As Max Rheinstein pointed out, "The states' freedom to fashion their own laws of conflict of laws is limited by the Constitution of the United States as interpreted by the Supreme Court of the United States." In particular, the due process clause of the fourteenth amendment, the privileges and immunities clause, and the full faith and credit clause have been interpreted to prevent a state from applying its own law to controversies having no significant connection with the forum state and to guarantee citizens of one state equal and fair treatment in the courts of another state. Indeed, it once seemed that the Supreme Court was slowly shaping a system of federal conflicts rules. Although this trend toward using
the national constitution as the source of a federal common law of conflicts has subsided, constitutional scrutiny of state conflict of laws decisions has not. Specifically, American courts now employ a governmental interest analysis to determine whether a state may constitutionally apply its own law to particular disputes.

In contrast, European lawyers and courts have only recently recognized that constitutional law affects choice of law decisions. The American emphasis on the importance of constitutional law in the conflicts area has undoubtedly influenced this European development. But it should be underscored that the interface between conflicts and constitutional law in many European countries does not parallel the American experience. For one thing, choice of law questions in the United States generally concern relationships within the legal system, while in Europe questions of private international law mainly concern the relationship between the domestic legal system as a whole and foreign legal systems. The problems are more truly international. This difference has perhaps been underemphasized in the United States where "little distinction is made between cases involving sister states of the United States and cases involving foreign nations." A judge in deciding interstate or inter-


12 Rheinstein, supra note 1, at U-159.
provincial conflicts questions remains within his own legal system, while a judge in truly international situations applies genuinely foreign law. For this reason, it is not unreasonable to ask the judge in a federal system deciding interstate cases to help to develop the "foreign" law, but it is asking too much to expect a judge of one country to speculate on the policies underlying the laws of another country. The problem a judge faces in attempting to determine the "constitutionality" of foreign statutes is a striking example of this. 13

Second, constitutional law serves a variety of disparate functions in different countries. In the United States, Canada, Australia, Italy, Austria, Norway, Japan, and the Federal Republic of Germany, for instance, the primacy of constitutional law is established. 14 This theoretical primacy has a direct impact on individual cases. Indeed, some commentators in countries such as Italy and the Federal Republic of Germany argue that no private international law decision should be rendered without considering constitutional law principles and scrutinizing applicable domestic and foreign principles for their compatibility with domestic constitutional rights. 15 In contrast, England’s system of parliamentary sovereignty


has rejected the view that the "constitution"—whatever this word may mean in the British context—is higher in the hierarchy of norms than an ordinary statute or a decision of the House of Lords.\(^\text{6}\) The provisions of Switzerland's written constitution do not empower courts to invalidate contrary federal statutes.\(^\text{17}\) In Norway the case law since the end of the Second World War has made the idea that a court of law should invoke the constitution to invalidate an act of Parliament seem like a thing of the past, although the Norwegian Supreme Court has overruled an act of Parliament on three occasions.\(^\text{18}\)

It is not my task here to suggest that either of these approaches is wrong or inappropriate. It is one thing if a constitution is created in a democratic country which has experienced the terror of totalitarian government and is therefore especially concerned with averting a repetition of this experience through, \textit{inter alia}, constitutional guarantees. It is another if a constitution has evolved in a country with a heritage of democracy, individual liberty, and an unimpeded, sovereign Parliament.\(^\text{19}\)

With these qualifications in mind, I will discuss two problems of the relationship between conflicts and constitutional law in a

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\(^{17}\) A. Favre, \textit{Droit constitutionnel suisse} 252 (2d ed. 1970). The Swiss do not share the German position that recognizes a sphere of individual rights superior even to the constitution, but they may be moving closer to it. H. Oehrhänsli, \textit{Die Gewährleistung der Freiheitsrechte unter besonderer Berücksichtigung der verfassungsmässigen Garantie der persönlichen Freiheit} 70-75 (1971); P. Saladin, \textit{Grundrechte im Wandel} 382-85 (1970). The preliminary draft of the new Swiss federal constitution (published February 23, 1978, by Bundesrat Kur Furgler) supports this thesis.


\(^{19}\) J. Andenaes, \textit{supra} note 14, at n.7.

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The third problem in this context may be only mentioned here: what should a court do when the applicable foreign law may be unconstitutional when measured against the foreign state's paramount constitution? It is not enough to say a foreign statute that is unconstitutional when tested against the foreign constitution should not be applied because it is not the law of the foreign state. The foreign country may have special constitutional courts to which the power of constitutional review is restricted and it may be impossible to get the constitutional question before one of these courts. See Judgment of September 13, 1954, Trib., Rome, 47 REV. CRIT. D. DROIT INT. P. 534, 535 (1958) note R. DeNova; Kahn-Freund, supra note 13, at 224; Neumayer, Fremdes Recht und Normenkontrolle, 23 RABELSZ 573, 586 (1958). Moreover, in many situations it is difficult to determine the desirability and feasibility of putting "a judge who has to apply foreign law in the position of his opposite number and therefore to allow him to inquire into the validity of foreign legislation within the limits set by foreign law." F. MANN, STUDIES IN INTERNATIONAL LAW 445 (1973).

In Italy, the constitutionality of a statute may be reviewed in a special non-adversary procedure. COST. art. CXXXIV. In West Germany, constitutional review of a statute may take place in a suit instituted by a private individual or in a special non-adversary proceeding at the instance of the federal or state government or of one-third of the members of the Federal Diet (Bundestag). GG art. XCIII, para. 1, nos. 2 & 4a.
be viewed as positive, national law but rather as transnational prescriptions that are not subject to any national constitution.\textsuperscript{23} The conflicts rules are simply neutral, formal provisions—rules of expediency, devoid of substantive justice.\textsuperscript{24} Furthermore, it might be argued, the participants in the establishment of the constitution probably never intended that constitutional provisions such as those providing equal rights to spouses or between legitimate and illegitimate children should be applied to conflicts rules.\textsuperscript{25} Rather, the existence of these rules was presupposed in drafting the individual country's constitution. Since the constitutional provisions were adopted within the framework of existing conflicts law, the argument runs, constitutional law should be considered subject to private international law in the hierarchy of norms.

The progressive reformulation of domestic conflicts rules during the last century has clearly demonstrated, however, that the rules of private international law have their origin in national law.\textsuperscript{26} Conflicts principles are based on the authority of a single country to create its own law and apply it to individuals subject to that authority. Moreover, the view that conflicts rules are merely formal, neutral principles ignores the necessity of an international justice.\textsuperscript{27} Every state has an interest in applying its own law—the law that

\begin{footnotesize}
\begin{enumerate}
\item E. Frankenestein, 1 Internationales Privatrecht 19-27 (1926) (the force of laws emanating from countries in international groups derives from the group, and not from the individual countries). See also W. Niederer, Einführung in die allgemeinen Lehren des internationalen Privatrechts 139 (3d ed. 1961) (international private law as applied by judges has the force of law, beyond unsecured right). But see E. Zitelmann, 1 Internationales Privatrecht 74-76 (1977).
\item See, e.g., Kegel, Begriffs-und Interessenjurisprudenz im internationalen Privatrecht, in Festschrift Hans Lewald 259, 259-88 (1953).
\end{enumerate}
\end{footnotesize}
its citizens and judges know. But conflicts principles are needed to
guide the discovery and application of the most appropriate law in
particular controversies.

Furthermore, it is an unfounded *petitio principii* that constitu-
tional orders do not apply to conflicts principles. No constitution
expressly excepts conflicts rules from its reach. Conflicts rules do
reflect special value judgments and should therefore be valid only
if in accord with the applicable principles of substantive justice
embodied in the constitution.28 There are, for example, numerous
practical disadvantages for wives resulting from the rule that in
domestic disputes the law of the husband’s nationality or residence
is to be applied.29 This rule cannot be defended as neutral or value-
free. It ignores the fact that the law of the wife’s nationality or
residence is generally most appropriate for application to her yet it
gives controlling weight to the same consideration in the husband’s
case. Moreover, the wife, unlike the husband, is not afforded the
opportunity to influence the choice of law determination by acquir-
ing a new nationality. Thus the arguments for excepting conflicts
principles from constitutional restrictions are unpersuasive.

Determining whether a constitutional provision applies to con-
licts rules may at times be difficult, but there will be clear cases.
The drafters of the German constitution, for example, declared that
all regulations contrary to particular provisions of the constitution
would automatically become ineffective on a date certain.30 German
choice of law statutes contravening those provisions must be disre-
garded, and the courts must decide conflicts questions that would
otherwise be governed by such provisions on a case-by-case basis.
However, courts faced with this situation31 should, out of due regard
for the primacy of the legislature in a republic, hew as closely as
constitutionally permissible to existing choice of law statutes.32

60 Cornell L. Rev. 969, 977-82 (1975).

29 Müller-Freienfels, *Legal Equality of Husband and Wife and the Child’s Welfare in
Private International Law*, in *ESSAYS IN JURISPRUDENCE IN HONOR OF ROSCOE POUND* 595, 605-
06 (1962).

30 See GG art. CXVII, para. 1, which invalidates all legal provisions contrary to legal
equality of sexes as of April 1, 1953. Following this route, the Bundesverfassungsgericht
determined that all statutes discriminating against illegitimate children, see GG art. VI,
para. 5, were to become void on October 20, 1969, the last day of the then current legislative
25 Bundesverfassungsgerichtsentcheidungen [BVerfGE] 167, 188.

31 As to the situation of West German courts after June 1, 1953, see Zweigert & Puttaran-

32 Cf. Judgment of December 18, 1953, BVerfG, W. Ger., 3 BVerfGE 225, 244 (in the
wake of GG art. CXVII, para. 1, see *note* 30 *supra*, courts attempted to leave untouched as
B. An Illustration: Constitutional Equality and Conflicts Principles in Family Disputes

Application of the law of the husband’s or the father’s nationality in marriage and child law cases has been increasingly subjected to criticism as violative of the equal rights guaranteed by many national constitutions. And indeed this view is gaining sway—the law of the husband and father is losing ground to the law of the common nationality or the common residence of husband and wife in matrimonial cases and to the law of the child in parental cases. For example, the appeals court of Berlin in a divorce suit brought by an Austrian against her German husband stated that the rule requiring application of the national law of the husband is unconstitutional because “it constitutes a discrimination against the wife in that it fails to accord equal value to the nationality of the wife.”

The court applied the law of the complainant, the Austrian law. Yet how best to incorporate equality principles in domestic conflicts rules remains uncertain, and examination of this question nicely illustrates the more general problem of reconciling conflicts principles with constitutional mandates.

Courts and lawyers have generally not been eager to fashion new conflicts rules that accord with equality, for they naturally have sought to preserve their investment in existing laws. In some countries, application of equality principles may be limited by appeal to
the constitutional principle guaranteeing the "unity of the family." This limitation is justified in countries such as Italy where, according to the constitution, the moral and legal equality of the spouses is "subject to the limitation provided by statute for the preservation of family unity." This qualification upon equality cuts deeply indeed.

Many in the Federal Republic of Germany are wary of the uncertainty that might result from rejection of the rule mandating application of the law of the husband's or father's nationality. They note the multitude of rules that have been suggested to replace the old principle: the national law of the plaintiff; the national law of the defendant; the law of the last common nationality; the law of the last common residence; and rules that refer to the "stronger" or "weaker" law in order to permit, as a practical matter, application of whatever law leads to the desired result. But this difficulty should be short-lived. Once the legislature enacts a constitutional rule to govern this situation or the highest court speaks to the question, the uncertainty will be largely dissipated.

Several commentators have suggested that conflict with equal rights principles may be avoided by giving the parties freedom to choose the applicable law among the common national law of the parties, the national law of one of the parties, and the law of the place of residence. This proposal neglects an important consideration. In torts or contracts, allowing the parties to choose the governing law seems sensible because they are free to create, vary, or abrogate their substantive legal rights and obligations. In marriage law, by contrast, public policy considerations restrict the parties' freedom to alter their obligations inter se, although there is a trend toward consensual divorce in most countries. In child law, granting the parties freedom to vary their legal relationships would be inconsistent with the court's duty to protect the child, whose welfare is the controlling concern.

Some German courts, in particular the appeals court of Ba-
varia, have avoided abrogating the rule requiring application of the national law of the husband by reasoning that, on the facts of the particular case, application of the national law of the wife would have yielded the same concrete result. This approach is questionable, however, because the national law of the wife referred to may be the law she acquired through marriage, not the law of her own nationality.

On the other hand, the appeals court of Stuttgart ruled, in a child custody proceeding subsequent to a divorce, that application of the law of the father would violate the equal rights principle as between the parents. The court held that it is the "task of the case law to fill the void created by the invalidation of unconstitutional rules. . . . [A]pplication of the law of the place of usual residence of the child (in Austria) is here the most just solution." This decision is especially remarkable because the court would have reached the same result—application of Austrian law—had it applied the German choice of law statute, Article 19 of the Introductory Law of the German Civil Code. Apparently the court was determined to declare Article 19 unconstitutional.

There is a certain danger in relying on constitutional considerations to invalidate choice of law principles. The tendency might develop to view a single constitutional choice of law solution as the only constitutional one, and a state of affairs in which future changes are impossible is clearly undesirable. This view has already surfaced. For example, Stöcker, a member of the federal ministry of justice in Germany, has stated that "in child law every reference to a law other than the law of the child's residence is unconstitutional, given the guardianship duty of the parents and of the governmental authorities." This position is overly inflexible. It is often

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Strumpell (divorce valid under laws of both countries); Judgment of May 17, 1974, OLG Düsseldorf, W. Ger., 21 FamRZ 538 (1974) note G. Beitzke (parties shared dual citizenship).

4 Judgment of April 10, 1975, Bayrisches Oberstes Landesgericht, W. Ger., 28 NJW 1602, 1603 (1975) (wife had dual citizenship in country of husband).


4 Proposals to choose the law of the marital residence in marriage cases and the native law of the child in child cases have won many supporters worldwide. See, e.g., Müller-Freienfels, supra note 29, at 607-10, 622-48. Modern Japanese scholars have favored this solution on constitutional grounds, Sawaki, JAP. ANNUAL OF LAW & A. POL. 76 (1960); Taneike, supra note 33, a view of great practical importance in light of the availability of constitutional review of statutes by the Japanese lower courts. E. HILLACH, supra note 15, at 59.

difficult to amend constitutions. In several countries constitutions may not be amended by statute and in others statutory constitutional amendments require supermajorities. More fundamentally, it is doubtful that constitutional provisions require a single choice of law solution instead of simply proscribing certain solutions.

The problem of inflexibility is somewhat reduced by the ability of the highest constitutional court to change its view of the effect of constitutional principles on a particular conflicts rule, especially after a change of judges. In most countries, such courts are not bound by their prior decisions. Nevertheless, these reversals must be kept within narrow and principled bounds, lest respect for the court's decisions be undermined.

II. FOREIGN LAWS THAT CONTRAVENNE THE DOMESTIC CONSTITUTION

Does domestic constitutional law require domestic courts to decline to apply foreign laws that would be unconstitutional if enacted by the domestic legislature? This is a matter of the scope of the particular domestic constitutional provision. In countries that accord the constitution supremacy over other types of law, the scope of constitutional provisions cannot be resolved by the rules of private international law, for then constitutional law would be subordinate to conflicts law. Rather, constitutional law itself must be the source for determining the range of application of constitutional rights.

This function of constitutional adjudication should be distinguished from incorporation of basic constitutional principles in the public order clause. The public order clause contained in conflicts statutes, and its case law analogue in countries where conflicts principles are developed in the courts, prohibit application of an otherwise applicable foreign law when that law is contrary to the forum's public policy. In contrast, a body of constitutionally-based rules delineating the scope of constitutional provisions would come into play one step earlier. If, for example, the forum constitution expressly reaches situations involving foreign elements, there is no

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46 For example, GG art. LXXIX, para. 2, provides that those portions of the German Constitution which can be amended require a two-thirds majority of both federal parliamentary houses. GG art. LXXIX, para. 3, further provides that certain portions of the Constitution, notably those protecting the inviolability of human dignity, cannot be changed.


48 Bernstein, supra note 1, at 2275, strongly favors this solution.
need to interpret and apply the public order clause so as to avoid applying a foreign law that contravenes the constitution of the forum state. In short, the question is neither one of ordinary private international law nor one of interpretation of the reach of what has been called the “cornerstone” of substantive law justice, the public order clause. It is a question of constitutional interpretation.

Answering this question will not be an easy task. Most constitutional articles do not clearly specify their sphere of application. Thus article 3 of the Italian constitution, which declares that the guarantee of equal rights applies only to Italians, is exceptional. Moreover, the historical materials indicative of the framers’ purposes usually shed little light on this question; in most cases the matter of application to international controversies simply was not considered. Furthermore, conceptual distinctions between “general” human rights, national basic rights, and citizenship rights, distinctions designed to help ascertain the kinds of people protected by particular constitutional safeguards, do not appear fruitful in this context. Distinctions between “human” and “basic” rights, turning on how fundamental the constitutional rights are, have also proved unproductive. Analysis wedded to abstract concepts should be eschewed in favor of careful consideration of the interests involved in each case.

An old, impressive illustration of the conceptual approach to this question was provided by the Swiss Federal Court in the last century. Decades before the highly-touted discovery of constitutional conflicts law, the court in 1897 held that to determine whether the permissibility of a contemplated marriage should be governed by foreign or Swiss law was to answer the wrong question. Rather, the court ruled that the right to marry guaranteed in the Swiss Constitution applied to the particular prospective spouses. The court reasoned that “the right to marry is viewed as a right which is based on human nature, an emanation of a free person” and a right to which all persons subject to Swiss sovereignty (in particular, Swiss residents) are entitled, regardless of citizenship.

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49 G. KEGEL, supra note 25, at 63.
50 COST. art. III.
51 See, e.g., H. VON MANGOLDT & F. KLEIN, I Das Bonner Grundgesetz 97-100 (2d ed. 1957) for an explanation of such distinctions.
52 Contra, Ferid, supra note 24, at 135. Ferid does not examine conflict rules for consistency with “basic rights." "Basic rights" (Bürgerrechte) extend only to German citizens. He would apply concerns inherent in general human rights (allgemeine Menschenrechte) to conflict rules, since ignoring these rights would damage the principle of equality.
53 BUNDESVERFASSUNG art. LIV (Switz.).
54 Judgment of December 16, 1897, BG, Switz., 23 Pt.2 Entscheidungen des schweizer-
Courts should not mistake the primacy of their constitutions and the absence of explicit restrictions on the purview of constitutional provisions as mandates for unlimited application of their constitutions to multinational controversies. There are strong reasons for proceeding cautiously. Employment of the forum state's constitution, like the more traditional use of the public order clause, generally results in application of the lex fori. The leading case in the German Federal Constitutional Court, the so-called Spaniard decision, indicates that the consequence of applying domestic constitutional law to conflicts problems will generally be application of the substantive law of the forum. This trend toward application of the law of the forum, coupled with the widespread and increasing acceptance of long-arm statutes for assuming jurisdiction, promotes forum shopping by the plaintiff. Private international law and its aim of an international justice will be abandoned if this development proceeds unchecked.

The impact of the ascendancy of constitutional law in the conflicts area on individual liberty is somewhat difficult to predict. In the United States, the importation of constitutional considerations into family law by the Supreme Court, for example, has enhanced individual liberty. In France, by contrast, civil liberties are more effectively protected through the Code Civil than through the vague
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pronouncements of the constitutional Declaration of Human Rights. Indeed, the French praise their Code as "une vraie constitution." 59

CONCLUSION

The experiences of different countries do not suggest that constitutional considerations should be neglected in choice of law decisions. On the contrary, they prove it salutary that constitutional law considerations are used to influence conflicts law decisions. In European private international law, the process of achieving appropriate solutions to concrete cases has for too long ignored constitutional law. By contrast, constitutional law has long been viewed in the United States as setting the boundaries for permissible choice of law decisions. Considerable room for radically different but equally constitutional conflicts decisions characterizes the American system.

Thus, constitutional arguments do not exclude the principled weighing of policy interests that is conflicts law. But there is a danger that legitimate private international law considerations may become seriously submerged. And the need for the certainty afforded by identifiable, workable conflicts rules is not diminished by a constitutional orientation. Coexistence in a flexible rule-governed process of decision is needed, a process that considers both private "international" law and "national" constitutional law from the standpoint of doing justice between the litigating individuals and in the light of considerations of social policy. It is an old experience of the comparative lawyer that the problems that arise in comparing different private law concepts of various countries, such as property, contract, or succession, are usually more complicated than the questions arising from comparing constitutional postulates such as equality of the sexes or equality of legitimate and illegitimate children.

Many basic constitutional ideas, promoted by the human rights discussions, are gaining adherents in the international community. Consequently, the international acceptability and the fairness to the parties of applying constitutional principles to international conflicts questions are increased. Private international law is too narrow unless constitutional ideas are considered.

59 Cf. G. Boehmer, Einführung in das bürgerliche Recht 73 (1954) (German law is phrased at such a level of abstraction that it is too distant from the image of life, while in France specific, simple law has content even in the absence of judicial interpretation).