Case*’); referred to recently in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 513 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

¹⁰² (1984) 158 CLR 447 (‘*Metwally*’), where a majority of the Court held that a Commonwealth law could not retrospectively remove s 109 inconsistency. The disagreement in *Metwally* arose over whether a retrospective Commonwealth law was invalidly purporting to alter the operation of s 109.

¹⁰³ See *Agrack (NT) Pty Ltd v Hatfield* (2003) 7 VR 63, 96 (Ormiston JA): ‘The answer [to whether there is a s 109 inconsistency] must be capable of being given without the need to resort to litigation and before s 79 [of the *Judiciary Act*] can have any operation’. The High Court heard an appeal from that case on 8–9 March 2005.

¹⁰⁴ For a discussion of s 109 inconsistency, see *Breavington* (1989) 169 CLR 41, 123 (Deane J); *Metwally* (1984) 158 CLR 447, 467, 476–7 (Murphy J).

¹⁰⁵ Even if this analysis were wrong, a separate objection to applying the forum statute is that this approach is contrary to s 118 of the *Constitution*. On my preferred view, s 118 does not require the application of any particular law, but it does require the rules selecting the applicable law to be ‘even-handed’ as between different law areas: see below Part V(B)(2).

forum statute. A more difficult question is whether this conflict can be resolved by applying the ‘closer connection’ test.

B *The ‘Closer Connection’ Test*

A common argument is that a conflict between the statutes of different states should be resolved by applying the statute of the state with the ‘closer connection’ to the person, thing or event. There are two different forms of this closer connection test.

The ‘absolute’ form of the test would require that the courts apply the law of the state which has the closest connection to the given person, thing or event. This would be so, even if the law applicable in that state is the common law and another state’s statutes are expressed to apply to the subject matter in dispute.¹⁰⁶ The absolute form therefore seems to assume that for any given person, thing or event, there will be a single state to which this subject matter has the closest connection. The effect of this approach is that only one state will ever have power to legislate with respect to a particular person, thing or event. However, that limit on state legislative power is difficult to reconcile with the states’ well-established power to legislate with extraterritorial effect. Indeed, a power to legislate extraterritorially seems, inevitably, to create the possibility that more than one state will have power to legislate with respect to the same subject matter.¹⁰⁷ Therefore, in the following discussion, I focus on the ‘comparative’ form of the closer connection test.

The comparative form of the test requires that when two states legislate with respect to the same person, thing or event, the courts should apply the statute of the state that has the closer connection to the subject matter. Unlike the absolute form of the test, the comparative closer connection test only has regard to *statutory* law — the courts should give effect to a state statute, even if there is another state with a potentially closer connection that has not legislated on the subject matter.¹⁰⁸

1 *Arguments Supporting a Closer Connection Test*

It is convenient to start with the main arguments in favour of a closer connection test. In summary, the arguments are that the closer connection test:

- is suggested by High Court authority;
- assesses (as is appropriate) the relative strength of the two states’ connection with the person, thing or event;
- is ‘venue-neutral’; and
- recognises the predominant concern that each state is said to have with matters within its geographical area.

¹⁰⁶ See, eg, Deane J stating that ‘the legal system can operate by silence’: *Breavington* (1989) 169 CLR 41, 136.

¹⁰⁷ See *Lipohar* (2000) 200 CLR 485, 553–4 (Kirby J); see also Nygh, above n 89, 431–2.

¹⁰⁸ See, eg, Kirk, above n 6.

(a) High Court Authority

First, the closer connection test receives some support from High Court authority. There are remarks in *Port MacDonnell* that suggest that a conflict between the statutes of different states should be resolved by determining which state has a closer connection to the particular person, thing or event. After stating that there was no s 109 inconsistency in that case, the Court continued:

A problem of greater difficulty would have arisen if the fishery defined [pursuant to the relevant South Australian Act] had a real connection with two States, each of which enacted a law for the management of the fishery. If the [South Australian instrument defining the fishery] had been construed as extending to waters on the Victorian side of the line of equidistance, *there would obviously have been grounds for arguing that the Victorian nexus with activities in these waters was as strong as or stronger than the South Australian nexus*. ... In the present case, [however,] ... there is no real question of any relevant inconsistency between the law of South Australia and the law of another State.¹⁰⁹

It is clear from this passage, however, that the Court was not offering a concluded view on how a hypothetical conflict between Victorian and South Australian statutes should be resolved. In any event, to the extent that the High Court was using territoriality as the main criterion for resolving state–state inconsistency, this argument is considered separately below.

(b) Appropriate to Assess Relative Strength of Connection

A second argument is that if one state's statute is to be given priority over another in cases of conflict, it is appropriate to assess the relative strength of each state's connection with the relevant person, thing or event.¹¹⁰ This would indeed be a powerful argument if one state's statute were to be given priority. However, if the alternative is giving effect to *neither* state statute to the extent of the inconsistency, this second argument does not take the matter much further.

(c) A Closer Connection Test Is Venue-Neutral

A third argument in favour of a closer connection test is that the test leads to the same result regardless of the choice of venue (as opposed to, say, applying the law of the forum). This argument should not be confused with the more general argument that conduct in Australia must lead to a single predictable outcome in Australian courts, regardless of where those proceedings are brought.¹¹¹ It may be accepted that uniformity of outcome is a desirable objective in formulating common law choice of law rules. As Kirby J in *Pfeiffer* explained, if a choice of law rule permitted different results, depending on venue, 'the law would no longer provide a certain and predictable norm, neutrally applied as between the parties. Instead, it would afford a variable rule which particular parties could manipulate to their own advantage.'¹¹²

¹⁰⁹ (1989) 168 CLR 340, 374 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ) (emphasis added).

¹¹⁰ Kirk, above n 6, 285.

¹¹¹ Cf Deane J, who held that the *Australian Constitution* created a 'unitary system of law': *Breavington* (1989) 169 CLR 41, 121.

¹¹² (2000) 203 CLR 503, 553.

However, the later case of *Blunden v Commonwealth*¹¹³ strongly suggests that uniformity of outcome may be desirable, but it is not a constitutional requirement, even for cases in federal jurisdiction. Moreover, ‘forum-shopping’ can be addressed by regulating the choice of *venue*, rather than the choice of *law*.¹¹⁴

Instead, the reason that the rule for resolving state–state inconsistency must be ‘venue-neutral’ is because that rule operates prior to any legal proceedings being instituted. In any event, the minimalist approach proposed below — giving effect to neither state statute to the extent of the inconsistency — is ‘venue-neutral’ in this sense. Therefore, this third argument is not a reason to favour the closer connection test over the minimalist approach proposed below.

(d) *A State Has Predominant Concern with Matters within its Geographical Area*

Perhaps most significantly, the closer connection test reflects the ‘predominant concern’¹¹⁵ that each state is said to have with matters within its geographical area. Therefore, on this argument, the test for resolving state–state inconsistency should give priority to a statute based on a predominant connection with the subject matter in question, rather than legislation based on a remote or general connection.

It may be accepted that the federal structure is framed on the assumption that the states will generally legislate only with respect to their own geographical areas. That assumption is given effect through the requirement that a state cannot legislate with extraterritorial effect unless there is a (remote or general) connection between the subject matter and the state. For the following reasons, however, I do not think that territoriality should be given additional weight by using it as the primary criterion for resolving a conflict between the statutes of different states.

First, in some situations, it will be difficult to say that one state has a closer territorial connection than another state. In Example A, the Queensland statute regulates activities that occur in Queensland and the New South Wales statute penalises activities that have an effect in New South Wales.¹¹⁶ Moreover, other matters, such as interstate communications or transactions, do not have an

¹¹³ (2003) 203 ALR 189 (*Blunden*). In *Blunden*, the Court held that the plaintiff’s suit against the Commonwealth arising out of a collision on the high seas was subject to the limitation legislation of the forum (in that case, the *Limitation Act 1985* (ACT)). Significantly for present purposes, the selection of the law of the forum as the applicable law meant that the ‘substantive’ law of a matter in federal jurisdiction could vary, depending on where proceedings were instituted. In my view, the result in *Blunden* is squarely inconsistent with any constitutional requirement that a case in federal jurisdiction must lead to the same outcome, regardless of where in Australia it is instituted: see Hill and Stone, above n 17, 75; cf *Sweedman* (2004) 210 ALR 140, 156 (Nettle JA).

¹¹⁴ See above n 93. It should also be noted that the forum-shopping associated with cases such as *McKain* and *Stevens v Head* (1993) 176 CLR 433 arose from the broad definition of ‘procedural’ laws, rather than the choice of law rule: Sir Anthony Mason, ‘Choosing between Laws’ (2004) 25 *Adelaide Law Review* 165, 166.

¹¹⁵ See *Pfeiffer* (2000) 203 CLR 503, 536–7 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

¹¹⁶ Although I argued that in any event there was no ‘inconsistency’ between those statutes.

obvious location.¹¹⁷ Asking which state has a closer connection to the relevant subject matter in either of these situations does not lend itself to any particular answer.

Secondly, even if one state clearly has a closer territorial connection, it is not self-evident that a closer territorial connection should always outweigh other connections, such as a connection based on residence. For example, although *Pfeiffer* held that applying the law of the place of the wrong strikes the appropriate balance between the interests of the various states,¹¹⁸ some states have since legislated so that cross-border workplace accidents are governed by the law of the state where the employee is insured, rather than the law of the state where the accident occurred.¹¹⁹ Moreover, there may be two important, but competing, government interests underlying each statute. In Example D,¹²⁰ Western Australia has an interest in court proceedings that take place in Western Australia, but South Australia has an interest in social work activities in South Australia. Similarly, in Example C,¹²¹ Tasmania has an interest in real property in Tasmania, but South Australia has an interest in the activities of its state bank.

In these situations, as Callinan J observed in *Mobil Oil*, the different states have ‘legislate[d] in respect of matters with which each has a legitimate connection’.¹²² The reference to a ‘legitimate’ connection emphasises that a state–state inconsistency cannot arise unless both state statutes have a sufficient territorial connection with the enacting state to be valid, and the statutes are consistent with other constitutional limitations, such as state–state governmental immunity.¹²³

¹¹⁷ See, eg, *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, 567–8 (Mason CJ, Deane, Dawson and Gaudron JJ), discussing the place where a negligent misrepresentation is taken to have occurred; *Lipohar* (2000) 200 CLR 485, 501, 503 (Gleeson CJ), 518 (Gaudron, Gummow and Hayne JJ), 549 (Kirby J), 585 (Callinan J), discussing where a conspiracy is taken to have occurred. See also *Mobil Oil* (2002) 211 CLR 1, 76–7 (Callinan J), discussing the difficulty of assessing where a product liability tort occurs. See also *Tolofson v Jensen* [1994] 3 SCR 1022, 1050 (La Forest J) (*‘Tolofson’*):

There are situations, of course, notably where an act occurs in one place but the consequences are directly felt elsewhere, when the issue of where the tort takes place itself raises thorny issues. ... Difficulties may also arise where the wrong directly arises out of some transnational or interprovincial activity. There *territorial considerations may become muted; they may conflict and other considerations may play a determining role* (emphasis added).

¹¹⁸ (2000) 203 CLR 503, 536–7 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

¹¹⁹ See *WorkCover Queensland Act 1996* (Qld) ch 5A; *Workers Compensation Act 1987* (NSW) s 13(2).

¹²⁰ In this example, the Western Australian statute provides that a witness in the Family Court of Western Australia must answer a subpoena and answer the questions asked, but the South Australian statute prohibits a social worker from disclosing to a court any information obtained in confidence.

¹²¹ In this example, the South Australian statute permits a court to rewrite an unconscionable contract to which the South Australian State Bank is a party, but the Tasmanian statute provides that unconscionability is not to be a ground for invalidating or otherwise affecting the validity of a contract concerning Tasmanian land.

¹²² (2002) 211 CLR 1, 80.

¹²³ See above Part II(B)(4). Here, ‘legitimate’ only means consistent with the federal structure of the *Constitution*, including (to the extent relevant) ss 117 and 118. By analogy, to determine whether a burden on political communication is valid, the courts asks ‘is the law reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?’: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567 (Brennan CJ, Dawson,

Thirdly, as noted already, the constitutional prohibition on state–state inconsistency seems to be derived from the rule of law rather than from territoriality. Therefore, although it would be appropriate (and indeed necessary) to give territoriality primary weight if the prohibition on state–state inconsistency derived from territorial limits on state power, territoriality would be invoked here only as a ‘tie breaker’ to resolve state–state inconsistency, rather than as a constitutional imperative.

It is true that a closer connection test need not be limited only to *territorial* considerations. However, to the extent that ‘closer connection’ includes factors other than a territorial connection, it can no longer rely on the ‘predominant concern’ that each state is said to have in matters within its geographical area. Indeed, the fact that the closer connection test requires the weighing of a large number of different factors might be a criticism of that test.

2 *Arguments against a Closer Connection Test*

The main arguments against the closer connection test can be summarised as follows:

- the test is too uncertain;
- the test unduly limits a state’s ability to use connecting factors that are adapted to a particular situation;
- in practice, is difficult to distinguish an assessment of closer connection from a bare assessment of the relative merits of the state legislation; and
- the test runs counter to the equal legislative competence of the states.

(a) *Uncertainty and Limiting Legislative Options*

It is useful to consider together the first two of these arguments: the lack of certainty inherent in the closer connection test, and the limits the test places on a state’s ability to use connecting factors that are adapted to particular situations. This is because there tends to be a trade-off between maximising certainty and maximising legislative options. The two arguments can be summarised as follows:

- The *uncertainty* argument contends that asking which state has a closer connection to a given person, thing or event is both difficult and fact-specific, and it is therefore difficult to predict the outcome of this test in a particular case.
- The *limiting options* argument is that the courts will adopt general rules to determine which state has the closer connection to a person, thing or event and, being constitutional rules, they cannot be modified by the states in particular situations when the general rule is not suitable.

There is some force to each of these criticisms. Consider, for example, two tests that have been proposed for deciding which state has the closer connection: (1) the test of ‘predominant territorial nexus’, balanced against what is ‘fair and

Toohy, Gaudron, McHugh, Gummow and Kirby JJ) (*Lange*), as rephrased in *Coleman v Power* (2004) 209 ALR 182, 207 (McHugh J), 230 (Gummow and Hayne JJ), 233 (Kirby J).

just’;¹²⁴ and (2) ‘the strength of the governmental interest in regulating a matter connected to the governance of the polity’s territory’, as assessed on a case-by-case basis.¹²⁵ Obviously, it is very difficult to predict the outcome of such open-ended tests. However, if, as seems likely, the courts attempt to increase certainty by adopting broad rules, those rules may not be suitable for a particular case. For example, imagine that the courts adopted a rule that torts were most closely connected with the state where the tort occurred. This rule would not necessarily be suitable for all intranational torts — by analogy, lower courts in Canada have held that applying the *lex loci delicti*¹²⁶ is not suitable for all inter-province torts, such as a misrepresentation in a company prospectus.¹²⁷ However, as it is a constitutional rule on this hypothesis, the *lex loci delicti* rule could not be amended. To the extent that courts move away from general rules to respond to particular cases, this ad hoc response will decrease the certainty of the closer connection test.¹²⁸

Nonetheless, while these criticisms of the closer connection test have some force, they are unlikely to be decisive in themselves. There is uncertainty in all law, including constitutional law.¹²⁹ Equally, limiting legislative options to some degree is an inevitable result of having a constitutional rule to resolve state–state inconsistency. Even so, certainty and maintaining legislative options are both important objectives.¹³⁰ Therefore, other things being equal, the fact that a test increases certainty and legislative options would be a reason, perhaps a strong reason, to prefer that test over others.

¹²⁴ See *Breavington* (1989) 169 CLR 41, 129 (Deane J); modified in *McKain* (1991) 174 CLR 1, 46, 53 (Deane J).

¹²⁵ Kirk, above n 6, 285–6.

¹²⁶ This is the usual rule for inter-provincial torts: *Tolofson* [1994] 3 SCR 1022.

¹²⁷ *Pearson v Boliden Ltd* (2002) 222 DLR (4th) 453, 490, 491–2 (Newbury JA) (British Columbia Court of Appeal). Instead, misrepresentation is governed by the law of each province in which the securities are distributed. See also *Cowley v Brown Estate* (1997) 147 DLR (4th) 282, 290 (Foisy JA), when a Saskatchewan resident was injured in a car accident in Alberta, ‘legal responsibility for, and the payment for medical costs occasioned by the accident must be governed by the law of Saskatchewan’. See generally Janet Walker, ‘“Are We There Yet?” Towards a New Rule for Choice of Law in Tort’ (2000) 38 *Osgoode Hall Law Journal* 331, 359–64, criticising the rigidity of the *Tolofson* test. In Australia, Professor Davis argues forcefully that the apparent certainty of the *Pfeiffer* test will be undercut by judges seeking to do justice in individual cases, perhaps by manipulating where torts are taken to have occurred: Gary Davis, ‘*John Pfeiffer Pty Ltd v Rogerson*: Choice of Law in Tort at the Dawning of the 21st Century’ (2000) 24 *Melbourne University Law Review* 982, 1007–8.

¹²⁸ This sort of argument is made about the application of the ‘reasonably appropriate and adapted’ test to laws that burden political communication: Adrienne Stone, ‘The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication’ (1999) 23 *Melbourne University Law Review* 668, 687–707.

¹²⁹ To take just one example, asking whether a Commonwealth law has a sufficient connection with a head of legislative power is hardly a self-applying test. For that reason, Kirby J considers that proportionality serves a useful function, even when assessing whether a law is ‘with respect to’ a head of power: *Leask v Commonwealth* (1996) 187 CLR 579, 634–7.

¹³⁰ Regarding certainty, see *Pfeiffer* (2000) 203 CLR 503, 528, 538 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ). Regarding maintaining legislative options, see, eg, *Mulholland v Australian Electoral Commission* (2004) 209 ALR 582, 586 (Gleeson CJ) (‘*Mulholland*’); *Singh v Commonwealth* (2004) 209 ALR 355, 373–4 (McHugh J, in dissent) (‘*Singh*’).

(b) Courts Cannot Properly Assess the Closer Connection

A related argument is that, in practice, the closer connection test is difficult to distinguish from a bare assessment of the relative merits of the state legislation. Arguably, assessing which state has a closer connection to a given person, thing or event is not an appropriate task for the courts.¹³¹ A conflict between the statutes of different states will ordinarily arise when the different states have based their legislation on different, but legitimate, connecting factors. For example, one state might legislate on the basis of where events occur, while another state might legislate on the basis of the residence of the people involved. A ‘closer connection’ test requires the courts to decide which of these connecting factors should be given priority. This requirement seems to skirt uncomfortably close to asking the courts to decide which of the competing legislative policies is more important. Clearly, this is a decision that the courts are ill-equipped to make and, in any event, should not be making.¹³²

One possible response to this argument is that the ‘closer connection’ test is not significantly different from matters already determined by the courts, such as the test for the validity of extraterritorial state legislation, and the common law choice of law rules.

However, there seems to be only a superficial similarity between the closer connection test and the test for extraterritorial state legislation. Asking whether a state law has a (remote or general) connection with the state does not require the courts to assess the relative strength of different connections with a state, and to give priority to different, legitimate connecting factors.

On the other hand, there is arguably a stronger similarity between the closer connection test and common law choice of law rules. Like the closer connection test, common law choice of law rules involve an assessment of which state (or ‘law area’) is more closely connected with a person, thing or event, having regard to various different connecting factors. Moreover, common law choice of law rules are also framed by reference to general categories, such as tort, contract and so on. There is, however, an important difference of degree. Although the closer connection test will probably lead to the courts developing general rules, it also seems likely that these rules would be subject to qualifications that enable the courts to respond to a particular case. For example, one test of closer connection mentioned earlier is ‘predominant territorial nexus’, subject to what

¹³¹ Initially, the Australian Law Reform Commission only objected to an interests analysis (such as closer connection) on the grounds of uncertainty: Australian Law Reform Commission, *Choice of Law*, Report No 58 (1992) [2.11], [6.18]–[6.19]. More recently, however, the Commission stated that ‘ascertaining the “interests” of a state or territory might involve assessing broad political, financial and social factors, which would be a difficult and arguably inappropriate task for courts’: Australian Law Reform Commission, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation*, Report No 92 (2001) [34.71] (emphasis added), discussing whether to apply an ‘interest analysis’ to determine which state and territory legislation should be adopted by the Commonwealth.

¹³² By analogy, there are strong indications that s 118 of the *Constitution* prevents a court from refusing to give effect to the statutes of another state on public policy grounds: *Merwin Pastoral Co Pty Ltd v Moolpa Pastoral Co Pty Ltd* (1933) 48 CLR 565, 577 (Rich and Dixon JJ), 587–8 (Evatt J).

is ‘fair and just’.¹³³ Such ad hoc qualifications could get dangerously close to a bare assessment of the respective merits of the different state statutes.

On balance, this argument probably does not undermine the closer connection test altogether. Rather, the concern that courts should not judge the relative merits of particular legislation may only be a reason to favour a relatively rule-based application of the closer connection test, rather than an ad hoc approach.

(c) *Giving Priority to One State’s Statute Is Contrary to the Equal Legislative Competence of the States*

A final point is that the closer connection test runs counter to the equal legislative competence of the states because it requires that priority be given to one state’s statute over another state’s statute. Of course, the equal legislative competence of the states could not permit a true conflict between the statutes of different states to stand.¹³⁴ However, if the conflict could be resolved without giving priority to one state’s statute, then the states’ equal legislative competence would be a reason to prefer that method. In addition, a constitutional rule that assigns priority to one state’s statute over another state’s statute reduces the incentives for the states to resolve an inconsistency between their statutes through cooperative political means.¹³⁵

3 *The Closer Connection Test: Better than the Available Alternatives?*

As might be expected, these arguments for and against the closer connection test do not strongly indicate whether that test should be used to resolve state–state inconsistency. Instead, the real issue seems to be whether the closer connection test is better than the available alternatives. The following discussion sets out an alternative approach to resolving state–state inconsistency (giving effect to neither state’s statute to the extent of the inconsistency) and then compares that approach to the closer connection test.

C *The Minimalist Approach*

As already noted, there has been a tendency to assume that a conflict between the statutes of different states can only be resolved by giving priority to one state’s statute. For example, the joint judgment in *Pfeiffer* defined a ‘conflict of law’ as an inconsistency between laws that ‘lead[s], to the extent of the inconsistency, to the invalidity of *one law*.’¹³⁶ A similar assumption underlies the

¹³³ See above n 124. These ad hoc qualifications attempt to preserve some legislative options while maintaining a reasonable level of certainty. Of course, a common law choice of law rule *could* contain ad hoc qualifications as well, but the High Court has resisted adding this sort of ad hoc or flexible exception to choice of law rules for tort: *Pfeiffer* (2000) 203 CLR 503, 538 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); *Regie National des Usines Renault SA v Zhang* (2002) 210 CLR 491, 519–20 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ). Ad hoc qualifications seem to be less likely with common law rules, because any difficulty with the application of the general rule in a particular situation can be addressed by legislation.

¹³⁴ But see Nygh, above n 89.

¹³⁵ See above Part II(B)(4).

¹³⁶ (2000) 203 CLR 503, 527 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ) (emphasis added).

following description of the approaches available under the ‘full faith and credit’ clause in art IV, § 1 of the *United States Constitution*: ‘To simultaneously apply the conflicting law of two states is impossible; to require each state to apply the law of the other is absurd; and to let each state apply its own law repeals the Clause.’¹³⁷

The following discussion challenges that assumption and suggests that a conflict between the statutes of different states can be resolved by not giving effect to *either* state’s statute to the extent of the inconsistency.

1 *Giving Effect to neither State’s Statute: How Would it Work?*

One obvious objection to this suggested approach is that giving effect to neither state’s statute would be unworkable and would lead to chaos. This would not be so. The minimalist approach would operate as follows:

- When there are conflicting *obligations*, each state’s statute is inoperative to the extent that it purports to impose a liability on conduct that is required to avoid incurring a liability under another state’s statute. This test would be particularly relevant for regulatory and penal statutes.
- When there are conflicting *rights*, each state statute is inoperative to the extent that it attempts to confer a right that is contradictory to a right conferred by the other state’s statute.

Of course, this general outline raises some questions, such as the meaning of ‘liability’ in this context, and what is meant by ‘contradictory’ rights. Those questions will be addressed in considering how the proposed minimalist approach would apply in different situations.

(a) *Regulatory and Penal Laws*

Concerns about legal chaos carry particular weight in the context of regulatory and penal laws. However, for the reasons that follow, the suggested approach should not lead to chaos.

First, and most importantly, a ‘conflict’ will only arise if the statutes of different states are inconsistent. In the context of regulatory and penal statutes, there is only an inconsistency if one state *requires* (and not merely permits) what another state prohibits.¹³⁸ Two consequences follow. To begin with, this type of actual contradiction between the regulatory statutes of different states should be very rare. The fact that neither state’s statute will be given effect in isolated cases should not undermine the general administration of either statute. Moreover, the courts will only be refusing to give effect to both states’ statutes when a person is subject to contradictory and apparently valid commands. Being subject to different contradictory and apparently valid commands hardly encourages compliance with the law. Even if the person knew in that situation that only one of those statutes would be given effect by the courts, it may be difficult for the person to predict which statute that would be.

¹³⁷ Douglas Laycock, ‘Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law’ (1992) 92 *Columbia Law Review* 249, 297.

¹³⁸ See above Part II(B)(3)(a).

Second, the conflict between the statutes of different states would only invalidate each statute to the extent of the inconsistency. Significantly, the inconsistency would only arise to the extent that one statute required what another statute prohibited. Therefore, a person who ignored both the statutory requirement and the statutory prohibition would not come within the area of the inconsistency and could be prosecuted under either statute. In effect, a person would need to comply with one statute to avoid prosecution (although it would not matter which one). Two further points may be noted:

- Unlike a test that gives one state's statute priority over another, this approach does not require a person to predict which contradictory statute will be given effect by the courts. Instead, as long as a person complies with one state's statute, he or she will be immune from prosecution under the other state's statute.
- The test for resolving a state-state inconsistency involving regulatory or penal statutes would operate in a similar manner to implying a 'lawful excuse' defence into each state's statute. That constitutional implication is consistent with a plausible legislative intention, because it would be unusual for one state to intend to require conduct that was prohibited by another state (or, conversely, to prohibit conduct that was required by another state).¹³⁹ However, as noted, a person would not have a lawful excuse merely because conduct prohibited by one state was *permitted* by another state.

Returning to the examples given earlier, this approach to resolving state-state inconsistency would not lead to the invalidity of Queensland and New South Wales anti-pollution statutes in Example A. There is no inconsistency between those statutes, and therefore no conflict to resolve.

In Example D, there does seem to be a constitutional inconsistency between the Western Australian and South Australian statutes. The Western Australian statute requires Adelaide to provide certain information to the court, but the South Australian statute prohibits Adelaide from disclosing that information to a court. On the minimalist approach, each state's statute would be inoperative to the extent that it purported to penalise conduct that was required by the other state's statute. Therefore, Adelaide could choose either to comply with the Western Australian statute (and provide the information) or to comply with the South Australian statute (and refuse to provide the information). As long as she complied with one state's statute, she could not be prosecuted for breach of the other state's statute.

It might be objected that this approach would require a state court to apply a hybrid of Western Australian and South Australian statutory law.¹⁴⁰ However,

¹³⁹ Cf *P v P* (1994) 181 CLR 583, 602 (Mason CJ, Deane, Toohey and Gaudron JJ), discussing s 109 inconsistency. In *GPAO*, the relevant Commonwealth law provided expressly that a person was not required to provide information if he or she had a 'reasonable excuse': see *GPAO* (1999) 196 CLR 553, 589 (Gleeson CJ and Gummow J).

¹⁴⁰ Here, there is a real difference between the 'choice of law' approach and the 'constitutional' approach to applying statutes of another state (as to which, see above Part II(A)(3)). On the choice of law approach, it would be impossible for a court in one state to apply directly the statutes of another state. By contrast, the constitutional approach may well require courts to

that is not the case, because Adelaide has a constitutional — not statutory — defence to prosecution. Imagine that she complied with the South Australian statute, and she is prosecuted in Western Australian for failing to disclose the information. Adelaide's defence is that the Western Australian statute cannot validly penalise her conduct, because of the implied constitutional prohibition on contradictory state statutes. The South Australian statute, in itself, does not provide a defence to prosecution under the Western Australian statute.

(b) *Tort Law*

A similar analysis would apply to a conflict between state tort statutes. Once again, the situations when there is an actual conflict between the tort statutes of different states will be rare indeed. Tort statutes are not inconsistent merely because they impose different, alternative, obligations on one person and that person is able to comply with both. Moreover, tort statutes are not inconsistent merely because they impose converse obligations on different people, provided that the court can give effect to both statutes. However, there will be a conflict between the tort statutes of different states if the statutes impose contradictory obligations on a person such that doing an act attracts liability under one statute, but *not* doing that act attracts liability under the other.¹⁴¹

The minimalist approach would read each state statute down to the extent of the inconsistency. Accordingly, when the tort statutes of different states impose conflicting obligations, each state's statute would be inoperative to the extent that it attempted to impose a liability on conduct that was required to avoid a liability under the other state's statute.¹⁴²

(i) *Meaning of 'Liability'*

A difficult question arises here about what sort of liability would be sufficient to give rise to a state-state inconsistency. For the following reasons, not every non-trivial adverse consequence should be treated as a 'liability' for these purposes. A 'liability' would clearly include a liability for an offence (whether civil or criminal) and would probably include tort-like liability. Consequently, a state-state inconsistency could conceivably arise between a statute that imposes liability for a criminal or civil offence and another statute that imposes tortious liability. To require a person to choose between committing a tort or a crime does not seem like a fair choice.¹⁴³

The difficult question is whether 'liability' should include other forms of liability, such as contractual liability. In principle, there does not seem to be any

apply a mixture of different states' statutory law. Even on the constitutional approach, however, it might be inappropriate for courts in one state to apply the *penal* statutes of another state.

¹⁴¹ To the extent that different states' tort statutes confer conflicting *rights*, each state statute would be inoperative to the extent that it attempted to confer a right that was contradictory to a right conferred by the other state's statute.

¹⁴² This slightly awkward formulation reflects the fact that tort statutes, unlike regulatory and penal statutes, do not formally prohibit a person from doing anything, but impose obligations on a person who does that thing. In practice, of course, there may be little difference.

¹⁴³ The High Court has noted that 'the roots of tort and crime in the law of England are greatly intermingled': *Gray v Motor Accident Commission* (1998) 196 CLR 1, 6 (Gleeson CJ, McHugh, Gummow and Hayne JJ), citing *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 149–50 (Windeyer J).

reason to treat a *contractual* liability to pay compensation differently from a *tortious* liability.¹⁴⁴ However, what about a non-monetary penalty such as ‘shaming’, or loss of a statutory benefit? The issue cannot be whether an adverse consequence has the same economic effect as a liability (such as a fine), because otherwise a taxation liability could give rise to a state–state inconsistency.

It therefore seems that a ‘liability’ would definitely include a fine and an obligation to compensate a person for loss, and that other adverse consequences would need to be considered closely. Ultimately, this issue seems to turn on a value judgement as to whether it would be fundamentally unfair to place a person in the position of incurring one adverse consequence rather than another. This appeal to fairness may explain why a taxation liability should not be treated as a liability for these purposes.¹⁴⁵ It seems unfair if we cannot structure our affairs to avoid committing an offence, tort or breach of a contract. Conversely, there does not seem to be any comparable unfairness if we cannot structure our affairs to avoid paying a tax.¹⁴⁶

(ii) *Examples*

Returning to the examples considered earlier, this approach to resolving state–state inconsistency would not mean in Example B that the New South Wales and Victorian motor accident statutes were both inoperative. As already noted, there was no true conflict between the statutes because Melba could choose between conflicting rights.

In Example F, the New South Wales and Victorian statutes do seem to impose conflicting obligations. Dr Albury could be sued by Melba’s family under a New South Wales statute if she did *not* provide a blood transfusion to Melba and Melba died (even when Melba had not consented to the transfusion), but she could also be sued by Melba under the Victorian statute if she *did* provide the transfusion without Melba’s consent. As an aside, it may be noted that a conflict may involve the defendant owing contradictory obligations to different people — in this example, to both Melba and Melba’s family.

On the minimalist approach, the conflict between these various obligations would be resolved by making both statutes inoperative to the extent of the inconsistency. The New South Wales statute would not impose on a doctor a duty to provide treatment when providing that treatment would give rise to a liability under the Victorian statute, and the Victorian statute would not impose liability on a doctor for providing treatment without consent when failing to provide treatment would give rise to a liability under the New South Wales statute. Dr Albury would still need to comply with one of either the New South Wales or

¹⁴⁴ Although there may be subtle differences in how that compensation is assessed. See, eg, J W Carter and D J Harland, *Contract Law in Australia* (4th ed, 2002) 818; R P Balkin and J L R Davis, *Law of Torts* (3rd ed, 2004) 4–6; *Astley v Austrust Ltd* (1999) 197 CLR 1, where a South Australian statute reducing damages on account of contributory negligence applied only to action in tort, not in contract.

¹⁴⁵ Although Oliver Wendell Holmes’ ‘bad man’ would not care whether a financial liability was a fine or a tax: Oliver Wendell Holmes, ‘The Path of the Law’ (1897) 10 *Harvard Law Review* 457, 459.

¹⁴⁶ Consequently, there may be no conflict between different state statutes simply because a single transaction is taxed under the law of different states.

Victorian statutes in order to avoid liability under the other statute. So, to rely on the New South Wales statute, Dr Albury would need to show that the blood transfusion was necessary to save Melba's life (if treatment was given without consent). To rely on the Victorian statute, Dr Albury would need to show that Melba refused consent, if the withheld blood transfusion could have saved Melba's life.

Again, this approach would not require a court to apply a hybrid of New South Wales and Victorian statutory law. Imagine that Melba's family sues Dr Albury under the New South Wales statute for failing to provide a transfusion. The New South Wales statute cannot validly impose a liability on Dr Albury, because in that particular purported operation the New South Wales statute is contrary to an implied constitutional prohibition against contradictory state statutes. The action brought by Melba's family under the New South Wales statute therefore fails.

(c) *Contract Law*

The main issue with contract statutes will usually be whether the court can give effect to both statutes. In situations when the courts cannot give effect to the conflicting contractual rights conferred by the statutes of different states, each state statute would be inoperative to the extent that it attempted to confer a right that was contradictory to a right conferred by the other state's statute.

(i) *'Contradictory' Rights*

It is necessary to explain here what is meant by 'contradictory' rights. As noted earlier, rights are not necessarily contradictory merely because one right alters, impairs or detracts from the other right. Moreover, if rights are conferred on one particular person, any inconsistency can be resolved by an election between those rights. The question therefore is whether, if both parties were to rely on these different rights in one instance, it would be possible for the court to make orders giving effect to both rights. By analogy, in Example E, it was possible for the court to order under the Queensland statute that the employer pay its employees lost wages, but also to order under the New South Wales statute that the employees pay the employer lost profits. There was therefore no constitutional inconsistency between the rights conferred under both statutes, even though in practice the rights might cancel each other out.

However, there need not be a precise correlation between rights for those rights to be 'contradictory' in this context. For example, one state's statute might permit a court to rewrite a 'harsh or unreasonable' contract, and another state's statute might permit a person to enforce an 'unconscionable' contract. Although there is no precise correlation between a contract being harsh and unreasonable and being unconscionable, these different concepts overlap to a significant degree. Therefore, to the extent that the harsh or unreasonable test overlapped with unconscionability, but no further, there would be an inconsistency between these statutes. However, it must be accepted that the question of whether

different rights overlap will sometimes involve difficult judgements, including the appropriate level of generality with which to describe the two rights.¹⁴⁷

(ii) *Examples*

These points can be illustrated by Example G. A South Australian statute permits a court to rewrite an unconscionable contract to which the South Australian State Bank is a party, but the Tasmanian statute provides that unconscionability is not a ground for invalidating or otherwise affecting the validity of a contract concerning Tasmanian land. Each state's statute would be inoperative to the extent that it conferred a right that was contradictory to a right conferred by the other state's statute. The right to have an unconscionable contract rewritten and the right to enforce an unconscionable contract are contradictory in the relevant sense because a court could not make orders that gave effect to both rights. In effect, this aspect of the dispute would be governed by the common law of unconscionability.

It may seem odd that, even though South Australia and Tasmania have both legislated to *change* the common law, it is ultimately the common law that is applied to the dispute. That result does not depend, however, on the common law being some sort of 'pre-political' baseline;¹⁴⁸ rather, it is a matter of necessity. If a court cannot give effect to both states' modifications to the common law — and assuming that there are no relevant Commonwealth statutes — then the court has no resource other than the common law with which to determine the dispute.

2 *Which Law Would Govern the Dispute?*

The preceding statement raises a further question: once an inconsistency between the statutes of different states is removed, which law then governs the dispute? In general terms, the minimalist approach does not affect *whether* a state statute is applied, or *which* state statute is applied — it affects only the *content* of any state statute that is selected. Accordingly, the law governing the dispute is determined in the usual way: by applying any relevant Commonwealth statutes, then any relevant state statutes — including statutes of another state applied by the forum's choice of law rules — and finally the common law. Two specific points require further elaboration.

(a) *Determining the Extent of the Inconsistency*

First, a state–state inconsistency will only render the statutes inoperative to the extent of the inconsistency. It will ordinarily only be the particular provisions creating the contradictory rights or obligations that will be inoperative, and the

¹⁴⁷ For example, in *Sweedman* (2004) 210 ALR 140, 158, Nettle JA held that the *Motor Accidents Act 1988* (NSW) provided for a remedy in 'damages', but the *Transport Accident Act 1986* (Vic) provided (relevantly) for a 'statutory quasi-contractual remedy'. However, it is strongly arguable that the two statutes occupied the same 'field', because a plaintiff could not recover under both statutes. Even so, any inconsistency between the statutes could be resolved by a plaintiff electing between inconsistent rights: see above Part II(B)(3)(b).

¹⁴⁸ Cases such as *Lange* demonstrate that the common law is subject to constitutional requirements as much as legislation, which suggests that the common law is also an exercise of 'governmental' power: see, eg, Hill and Stone, above n 17, 82–7.

remainder of the statute will continue to apply.¹⁴⁹ In some cases, however, the ‘invalidity’ of one provision may lead to the consequent invalidity of another provision that is legally dependent on the invalid provision. By analogy, an inconsistency under s 109 of the *Constitution* has the following effect:

every part of a completely interdependent and inseparable legislative provision must fall within ‘the extent of the inconsistency.’ No doubt s 109 means a separation to be made of the inconsistent parts from the consistent parts of a State law. But it does not intend the separation to be made where division is only possible at the cost of producing provisions which the State parliament never intended to enact. The burden of establishing interdependence in such a case is necessarily upon those who assert it in view of the words of s 109, and perhaps it is not a light one.¹⁵⁰

Similarly, s 79 of the *Judiciary Act* will not pick up ‘some but not all of [a state statute], if to do so would give an altered meaning to the severed part’ of the statute.¹⁵¹

(b) *Operation of Choice of Law Rules when There Is a State–State Inconsistency*

Second, the minimalist approach will affect the content of a state statute, even when that statute is picked up by the forum’s choice of law rules. Assume for the moment that the statutes of one state are applicable in the courts of another state through the forum’s choice of law rules.¹⁵² As noted earlier, a constitutional rule for resolving state–state inconsistency does not depend on the existence of legal proceedings. Instead, the constitutional implication underlying the minimalist approach removes the inconsistency prior to a state statute being picked up by the choice of law rules of another state. By way of analogy, when there is a s 109 inconsistency between a Commonwealth and a state statute, the state statute is not picked up and applied to the Commonwealth through s 64 of the *Judiciary Act*.¹⁵³ Consequently, when there is a state–state inconsistency, the choice of law rule would pick up the statute as ‘read down’ to the extent of the state–state inconsistency. The minimalist approach would not, however, affect *which* statute was selected by the forum’s choice of law rule.

The significance of these points can be illustrated by returning to Example F. It will be recalled that Dr Albury decides not to give Melba the blood transfusion, because Melba had refused consent, and Melba dies. Dr Albury’s conduct avoids

¹⁴⁹ In Example C, the only provision of the South Australian State Bank Act that would not apply is the provision conferring a right on a person to apply to have an unconscionable contract rewritten — the provisions establishing the bank and so on remain operative.

¹⁵⁰ *Wenn v A-G (Vic)* (1948) 77 CLR 84, 122 (Dixon J). See also *Clarke v Kerr* (1955) 94 CLR 489, 503 (McTiernan, Williams, Fullagar and Taylor JJ).

¹⁵¹ *Solomons v District Court of New South Wales* (2002) 211 CLR 119, 135–6 (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ). See also *British American Tobacco Australia Ltd v Western Australia* (2003) 200 ALR 403, 410–11 (Gleeson CJ), 418, 421 (McHugh, Gummow and Hayne JJ), 445 (Kirby J).

¹⁵² The alternative view is that state statutes are applicable in courts in other states directly by force of the *Constitution*: see above Parts II(A)(2)–(3).

¹⁵³ *Dao v Australian Postal Commission* (1987) 162 CLR 317, 331–2 (Mason CJ, Wilson, Deane, Dawson and Toohey JJ); *Deputy Commissioner of Taxation v Moorebank Pty Ltd* (1988) 165 CLR 55, 63–4 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

an apparent liability to Melba under the Victorian statute, but creates an apparent liability to Melba's family under the New South Wales statute.

Imagine now that Melba's family live in Queensland, and wish to sue Dr Albury under the New South Wales statute, either in New South Wales, Victoria or Queensland. (Assume that the New South Wales statute confers a right on relatives who live outside New South Wales.) None of these states have modified the common law choice of law rule that intranational torts are determined by the place of the wrong.

Under the minimalist approach, both the New South Wales and Victorian statutes would be read down to the extent of the state-state inconsistency. Relevantly, the New South Wales statute would be inoperative to the extent that it purported to impose liability on a doctor who did not provide the transfusions in order to avoid incurring a liability under another state's statute. Assuming that the court in each state adopted the 'choice of law' approach to applying the statutes of another state, the outcome of the lawsuit by Melba's family in the various venues would be as follows:

- In New South Wales, the only relevant statute is the New South Wales statute, because the Victorian statute is not picked up by the forum's choice of law rule. However, the New South Wales statute is still 'read down' to the extent of the constitutional inconsistency with the Victorian statute. Therefore, as Dr Albury has acted in compliance with the Victorian statute, she is not liable under the New South Wales statute, as read down to avoid the state-state inconsistency.
- In Victoria, there is an apparent conflict between the Victorian statute and the New South Wales statute. However, both statutes are read down to avoid the inconsistency. The effect is, first, that the Victorian statute does not override the common law choice of law rule (that picks up the New South Wales statute) because there is no longer any inconsistency between the New South Wales and Victorian statutes; and second, that Dr Albury is not liable under the forum's choice of law rule, because it picks up the New South Wales statute in its read-down form.
- In Queensland, the only relevant statute is the New South Wales statute, because it is this statute — not the Victorian statute — that is picked up by the forum's choice of law rules. The New South Wales statute is read down to the extent of the inconsistency with the Victorian statute. Again, Dr Albury is not liable under the read-down New South Wales statute.

Therefore, it can be seen that the operation of the minimalist approach should not be affected by the choice of venue. Moreover, as the minimalist approach — unlike the closer connection test — does not require the forum court to apply any particular statute, there is no tension or contradiction between using this method of resolving state-state inconsistency and using the 'choice of law' approach to apply the statutes of other states.

3 *Comparison with the Closer Connection Test*

Assuming that the minimalist approach is workable, the next question is whether it is a better method of resolving state-state inconsistency than the

closer connection test. To a large extent, the advantages and disadvantages of the minimalist approach are the reverse of the advantages and disadvantages of the closer connection test discussed earlier. On one hand, the minimalist approach seems to be relatively certain¹⁵⁴ and avoids placing the courts in a position where they have to decide that one state's statute should be given priority over another state's statute. On the other hand, the minimalist approach runs counter to suggestions from the High Court that each state has a predominant concern with respect to matters within its geographical area. I have already argued that considerations of territoriality need not be given primary weight in resolving a state-state inconsistency.

(a) *Limiting Legislative Options*

Another argument against the closer connection test is that it would limit the options for parliaments to use connecting factors that are suitable for particular situations. Of course, limiting legislative options to some extent is the inevitable result of using a constitutional rule to resolve state-state inconsistency. However, as a practical matter the minimalist approach will probably reduce legislative options to a lesser degree than the closer connection test.

First, the minimalist approach is combined with a much narrower test of state-state inconsistency than is usually proposed for the closer connection test.¹⁵⁵ This narrow test of inconsistency preserves the operation of competing state statutes as far as possible, and to this extent permits the use of different connecting factors.

Second, the minimalist approach — on my preferred analysis — is combined with an approach to applying the statutes of another state that allows states to enact choice of law rules. The closer connection test, by contrast, is often combined with a constitutional approach to applying the statutes of other states that leaves no room for intranational choice of law rules.¹⁵⁶

Admittedly, these practical differences do not result from anything logically inherent in the closer connection test. If the closer connection test had a similarly narrow test of state-state inconsistency and was combined with the choice of law approach to applying statutes of another state, then there may be little practical difference between that test and the minimalist approach in the limits they place on legislative options.¹⁵⁷

¹⁵⁴ Although this approach is not without its uncertainties. In particular, it could sometimes be difficult to determine whether both states' statutes give rise to a 'liability' and whether the rights provided for by different states' statutes are 'contradictory': see above Parts III(C)(1)(b)–(c).

¹⁵⁵ For example, Kirk argues that the statutes of different states conflict if one statute alters, impairs or detracts from the other statute: Kirk, above n 6, 285.

¹⁵⁶ See above Part II(A)(3)(b). Admittedly, the minimalist approach to resolving state-state inconsistency *could* be combined with the constitutional approach to applying the statutes of another state: see below Part V(C).

¹⁵⁷ Even in that situation, there might still be a greater inducement under the closer connection test to adopt conventional connecting factors. If the courts give priority to one state's statute over another, a state legislature has an incentive (perhaps weak) to use connecting factors that have previously been preferred by the courts because that will maximise the chance of that state's statute being given priority. On the other hand, if the courts do not give effect to either state's statute in cases of conflict, then there is no comparative advantage in choosing one set of connecting factors over another. In this limited way, the minimalist approach better preserves legislative options.

(b) Different Methods Work Better in Different Situations

Considering the practical operation of the closer connection test and the minimalist approach, it would seem that the different methods for resolving state–state inconsistency function better in different situations.

The closer connection test works particularly well when one state clearly has a stronger interest, because there is a strong intuition that the law of that state should prevail. That intuition might hold even when it is technically possible to obey or give effect to both statutes.¹⁵⁸ In that situation, the closer connection test also offers the apparent simplicity of only having to obey or give effect to one statute.

By contrast, the minimalist approach works particularly well when the strength of the respective interests of the different states is fairly even. This is because intuition suggests that both statutes should be treated equally which, in this situation, requires giving effect to *neither*. In this situation the apparent simplicity of the closer connection test — which only requires obeying or giving effect to one statute — is offset by the uncertainty of not knowing *which* state statute will prevail in advance of a decision by a court.

I argued earlier that any method of resolving state–state inconsistency should focus on situations where different states have a relatively equal interest in the subject matter because there are other means of dealing with situations where one state clearly has a greater interest.¹⁵⁹ If this argument is accepted, it would favour adopting the minimalist approach over the closer connection test.

(c) Three Matters for Disagreement

However, there are limits on the extent to which the preferable method for resolving state–state inconsistency can be determined by legal debate. There are three matters underlying this debate on which there is no single ‘correct’ view.

First, any view on how to resolve inconsistency between the statutes of different states will be influenced by one’s conception of federation. A federation is both a single nation and a collection of governments. In the choice of law context, emphasising the nation encourages a uniform approach across Australia, but emphasising the collection of governments encourages — even celebrates — a diversity of approaches. A similar difference of emphasis is likely to arise in determining the best method of resolving a *conflict* of laws.

Second, any view about the proper form of an implied constitutional limitation will be influenced by one’s willingness to imply limits on legislative power. Although a written constitution necessarily places some matters beyond legislative amendment, parliamentary supremacy remains a fundamental principle of Australian constitutional law. Some attempt to reconcile ‘the need for basic

¹⁵⁸ For example, when one state’s statute alters, impairs or detracts from another state’s statute.

¹⁵⁹ See above Part II(B)(4). There is some authority that the *Constitution* should not be interpreted to prevent an abuse of legislative power, or by reference to extreme examples: *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 151 (Knox CJ, Isaacs, Rich and Starke JJ) (*‘Engineers Case’*); *Shaw v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 203 ALR 143, 151 (Gleeson CJ, Gummow and Hayne JJ); *Singh* (2004) 209 ALR 355, 402 (Gummow, Hayne and Heydon JJ); cf 431–2 (Kirby J).

values with the requirement of flexibility¹⁶⁰ by starting from the proposition that a narrower limit on legislative power is usually to be preferred to a broader limit; others, however, dispute that any such presumption exists.¹⁶¹

Finally, any view on the appropriate form of a legal test will be influenced by one's views on the proper balance between predictability and flexibility in the law.¹⁶²

These matters highlight some key points of difference between the closer connection test and the minimalist approach. Considering these matters in reverse order:

- The minimalist approach seems to be considerably more certain in its application than the closer connection test. However, the flexibility of the closer connection test means that it arrives at the intuitively 'correct' result in situations where one state clearly has a stronger interest in the relevant subject matter.
- In practice, the closer connection test is likely to limit legislative power to a greater degree than the minimalist approach. That is because a closer connection test is often combined with a relatively broad test of inconsistency and with an approach that leaves no room for state Parliaments to enact intranational choice of law rules. By contrast, the minimalist approach reduces the role of the courts because, apart from preserving the concurrent operation of state statutes as far as possible, there is room for defendants to choose when faced with inconsistent obligations, and for plaintiffs to choose when given inconsistent rights.
- As a corollary to the expanded options for legislatures, the minimalist approach maximises the possibility of different choice of law rules for different law areas. By contrast, the closer connection test — at least, as combined with the other features mentioned — promotes uniformity of rules throughout Australia.

To the extent that there is no 'correct' view on these matters, there are no clear answers on the comparative merits of the closer connection test and the minimalist approach.

¹⁶⁰ *Mulholland* (2004) 209 ALR 582, 586 (Gleeson CJ).

¹⁶¹ See, eg, *A-G (Vic) ex rel Black v Commonwealth* (1981) 146 CLR 559, 615 (Mason J) (a restriction on legislative power should not be expanded 'beyond the mischief to which it was directed'), 652–3 (Wilson J), cf 577 (Barwick CJ), 633 (Murphy J) ('*DOGS Case*'). See also *SGH Ltd v Commissioner of Taxation* (2002) 210 CLR 51, 67 (Gleeson CJ, Gaudron, McHugh and Hayne JJ), referring to the statement of Mason J, without deciding. A similar debate occurs over the level of deference, if any, that should be given to parliament's judgement in determining whether a law is 'appropriate and adapted' to achieving a legitimate end. In *Coleman v Power* (2004) 209 ALR 182, 209, McHugh J stated that the parliament had a margin of choice; see also 192 (Gleeson CJ, in dissent), 267–8 (Heydon J, in dissent). However, a majority of the Court also rejected arguments that the proper test was whether the law was 'reasonably capable of being seen as appropriate and adapted': at 205 (McHugh J), 230 (Gummow and Hayne JJ), 233 (Kirby J).

¹⁶² It may be that the balance between flexibility and certainty should be struck differently in different situations. For example, Mark Leeming argues that certainty is particularly important with criminal law, but that flexibility is more desirable with the civil law: Leeming, above n 6, 117.

D Summary

Having concluded in Part II that state–state inconsistency would only arise when it was impossible to obey or give effect to both statutes simultaneously, this part has considered how that inconsistency can be resolved. In summary:

- 1 A constitutional implication derived from the rule of law principle can be drawn that prohibits an inconsistency between the statutes of different states.
- 2 Although a common argument is that the courts should apply the statute of the state with the closer connection to the subject matter, I have suggested that state–state inconsistencies could be resolved by giving effect to *neither* state statute to the extent of the inconsistency (the minimalist approach).
- 3 Under this minimalist approach, when there are inconsistent *obligations*, each state statute is inoperative to the extent that it purports to impose liability on conduct that was required to avoid incurring liability under the other state’s statute. When there are inconsistent *rights*, each state statute is inoperative to the extent that it purports to confer rights that are contradictory to rights conferred by the other state’s statute.
- 4 This minimalist approach appears workable and indeed more appropriate for situations where both states have a fairly equal interest in the relevant subject matter. The situation where one state clearly has a greater interest can be dealt with using other doctrines, such as extraterritoriality and state–state governmental immunity.

IV CONCLUSION

At first sight, the judicial and academic interest in a conflict between the statutes of different states seems to be quite disproportionate to its practical significance. However defined, a conflict between state statutes occurs only rarely — as demonstrated by the fact that the High Court has not yet needed to determine how such a conflict should be resolved. In terms of practical significance, the most important doctrines are those which have received the least attention here: the presumptions against extraterritoriality which prevent a conflict from arising in most cases.

However, a conflict between state statutes is significant because of what it suggests about other aspects of the federal judicial system, particularly choice of law. The fact that a *conflict* of laws can only be resolved by a constitutional rule could be offered as a reason for using a constitutional rule to also attempt to resolve a *choice* of law. There would be some force in that view if the constitutional rule to resolve a conflict of law requires giving effect to one state’s statute over another. Any concession that the *Constitution* requires the application of a particular state’s statute in one situation — when it is impossible to obey or give effect to statutes of different states — makes it all the more difficult to argue that the *Constitution* does not also require the application of a particular state’s statute in other situations — say, when one state’s statute alters, impairs or detracts from another state’s statute.

The minimalist approach to resolving state–state inconsistency attempts to halt that analogical stampede. By adopting a method of resolving conflict that apparently invites legal chaos — giving effect to neither statute — the minimalist approach contains an in-built tendency towards a narrower, rather than broader, field of operation: a state–state inconsistency would not arise on this approach unless it were impossible to obey or give effect to both statutes simultaneously. Applied only to this narrow situation, the minimalist approach seems quite workable. Moreover, the minimalist approach leaves room for the concurrent operation of state substantive statutes and leaves the operation of choice of law rules, both common law and statutory, untouched.

That is not to say that there is no scope for reconsidering the suitability of traditional choice of law rules in a federation. There is something to be said for the view that common law choice of law rules should pick up any state statute that is expressed to apply to the same person, thing or event, subject to the statutes of the forum — both substantive and choice of law — providing to the contrary. On this view, traditional common law choice of law principles would be taken into account at the early stage of determining whether a state’s statute was intended to apply to the relevant subject matter. However, whatever its merits, this approach does not depend on any constitutional implication. Minimising the extent of constitutional implication in this area allows legislatures, as well as courts, to make choices about choices of law.

V APPENDIX: HOW DO COURTS IN ONE STATE APPLY THE STATUTES OF ANOTHER STATE?

In defining a ‘conflict’ between the statutes of different states, an issue arose regarding how courts in one state should apply statutes of another state.¹⁶³ I noted that there were two approaches to this issue — which I called the ‘choice of law approach’ and the ‘constitutional approach’ — but said that the minimalist approach to resolving state–state inconsistency did not depend on adopting one approach over the other.

In this Appendix, however, I will briefly explain my preferred view, which is that (1) state statutes apply in courts in other states through the forum’s choice of law rules,¹⁶⁴ but that (2) s 118 of the *Constitution* requires these choice of law rules to be even-handed as between the law of the forum and the law of other states. I will also explain why the debate between the choice of law approach and the constitutional approach does not affect my suggested approach for resolving state–state inconsistency.

A *Applying the Statutes of Another State: The Traditional Analysis*

The traditional analysis is that courts in one state apply the statutes of another state either through the application of the forum’s choice of law rules (for cases in state jurisdiction) or through ss 79 and 80 of the *Judiciary Act* (for cases in federal jurisdiction). It is necessary to consider this analysis in more detail.

1 *State Jurisdiction: Statutes of Other States Apply through the Forum’s Choice of Law Rules*

For cases in state jurisdiction, the traditional analysis — that statutes of another state only apply through the forum’s choice of law rules — presupposes that the statutes of another state cannot apply ‘directly’ or of their own force. Although this analysis is well established, the actual reason that statutes of one state do not apply directly in the courts of another state has not been clearly explained. In *Pfeiffer*, the joint judgment simply stated that ‘it *may* be said that it is to be inferred that it is the legislative will of the State ... that [its] courts should apply the law of that State to which they owe their origin and from which they derive their authority’.¹⁶⁵

There are strong obiter dicta in *Re Wakim; Ex parte McNally*¹⁶⁶ that one state cannot confer jurisdiction on courts of another state. However, *jurisdiction* — in the sense of the court’s ‘authority to decide’ — is a different issue from determining which law is *applicable* in the exercise of that jurisdiction.

¹⁶³ See above Part II(A)(2).

¹⁶⁴ For cases in federal jurisdiction, these choice of law rules are applied by either ss 79 or 80 of the *Judiciary Act*.

¹⁶⁵ (2000) 203 CLR 503, 536 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ) (emphasis added). Even this qualified statement was expressed to apply only when state courts were ‘enforcing an obligation of [that state’s] creation’: at 536. See further O’Brien, above n 69, 347–54 (see especially 353).

¹⁶⁶ (1999) 198 CLR 511, 573 (Gummow and Hayne JJ).

It might be that statutory law is, in effect, a command directed at courts. If so, then ordinarily only the legislature that establishes a court can make commands binding on it.¹⁶⁷ This view of statutory law would mean that any rights and obligations apparently conferred on people would be more accurately described as a prediction of orders that a court will make. Equally, to say that statutes ‘bind’ people would actually mean that people are subject to certain orders by a court. This unsophisticated Holmesian analysis¹⁶⁸ might not be suitable for all purposes,¹⁶⁹ but the analysis would seem to apply to the sorts of statutory law that give rise to court disputes.

Significantly, however, the proposition that one polity cannot make commands binding on the courts of another polity is subject to the *Constitution*. Most obviously, covering cl 5 of the *Constitution* makes Commonwealth statutes binding on state courts. I will consider later whether s 118 has an analogous effect on the statutes of another state.

One consequence of this traditional analysis of cases in state jurisdiction is that the only ‘conflict’ that can arise in these cases is between the forum statute and the forum choice of law rule (which picks up the other state’s statute). However, the resolution of this conflict does not depend on whether the forum’s choice of law rule is common law or statutory, because state–state inconsistency is resolved by a constitutional rule.¹⁷⁰

2 *Federal Jurisdiction: Statutes of Other States Applied by Sections 79 and 80 of the Judiciary Act*

For cases in federal jurisdiction, there is a slightly different analysis of how courts in one state apply the statutes of another state. The joint judgment in *Pfeiffer* observed that federal jurisdiction is Australia-wide, so that the issue in federal jurisdiction cases is not choosing between laws of competing jurisdictions, but rather identifying the applicable law in accordance with ss 79 and 80 of the *Judiciary Act*.¹⁷¹ This remark could be read as suggesting that the choice of venue within Australia cannot affect the ‘applicable law’ for cases in federal jurisdiction; in other words, a case in federal jurisdiction will have the same

¹⁶⁷ For one state to make commands directly binding on the courts of another state would seem to be contrary to state–state governmental immunity (see above n 88). However, state–state governmental immunity would not prevent the courts in one state from applying the statutes of another state through common law choice of law rules. This constitutional implication would only protect courts from legislation (or executive or judicial action) of *another state*, but the application of another state’s statutes through common law choice of law rules involves the exercise of judicial power by courts in *that state*. But see James Stellios, ‘Choice of Law and the Australian Constitution: Locating the Debate’ (2005) 33 *Federal Law Review* 7, arguing that the authority for the courts in one state to apply the legislation of another state must derive from s 118 of the *Constitution*, not the common law.

¹⁶⁸ Cf Holmes, above n 145, 461: ‘The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the [common] law.’

¹⁶⁹ For example, s 53 of the *Commonwealth Constitution* is not justiciable (see, eg, *Western Australia v Commonwealth* (1995) 183 CLR 373, 482 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ) (*‘Native Title Act Case’*); P H Lane, *Lane’s Commentary on the Australian Constitution* (2nd ed, 1997) 120, 392), but s 53 is still a ‘law’.

¹⁷⁰ See above Part III(C)(2)(b).

¹⁷¹ (2000) 203 CLR 503, 530 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

applicable law regardless of where in Australia it is instituted. However, the later case of *Blunden* appears to refute any such suggestion.

The effects of ss 79 and 80 of the *Judiciary Act* are as follows. When there is a choice of law, the fact that s 79 only picks up statutes ‘in all cases to which [the statutes of that state] are applicable’ allows the choice to be resolved through the forum’s usual choice of law rules. Common law choice of law rules are applied by s 80, and statutory choice of law rules are picked up by either s 79 or s 80.¹⁷²

However, when there is a conflict between the statutes of different states, the forum’s substantive statute is by hypothesis applicable in its terms. Of course, the other state’s statute is also applicable in its terms; however, s 79 of the *Judiciary Act* seems to pick up only the statutes of the state in which the court is exercising jurisdiction (that is, the forum).¹⁷³ Therefore, a conflict between the statutes of different states is, again, translated into a conflict between the forum’s (substantive) statute and the forum’s choice of law rule. With a statutory choice of law rule, the question is which forum statute — the substantive statute or the choice of law statute — is ‘applicable’ for the purposes of s 79. With a common law choice of law rule, the question is whether the common law rule has been ‘modified ... by the statute law in force in the State’ for the purposes of s 80.¹⁷⁴

These questions are substantially the same as those raised in state jurisdiction cases about how state courts apply the statutes of another state. So, although cases in federal jurisdiction involve a slightly different chain of reasoning, the operation of ss 79 and 80 of the *Judiciary Act* is consistent with the choice of law approach.

Two further points about ss 79 and 80 of the *Judiciary Act* should be noted. First, the coverage of s 79 has not been conclusively determined.¹⁷⁵ For example, there is a real question as to whether s 79 could validly operate on *all* state statutes that are relevant to a federal matter — such as the law of negligence applicable to a matter under s 75(iv) of the *Constitution*. It would seem clear that s 79 can operate validly on statutes that regulate the exercise of jurisdiction, but the position is less clear with statutes that create or alter the substantive rights and liabilities of the parties.¹⁷⁶ Accordingly, there may be a question as to whether s 79 is relevant if the ‘conflict’ between the statutes of different states concerned substantive rights and obligations.

Second, both ss 79 and 80 are expressed to operate subject to the *Constitution*. Consequently, any state statute picked up by s 79, and any common law choice of law rule applied by s 80, will be ‘read down’ to avoid any state–state inconsis-

¹⁷² *Blunden* suggests that s 80 of the *Judiciary Act* applies statutory modifications of the common law: (2003) 203 ALR 189, 194 (Gleeson CJ, Gummow, Hayne and Heydon JJ).

¹⁷³ Section 79 of the *Judiciary Act* provides that ‘[t]he laws of *each* state ... shall ... be binding on all Courts exercising federal jurisdiction in *that* state’ (emphasis added). Thus it seems that ‘each’ state should be read as ‘a’ state.

¹⁷⁴ The reference in s 80 to the statutes ‘in force in the State’ might be capable of referring to statutes enacted by another state operating with extraterritorial effect, but s 80 does not provide any mechanism for choosing between the statutes of different states in cases of conflict.

¹⁷⁵ A point noted in Selway, above n 6, 36–8.

¹⁷⁶ One possibility is that s 79 operates as a choice of law rule on substantive statutes, directing the application of independently existing law: see O’Brien, above n 69, 337–44.

tency.¹⁷⁷ Moreover, if the High Court were to adopt the constitutional approach, ss 79 and 80 would not purport to apply a statute other than that which was required by the *Constitution*.

B Does Section 118 of the Constitution Alter the Traditional Analysis?

The question then is whether s 118 of the *Constitution* — read in light of other constitutional provisions — alters this traditional analysis. There are two possible versions of the constitutional approach: that s 118 itself applies the statutes of one state in courts in another state, and that s 118 recognises a ‘constitutionalised’ choice of law rule that compels the application of another state’s statute.¹⁷⁸ The arguments for the constitutional approach have been much discussed in the literature¹⁷⁹ and need not be described in detail here. These arguments and my responses are as follows.

1 The Constitutional Approach: Arguments For and Against

(a) Section 118 Must Be Given Some Effect

Argument: The constitutional approach is required to give some effect to s 118 of the Constitution, and accords with the natural meaning of ‘full faith and credit’.¹⁸⁰

Response: It is not accurate to say that the existing interpretation of s 118 is of no effect. That interpretation *requires* one state to recognise the laws of another state. This contrasts with independent nation-states, where foreign laws are recognised only as a matter of comity. Consequently, the existing interpretation provides that one state cannot refuse to give effect to another state’s statute on the grounds of public policy.¹⁸¹ The argument is therefore really that the existing interpretation of s 118 does not give *enough* effect to that provision.

However, federal unity can be enhanced by small, as well as large, steps. For example, the provision in s 51(xxiv) of the *Constitution* for uniform laws of service throughout the Commonwealth was considered by Justice Jackson of the United States Supreme Court to be a significant improvement on the US model.¹⁸² More recently, Spigelman CJ has stated that ‘[t]he object of [ss 51(xxiv) and (xxv), and s 118] is to ensure that, in broadly expressed respects, the operation of the legal system is, in substance, borderless.’¹⁸³

¹⁷⁷ See above Part III(C)(2)(b).

¹⁷⁸ See above Part II(A)(2).

¹⁷⁹ See, eg, Nygh, above n 89; Opeskin, above n 36. The following discussion will concentrate on the recent and comprehensive argument contained in Kirk, above n 6, 267–84.

¹⁸⁰ Kirk, above n 6, 267–8.

¹⁸¹ *Pfeiffer* (2000) 203 CLR 503 suggests that this principle may also apply to choice of law rules.

¹⁸² Justice Robert Jackson, ‘Full Faith and Credit — The Lawyer’s Clause of the *Constitution*’ (1945) 45 *Columbia Law Review* 1, 19–20.

¹⁸³ *Dalton v NSW Crime Commission* [2004] NSWCA 454 (Unreported, Spigelman CJ, Mason P and Wood CJ at CL, 15 December 2004) [11] (Spigelman CJ). In this case it was held by majority (Mason P in dissent) that s 51(xxiv) of the *Constitution* supported a Commonwealth law providing for the interstate service of the process of a New South Wales investigative tribunal. Mr Dalton has applied for special leave to appeal to the High Court.

Significantly, what is said to be ‘borderless’ here is the legal system — not the law itself.

As for ‘natural meaning’, I doubt that this takes the matter much further. ‘Full faith and credit’ seems to be a phrase that takes its content from legal usage and understanding (like ‘trading corporation’)¹⁸⁴ rather than being a phrase of ordinary language. In any event, the previous interpretation of s 92 of the *Constitution* demonstrates the difficulties of giving apparently wide phrases a meaning unconstrained by context or history.¹⁸⁵ Although some members of the High Court suggested in the *DOGS Case* that they were giving the phrase ‘establishing any religion’ its ordinary meaning,¹⁸⁶ it is more accurate to say that the Court chose between various plausible meanings by reference to history and the context of s 116.¹⁸⁷ Clearly, s 118 is intended to promote federal unity, but the choice between various unity-promoting interpretations — which includes the existing interpretation of s 118 — cannot be divined from the text.

(b) *States Are Not Foreign Entities*

Argument: Australia has one system of law, having regard to the single common law and the exercise of federal jurisdiction. Therefore, the different states are not foreign entities as between themselves.¹⁸⁸

Response: It cannot be stated in unqualified terms that Australia has a unified legal system. Clearly, there is a greater integration of state and federal judicial power in the Australian judicial system than in other federations (particularly the US). Most obviously, there is a single Australian common law, and the Commonwealth may regulate exclusively the manner in which all courts (both state and federal) exercise federal jurisdiction. However, *Pfeiffer* demonstrates that these features are also consistent with the choice of law approach. The fact that there is some degree of integration — both in constitutional law and as a matter of practice — does not mean that an even greater degree of integration is required.¹⁸⁹

Equally, it is clearly true that the relationship between the different states is not exactly the same as the relationship between different nations. Indeed, the joint judgment in *Pfeiffer* stated that ‘the terms of s 118 indicate that, as between

¹⁸⁴ *Singh* (2004) 209 ALR 355, 359 (Gleeson CJ); see also *Re Colonel Aird; Ex parte Alpert* (2004) 209 ALR 311, 337 (Kirby J): the meaning of ‘defence’ in s 51(vi) ‘picks up, and carries with it into Australian constitutional law, the fundamental notions of national “defence” that derive from British constitutional history’.

¹⁸⁵ *Mulholland* (2004) 209 ALR 582, 631 (Gummow and Hayne JJ); *Singh* (2004) 209 ALR 355, 374 (McHugh J).

¹⁸⁶ See especially (1981) 146 CLR 559, 581–2 (Barwick CJ), 597–8 (Gibbs J), 616 (Mason J), cf 606 (Stephen J) (noting the different meaning of ‘establishment’ of the Commonwealth in s 106 and ‘establishing’ a religion in s 116), 653 (Wilson J) (stating that establishment has ‘no fixed connotation’).

¹⁸⁷ *Ibid* 597 (Gibbs J) (explaining that several dictionary meanings of ‘establish’ were inappropriate for s 116), 616–17 (Mason J) (referring to historical understanding of the meaning of ‘establishing’ a religion).

¹⁸⁸ Kirk, above n 6, 271.

¹⁸⁹ See *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 579 (Gummow and Hayne JJ): ‘The fact that there is a power to invest state courts with federal jurisdiction does not mean that there must be some capacity to make a reciprocal arrangement’.

themselves, the States are not foreign powers'.¹⁹⁰ However, the choice of law approach only depends on there being one relevant similarity between these two sets of relationships: that one state cannot make commands binding on courts in another state, just as one nation cannot make commands binding on courts in another nation. The joint judgment in *Pfeiffer* appears to accept this analysis.¹⁹¹ Therefore, the argument that the states are not foreign entities as between each other merely describes the *consequence* of the constitutional approach, rather than being a *reason* for it.¹⁹² Although *Pfeiffer* indicates that some modification of traditional choice of law rules is required, it does not reject the use of choice of law rules for intranational disputes.

(c) *Parliamentary Supremacy and Representative Democracy*

Argument: The constitutional approach better gives effect to parliamentary supremacy and representative democracy, because it is inappropriate for courts through common law choice of law rules to refuse to give effect to legislation that is expressed to apply to a person, thing or event.¹⁹³

Response: First, and most importantly, the choice of law approach presupposes that the statutes of one state *cannot* apply directly in courts in another state. Therefore, it is not accurate to say that the constitutional approach merely requires courts to give effect to statutes when those statutes are applicable because, on the choice of law approach, the statutes of one state are not directly applicable in another state's courts.¹⁹⁴ Second, it seems slightly odd that parliamentary supremacy and representative democracy are relied on to support an implied *limit* on legislative power — as the constitutional approach would prevent the states from enacting choice of law rules. Third, this argument is inapplicable to *statutory* choice of law rules, which suggests that the constitutional approach is at most a reason to change the common law. Finally, references to parliamentary supremacy and representative democracy do not distinguish Australia from the US, where the provision equivalent to s 118 is not given a 'full effect' interpretation.¹⁹⁵

¹⁹⁰ (2000) 203 CLR 503, 534 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

¹⁹¹ *Ibid* 535–6; see also 526–7 (state jurisdiction), 530 (federal jurisdiction) (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

¹⁹² Cf Kirk, above n 6, 271–2, who argues that the usual objection to the vested rights theory — that the courts of one polity cannot apply the law of another polity — has no application as between different Australian law areas because 'the Australian States are not foreign entities to each other but part of one nation and one legal structure established and maintained by the *Constitution*'. In *Blunden*, however, the High Court reaffirmed its rejection of the 'vested rights' theory: (2003) 203 ALR 189, 195–6 (Gleeson CJ, Gummow, Hayne and Heydon JJ).

¹⁹³ Kirk, above n 6, 271.

¹⁹⁴ Cf arguments that the constitutional approach is merely a 'literal' interpretation of s 118 of the *Constitution*: Gageler, above n 18.

¹⁹⁵ Broadly, the full faith and credit clause, art IV, § 1 of the *United States Constitution*, has been interpreted as requiring only that the forum have a minimum connection with the dispute, which duplicates 'due process' requirements: see *Allstate Insurance Co v Hague*, 449 US 302, 308, 312–13 (Brennan J) (1981); confirmed in cases such as *Phillips Petroleum Co v Shutts*, 472 US 797 (1985) and *Franchise Tax Board of California v Hyatt*, 538 US 488 (2003). See generally Opekin, above n 36, 173–6.

(d) Increased Certainty

Argument: The constitutional approach promotes predictability in the law, because it ensures that the result of a dispute is the same, regardless of venue.¹⁹⁶

Response: It is clearly true that the constitutional approach leads to the same outcome for a dispute, regardless of venue. It is also true that a ‘venue-neutral’ approach does promote predictability in the law to some extent. However, that benefit should not be overstated. To begin with, the constitutional approach is not the *only* way to ensure that a dispute will lead to the same outcome. The choice of venue is regulated by existing laws, which make provision for matters to be heard in the ‘appropriate’ forum.¹⁹⁷ Moreover, some significant differences in outcome have been reduced by taking a narrower view of what constitute ‘procedural’ laws.¹⁹⁸ Therefore, it is something of an exaggeration to say that the choice of law approach involves a ‘gross departure’¹⁹⁹ from the rule of law. It should also be noted that the constitutional implication underlying the prohibition on state–state inconsistency only requires that there are not *contradictory* commands.²⁰⁰ Unless state statutes are inconsistent in the sense described in Part II, this constitutional implication does not require that someone be able to predict which (non-inconsistent) state’s statute will be applied by the forum’s choice of law rule.

In any event, the benefit of predictability of outcome has to be traded off against other consequences of the constitutional approach. Most obviously, the constitutional approach would impose a significant limit on state legislative power because the states would not have the power to enact choice of law rules. It has been suggested, in response to this last objection, that the constitutional approach would not unduly limit legislative power because the Commonwealth could still enact choice of law rules under s 51(xxv) of the *Constitution*.²⁰¹ However, it is doubtful that the power conferred by s 51(xxv) could be separated from the limitation contained in s 118.²⁰² It seems more likely that the Commonwealth may only provide for the recognition throughout the Commonwealth of the statutes of the states in a manner that gives full faith and credit to those state statutes (however the full faith and credit requirement may be interpreted). Consequently, if s 118 required that state statutes be given effect whenever they applied to a person, thing or event, a Commonwealth law enacted under s 51(xxv) of the *Constitution* could not provide to the contrary.²⁰³

¹⁹⁶ Kirk, above n 6, 269–70.

¹⁹⁷ See above n 93 and accompanying text.

¹⁹⁸ See above n 114 and accompanying text.

¹⁹⁹ Kirk, above n 6, 270; cf *Goad v Celotex Corp*, 831 F 2d 508, 512 (Widener J) (4th Cir, 1987): forum shopping is a ‘spectre or ... a strawman, depending on whose ox is being gored’.

²⁰⁰ See above Part III(A)(2).

²⁰¹ Kirk, above n 6, 280.

²⁰² The historical purpose of s 51(xxv) was to allow the Commonwealth to ‘legislate in order to give effect to s 118’: John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 620. Indeed, the US equivalents of ss 51(xxv) and 118 of the *Australian Constitution* are both contained in the *United States Constitution* art IV § 1.

²⁰³ See Bernard O’Brien, ‘The Role of Full Faith and Credit in Federal Jurisdiction’ (1976) 7 *Federal Law Review* 169, 189–91.

2 *Preferred Interpretation of Section 118: Choice of Law Rules Must Be Even-Handed*

Despite these criticisms, the constitutional approach is persuasive in stating that an express full faith and credit requirement must impose *some* constraint on state choice of law rules. The joint judgment in *Pfeiffer* seems to say as much. However, it does not follow that the only alternative to treating the various states as foreign powers is to discard choice of law rules altogether. Section 118 might merely prevent a state choice of law rule from discriminating against the law of another state.²⁰⁴ On this view, a state can adopt any choice of law rule that it wishes, provided that the rule is ‘even-handed’ as between forum law and the law of other states, and as between local residents and residents of other states.

This middle position leaves considerable room for states to enact choice of law rules, but also recognises that in a federation, one state cannot refuse to give effect to the statutes of other states because of an objection to the content of those statutes. I would argue that a requirement of even-handedness is more consistent with federal structure than a requirement of uniformity. As Gleeson CJ stated in *R v Putland* — albeit in the context of differing substantive laws — ‘[i]f state and territory laws were all necessarily the same, then there would be little point in having state and territory legislatures’.²⁰⁵

C Debate Does Not Affect Minimalist Approach to Resolving State–State Inconsistency

Ultimately, this debate between the choice of law approach and the constitutional approach does not affect my main point, which is to offer an alternative method for resolving a conflict between the statutes of different states. Indeed, the constitutional approach would accept as axiomatic that a true conflict between the statutes of different states must be resolved by a constitutional rule. As s 118 of the *Constitution* does not itself provide any means for resolving that conflict, a judge who adopted the constitutional approach might decide to resolve state–state inconsistency by giving effect to neither state statute to the extent of the inconsistency. Alternatively, a judge who adopted the choice of law approach to applying the statutes of other states might accept that, once the statutes of different states are in *conflict*, that conflict needs to be resolved by a constitutional rule prior to either statute being picked up by a choice of law rule.²⁰⁶

Although there is no logical contradiction between the two positions, it may well be that a judge who adopts the constitutional approach is less likely to favour the minimalist approach to resolving state–state inconsistency. As noted

²⁰⁴ Section 117 might prevent a state choice of law rule from discriminating against residents of other states: see Stellios, above n 167. For a comparable even-handedness argument made in the US, see Kermit Roosevelt, ‘The Myth of Choice of Law: Rethinking Conflicts’ (1999) 97 *Michigan Law Review* 2448. Stellios goes on to argue, however, that any requirement of equality derived from s 118 goes beyond requiring a state court to identify the applicable law in an even-handed neutral way. Rather, in his view, the state court must choose the applicable law ‘by an actual consideration of [the content of] the competing laws’: Stellios, above n 167.

²⁰⁵ (2004) 204 ALR 455, 462.

²⁰⁶ See above Part III(C)(2)(b).

earlier, the minimalist approach is influenced by the view that a federation should encourage diversity rather than uniformity, and that limits on legislative power should be as sparing as possible. By contrast, the constitutional approach promotes uniformity within the federation and is less concerned by the imposition of significant limits on legislative power.

In any event, the most significant issue here is the definition of 'conflict', rather than the method chosen for resolving that conflict — whether it be the closer connection test or not giving effect to either statute. If a 'conflict' between the statutes of different states has the narrow meaning suggested in Part II above, then the courts may never need to settle on a method of resolving that conflict.