

THE FEDERAL CONSTITUTION AND THE CHOICE OF LAW*

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I. INTRODUCTION

A New York resident enters into a contract with a New York corporation in New York, all negotiations connected with the contract having been carried on in that state. Subsequently, the individual contracting party becomes domiciled in Georgia and sues on the contract there. The corporation appears and defends upon the ground that certain misrepresentations of fact were made by the plaintiff in the course of negotiations, proving that a New York statute explicitly makes such misrepresentations a valid defense as a matter of law. The plaintiff, admitting the misrepresentations, points to an unbroken line of decisions in Georgia holding that the question whether misrepresentations of the type involved are material, and thus a defense, is one for the jury.

As a problem in the conflict of laws, these facts present relatively little difficulty. Even though they embrace the possibility of divergent results, the categories of rules into which a court's discussion would fall are familiar. Much less familiar is the idea that a constitutional law problem is involved. Yet it is clear that on the facts stated, the Georgia court is compelled by the Constitution of the United States to apply the New York statute.¹ The importance of this fact to the defendant corporation and to

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1. The facts of the hypothetical case stated, while condensed and generalized, are believed to vary in no substantial particular from those in *John Hancock Mut. Life Ins. Co. v. Yates* (1936) 299 U. S. 178, noted in (1937) 6 *Brooklyn L. Rev.* 463; (1937) 37 *Col. L. Rev.* 485; (1937) 22 *Corn. L. Q.* 384; (1937) 50 *Harv. L. Rev.* 520; (1937) 22 *WASHINGTON U. LAW QUARTERLY* 430; and see cases discussed *infra*, section II dealing with the effect of the full faith and credit clause upon such situations. For criticism of the suggestion that the authority of these cases is limited to insurance and a few similar problems, see *infra*, note 88.

practitioners and litigants generally is obvious: they need not accept as final this type of adjudication by a court which may have allowed some bias in favor of the local litigant to guide its footsteps amiss in choosing the governing law. To the conflicts student, it means that one at least among the many difficult choice of law problems has been authoritatively settled.

How far do these important assurances to practitioners and students extend? Would the constitutional compulsion on the Georgia court exist if Georgia had also had a statute on the point squarely contrary to that of New York?² Or if it had had such a statute and New York's rule had been judge made? Or if neither state had had a statute on the point? It seems apparent that if the answer to each of these questions is an unqualified affirmative there already exists the situation foreseen as a possibility by the Conflict of Laws Restatement:³

If it is or should become a violation of the Constitution of the United States whenever a court, in choosing from the law of two or more states * * *, selects the law of the wrong State, every question arising in the Conflict of Laws is or would thus become a question of Constitutional Law which the Supreme Court of the United States would have the power finally to determine.

And no litigant need ever accept as final any state adjudication which runs counter to his contentions as to the proper choice of law until the Supreme Court of the United States has passed upon the point or declined review.

The existence of such a situation would surely come as news of the most sensational character to the great mass of lawyers and scholars alike. It will be the purpose of this essay to examine the authorities which bear on the extent to which it does exist.

To what extent may the Constitution of the United States serve as final referent for the problem: "Which state law shall govern cases in which the facts in controversy concern more than

2. Whether the Georgia law involved in *John Hancock Mut. Life Ins. Co. v. Yates* (1936) 299 U. S. 178, cited supra note 1, was statutory or judge made does not clearly appear from either the Supreme Court opinion or those of the lower courts. (1935) 50 Ga. App. 713, 179 S. E. 239; (1936) 182 Ga. 213, 185 S. E. 268. Nor can this question be answered certainly without an extensive investigation of the effect of general code provisions. The writers have concluded that the law of Georgia involved was "common law" insofar as concerns the present discussion, and will so treat it throughout this article.

3. Restatement, *Conflict of Laws* (1934) sec. 43, comment, pp. 73-74.

one state?" This question has already evoked analyses primarily as a question concerning the conflict of laws;⁴ and in those analyses will be found able and extensive delineation of the general aspect of its problems which will not be repeated here. A simple statement will serve to distinguish the viewpoint adopted in the present discussion. Constitutional law arises solely from express dictates of a written document.⁵ It follows that any such question as, "Has the Conflict of Laws become a branch of Constitutional Law?" poses a false problem if taken literally.⁶ In the case stated at the opening of this discussion, the Supreme Court could not say, "We find that the conflict of laws rule makes New York's statute the properly governing law, and therefore Georgia's failure to apply it violates the full faith and credit clause."⁷ The Constitution must furnish the tests for ascertaining the properly applicable law as well as the requirement that

4. See Dodd, *The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws* (1926) 39 Harv. L. Rev. 533; Ross, *Has the Conflict of Laws Become a Branch of Constitutional Law?* (1931) 15 Minn. L. Rev. 161, and "Full Faith and Credit" in a Federal System (1936) 20 Minn. L. Rev. 140; Langmaid, *The Full Faith and Credit Required for Public Acts* (1929) 24 Ill. L. Rev. 383. But see Smith, *The Constitution and the Conflict of Laws* (1939) 27 Geo. L. J. 536, where a strictly constitutional approach is taken.

5. But cf. *Pennoyer v. Neff* (1877) 95 U. S. 714; and *D'Arcy v. Ketchum* (U. S. 1850) 11 How. 165, and the widely discussed doctrines of inherent and implied powers not relevant here.

The absence of a federal common law has recently received strong affirmation in the case of *Erie R. R. v. Tompkins* (1938) 304 U. S. 64; see Comments (1939) 52 Harv. L. Rev. 1002; (1938) 1 La. L. Rev. 161.

6. It is not suggested that previous writers on this topic have failed to understand this truism. Dodd, *supra* note 4, plainly recognizes it; Ross, *supra* note 4, 20 Minn. L. Rev. at 173, says, "* * * only its [the state's] obligations under the United States Constitution can constrain it to apply the law of [another state] to the case, and its constitutional obligations cannot be worked out by adopting any rules of international law as the rules of constitutional law, nor by Euclidean reasoning from a postulated 'territoriality' of the 'sovereignty' of state X or state Y."

7. It should be noted here that, as will appear below, slightly different facts would have made the due process clause of the Fourteenth Amendment the relevant constitutional provision; and it is not beyond argument that other constitutional clauses may in other cases have relevance not investigated here *in extenso*. For example—the interstate commerce clause, see *Western Union Tel. Co. v. Brown* (1914) 234 U. S. 542; the privileges and immunities clause of the Fourteenth Amendment, but see *Chambers v. Baltimore & Ohio R. R.* (1907) 207 U. S. 142; but cf. Schofield, *The Claim of a Federal Right to Enforce in One State the Death Statute of Another* (1908) 3 Ill. L. Rev. 65; Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law* (1929) 29 Col. L. Rev. 1; Note (1931) 74 A. L. R. 710, 719; and those provisions giving specific powers to the federal government such as the power to govern federally owned territory, see *Western Union Tel. Co. v. Brown*, *supra*.

it be applied when ascertained. Thus the question may correctly be put: to what extent do the constitutional rules governing choice of law supersede or overlap the conflict of laws rules on the same subject, and what are they?

Once the foregoing distinction is established it must be admitted that from one point of view, at least, it may seem wholly lacking in substance. For many years after the adoption of the Constitution and before the present effect of the full faith and credit clause and the due process clause on choice of law situations had been suspected,⁸ the state courts had been deciding cases in which it was necessary to determine whether the law of some state other than the forum should govern. And it is no more than natural that when the Constitution began to be applied in the solution of some of the same problems, analyses and criticisms of the scope of the new constitutional determinations should raise inquiries about the extent to which constitutional law had "taken over" or "adopted" the pre-existing conflicts rules.

As a figure of speech, inquiries so worded seem unexceptionable. In effect, however, they may tend to obscure very real differences in scope between the new and the old rules governing choice of law. Judicial statesmanship may well see in the requirements of a federal system reasons for self-limitation in the face of opportunities to exercise an almost unlimited power to unify and rigidify the rules governing interstate recognition of state law. Moreover, some matters relating to the proper choice of law in the field known as conflict of laws may lie wholly outside of the scope of the applicable constitutional powers. It will be the purpose of this essay to indicate both the situations in which power seems to be lacking altogether and those in which prudent self-limitation by the federal courts may leave important sectors of common law rules of conflict of laws full or partial autonomy.

The general contours of the constitutional inroads on the choice of law field are capable of being sketched with some confidence. The Supreme Court's power under the full faith and credit clause as complemented by Act of Congress may be exercised to force upon the forum recognition of the judgment of a sister state;⁹

8. Smith, *supra* note 4, at 541-543, suggests some of the factors which militated against early recognition of the power these two clauses were later to disclose.

9. *Fauntleroy v. Lum* (1908) 210 U. S. 230.

by the force of the clause itself, recognition of a cause of action¹⁰ or defense¹¹ founded upon a sister state's statute may be compelled. Conversely, the Court may forbid, under the due process clause, the application of a state's statute in defiance of extra-state law.¹² And, in consequence, where two states have statutes both purporting to cover the facts at issue, these powers of the Supreme Court may overlap.¹³ That these powers may be evoked from the Constitution in a proper case is probably beyond question. No case has squarely held yet, however, that where the decision of one state based solely on its common law ignores the common law rule of a sister state any power exists in the due process clause to forbid the application of the local rule, or in the full faith and credit clause to compel recognition of the foreign rule. So much can be stated simply. The classification of the cases in which these powers will be exercised—the "proper" cases for their application—and the indication of points at which these powers may be extended are quite a different matter. The two sections immediately following will attempt an analysis of the decisions which seem to throw light on the extent to which the full faith and credit clause and the due process clause respectively afford the possibility of review by the United States Supreme Court of choice of law determinations.

II. CHOICE OF LAW QUESTIONS SUBJECT TO THE FULL FAITH AND CREDIT CLAUSE

The history of the full faith and credit clause in its application to choice of law situations is tortuous and confused.¹⁴ Much that might be thought fundamental to any discussion or application of it remains obscure. Thus, the constitutional provision

10. *Bradford Elec. Light Co. v. Clapper* (1932) 286 U. S. 145.

11. *John Hancock Mut. Life Ins. Co. v. Yates* (1936) 299 U. S. 178.

12. *Home Ins. Co. v. Dick* (1930) 281 U. S. 397, 74 A. L. R. 701; *New York Life Ins. Co. v. Dodge* (1918) 246 U. S. 357.

13. *E. g.*, *Alaska Packers Ass'n v. Industrial Accident Comm.* (1935) 294 U. S. 532; *Pacific Employers Ins. Co. v. Industrial Accident Comm.* (1939) 306 U. S. 493.

14. The origin of the phraseology and the purposes of the adoption of this clause are discussed at length in Ross, *supra* note 4, 20 *Minn. L. Rev.* at 140-149; Costigan, *The History of the Adoption of Section I of Article IV of the United States Constitution and a Consideration of the Effect on Judgments of that Section and of Federal Legislation* (1904) 4 *Col. L. Rev.* 470, 470-476; Cook, *The Powers of Congress Under the Full Faith and Credit Clause* (1919) 28 *Yale L. J.* 421, 421-426; Smith, *supra* note 4, at 536-543.

expressly delegates the power of deciding some questions as to its applicability and effect to Congress.¹⁵ Yet the question what scope is left to Congress by the Supreme Court's application of the clause itself is almost totally untouched.¹⁶ Some other matters, on the contrary, are substantially clear in outline: for example, there can be little doubt that the clause leaves the courts of American states free to disregard the judgments or laws of foreign nations.¹⁷ Penal or revenue laws, and even judgments based on penal laws are not, at least currently, forced upon sister states by constitutional dictate.¹⁸ So, too, a controversy touching *real* interests within the forum may be governed by its law without constitutional objection although otherwise properly controlled by the law of another state in whole or in part.¹⁹ And finally the entire question of the faith and credit

15. U. S. Const. Art. IV, sec. 1: "Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." (Italics supplied.)

16. See Mr. Justice Stone, dissenting in *Yarborough v. Yarborough* (1933) 290 U. S. 202, 215 n. 2: "The mandatory force of the full faith and credit clause as defined by this Court may be, in some degree not yet fully defined, expanded or contracted by Congress. Much of the confusion and procedural deficiencies which the constitutional provision alone has not avoided may be remedied by legislation. Cook, Powers of Congress Under the Full Faith and Credit Clause, 28 Yale Law Journal, 421; Corwin, The "Full Faith and Credit" Clause, 81 University of Pennsylvania Law Rev. 371; cf. 33 Columbia Law Rev. 854, 866. The constitutional provision giving Congress power to prescribe the effect to be given to acts, records and proceedings would have been quite unnecessary had it not been intended that Congress should have a latitude broader than that given the courts by the full faith and credit clause alone. * * *"

And compare the suggestion by Ross, *supra* note 4, 20 Minn. L. Rev. at 183, that the Supreme Court may have closed off the area in which Congress might legislate: "The fact that both the 'full faith and credit' section and the fourteenth amendment expressly authorize Congress to legislate for their implementing and completion will perhaps save the judicially developed rules from being deemed entirely sacrosanct; yet it is standards of 'reasonableness' that the court is endeavoring to erect,—than which there is no other word so all controlling and overpowering (nor more undefineable and 'political') in all our constitutional law."

17. *Aetna Life Ins. Co. v. Tremblay* (1912) 233 U. S. 185; and see *Home Ins. Co. v. Dick* (1930) 281 U. S. 397, 74 A. L. R. 701. Compare, however, cases involving the effect of treaty provisions according recognition to judgments and causes of action of foreign nations: *Santovincenzo v. Egan* (1931) 284 U. S. 30; *Missouri v. Holland* (1920) 252 U. S. 416.

18. See Langmaid, *supra* note 4, at 415 *et. seq.*; and dissenting opinion of Mr. Justice Stone in *Yarborough v. Yarborough* (1933) 290 U. S. 202. As to judgments based on fiscal laws, see *Milwaukee County v. M. E. White Co.* (1935) 296 U. S. 268.

19. *Olmsted v. Olmsted* (1910) 216 U. S. 386; *Hood v. McGehee* (1915) 237 U. S. 611, where a status acquired abroad was recognized *as such*, but

to be given the judgment of a sister state has been expressly taken over by congressional enactment under the enabling section of the constitutional clause, and thus is not relevant here.²⁰

Leaving aside, however, both those problems upon which practically no light has been shed, and those which are understandable in general outline, there remains a large field of uncertainty into which the present discussion falls. What constitutes full faith and credit? May its effects differ with the subjects to which it must be applied?²¹ What are those subjects? Mere reading of the clause itself is of scant assistance save in the last question.²² And even there, until recently, the phrase "public

the law of the forum was applied to deny the right to inherit tangibles there located. But cf. *Loughran v. Loughran* (1934) 292 U. S. 216, where a woman was held entitled to dower at the forum although her marriage could only be valid there because valid where consummated.

See also Mr. Justice Stone, dissenting in *Yarborough v. Yarborough* (1933) 290 U. S. 202, 213. See Comment, *Legitimation of the Issue of Invalid Marriages in the Conflict of Laws* (1937) 46 *Yale L. J.* 1049. And contrast the effect of the treaty-making power to effect local rules as to real interests: *Hauenstein v. Lynham* (1879) 100 U. S. 483.

See also *Clark v. Williard* (1934) 292 U. S. 112, (1935) 294 U. S. 211, holding, in two steps, that Montana was required to recognize the title to Montana property of an Iowa "statutory" receiver of an insolvent Iowa corporation, but that Montana law as to the priority of creditors prevailed in the distribution of such property. Thus it is obvious that in putting the real interests question among those as to which there is substantial certainty under the full faith and credit clause, the writers do not deny that there are many difficulties of application and analysis. The suggestion is simply that the main outline of the rule is understandable.

20. Here again it is not meant to suggest that all problems have been solved. From the time when *D'Arcy v. Ketchum* (U. S. 1850) 11 *How.* 165 first construed the congressional act to mean far less than its words plainly state, the field has contained its full share of doubts. See *Alaska Packers Ass'n v. Industrial Accident Comm.* (1935) 294 U. S. 532, 547; *Wald, Judgments of Sister States* (1878) 7 *Cent. L. J.* 3; *Merriman, Judgments of the Courts of Sister States—"Full Faith and Credit"* (1881) 12 *Cent. L. J.* 482; *Gall, Full Faith and Credit Clause* (1922) 95 *Cent. L. J.* 225; *Corwin, The "Full Faith and Credit" Clause* (1933) 81 *U. of Pa. L. Rev.* 371. And note difficulties where judgments for other than money are involved, *Lorenzen, Application of Full Faith and Credit Clause to Equitable Decrees for the Conveyance of Foreign Land* (1925) 34 *Yale L. J.* 591. See also, on decrees for payment of alimony or support, *Yarborough v. Yarborough* (1933) 290 U. S. 202; compare, on the distinction from *res judicata*, *Stoll v. Gottlieb* (1938) 305 U. S. 165.

21. It seems apparent that they may and do differ, at least as between those flowing from the recognition of "public acts" as to which Congress has not spoken under the enabling clause and those found in cases where a "judicial proceeding" is recognized in conformance with the congressional act. See Mr. Justice Stone, dissenting in *Yarborough v. Yarborough* (1933) 290 U. S. 202, 215 n. 2; and see *Milwaukee County v. M. E. White Co.* (1935) 296 U. S. 268.

22. U. S. Const. Art. IV, sec. 1 includes "public acts, records and judicial proceedings."

acts" had not been satisfactorily interpreted, while at present the term "records" may conceivably afford a basis for far-reaching changes.²³ It is at least clear, however, that the clause has not yet been held to require that the forum apply the common law rules of a sister state,²⁴ no matter how proper it may appear that they should govern the controversy, nor, it is submitted, should it. Since, by its very nature, the full faith and credit clause looks to the law of the sister state, any requirement under the clause that the forum apply that law would of necessity involve the Supreme Court in the determination of what the sister state's common law is—an activity the complexities of which need no emphasizing. They seem obviously beyond the scope of anything the Supreme Court could, or ought to be required to do.²⁵

23. See Comment (1918) 13 Ill. L. Rev. 43, for the suggestion that a state's common law is to be found in published reports—"records" which are entitled to full faith and credit just as are "public acts" and "judicial proceedings." As to "public acts," they have been held to include not only statutes, resolutions of state legislatures, and state constitutions, see Field, *Judicial Notice of Public Acts Under the Full Faith and Credit Clause* (1928) 12 Minn. L. Rev. 439, but *in effect* state administrative acts as well, although not always clearly distinguished from "judicial proceedings" and statutes, see *Converse v. Hamilton* (1912) 224 U. S. 243; *Broderick v. Rosner* (1935) 294 U. S. 629.

24. It can be argued that the possibility of such holdings is not entirely foreclosed: (1) Because, in many states the common law is in force only by virtue of a "public act." (2) Because a state's common law is to be found in reports which constitute "records" and must be given full faith and credit, see Comment (1918) 13 Ill. L. Rev. 43, 56. (3) Because "judicial proceedings" has been so loosely used in some cases as to indicate, at least, that decisions construing statutes in litigation between other parties must be given full faith and credit *as such* and not as a method of giving faith and credit to the statute construed. See *Supreme Council of the Royal Arcanum v. Green* (1915) 237 U. S. 531; *Green v. Van Buskirk* (U. S. 1866) 5 Wall 307. This looseness might be argued to indicate that the same use of "judicial proceedings" would be justified when no statute was involved. This last argument seems clearly foreclosed, however, by the manner in which the Supreme Court turned from this looseness of phraseology after *Modern Woodmen of America v. Mixer* (1925) 267 U. S. 544. *E. g.*, *John Hancock Mut. Life Ins. Co. v. Yates* (1936) 299 U. S. 178; *Sovereign Camp of the Woodmen of the World v. Bolin* (1938) 305 U. S. 66. Another suggestion has been made in the discussion of a closely analogous point: Congress could legislate under the enabling clause of the full faith and credit provision requiring interstate recognition of common law rules in a proper case. See Cook, *supra* note 14, at 426 *et. seq.* There seems no answer to this but the argument that if the court does not think "judicial proceedings" or "records" mean "common law of the state," Congress's power to give effect to them could not alter their nature to such an extent.

25. Compare the requirements under *Modern Woodmen of America v. Mixer* (1925) 267 U. S. 544, and *Ohio v. Chattanooga Boiler & Tank Co.* (1933) 289 U. S. 439, that the Supreme Court discover the construction put

Far more difficult, however, is the question: What is full faith and credit? An initial uncertainty may be stated as follows: assuming that giving the required full faith and credit to a foreign judgment or statutory cause of action means the application of the foreign rule in a proper case once jurisdiction is taken, does the requirement of full faith and credit mean that the forum must take jurisdiction of the controversy arising on the foreign matter? That is, must the forum *entertain* the foreign cause of action as distinguished from determining its outcome by foreign law if the action is entertained?²⁶ This ques-

upon the sister state's statute by its own courts—a far easier task, but not infrequently fraught with difficulty, as any collection of cases dealing with the federal jurisdiction questions arising under section 25 of the Judiciary Act of 1789 and subsequent changes therein will attest. See *e. g.* Rubin and Willner, *Obligatory Jurisdiction of the Supreme Court: Appeals from State Courts under Section 237 (a) of the Judicial Code (1939)* 37 Mich. L. Rev. 540.

It will be suggested below that the same difficulties do not attend the application of the due process clause to prevent common law decisions of the forum from governing cases by the local rule when no justifiable interest of the forum state in the premises can be shown as a reason for refusing to apply a sister state rule claimed to govern. There, the application, once ascertained, of the local rule is wrong regardless of the nature or effect of the foreign rule. To the effect that there is a distinction, see Mr. Justice Stone, dissenting in *Yarborough v. Yarborough* (1933) 290 U. S. 202.

The problem of discovering the content of the sister state law in a conflicts situation is to be distinguished from that of applying the law of a state under the doctrine of *Erie R. R. v. Tompkins* (1938) 304 U. S. 64, in a diversity of citizenship situation where the law of only one state is to be considered and where that law has already been passed upon by a lower federal court in the place of the origin of the law.

26. Historically, this distinction was not obvious in the cases as they arose. The earlier cases applying the full faith and credit clause dealt with judgments. While it is true that the judgments merely formed the basis for an action of debt in most cases—that is, were merely causes of action in themselves, see Ross, *supra* note 4, 20 Minn. L. Rev. at 146-148—, the cause of action so constituted was such a simple one that, once entertained, little was left to the court of the forum in the way of choice of results. Further, the judgment of another state involves the question of the dominion of one state only over the subject matter, while choice of law may involve the interests of many. *D'Arcy v. Ketchum* (U. S. 1850) 11 How. 165, by incorporating into the words "judicial proceedings" the requirements of jurisdiction as defined by common law conflicts rules, removed what might otherwise have raised the distinction more clearly—*i. e.*, the reasonableness of the foreign court in taking jurisdiction of the case and giving judgment. Compare the nature of the determination of what may be called legislative jurisdiction in *Alaska Packers Ass'n v. Industrial Accident Comm.* (1935) 294 U. S. 532.

Later cases have made frequent reference to the distinction: *Home Ins. Co. v. Dick* (1930) 281 U. S. 397, 74 A. L. R. 701; *Modern Woodmen of America v. Mixer* (1925) 267 U. S. 544; *Broderick v. Rosner* (1935) 294 U. S. 629; but cf. *Chambers v. Baltimore & Ohio R. R.* (1907) 207 U. S. 142, and criticism thereof by Schofield, *supra* note 7.

The privileges and immunities clause of the Fourteenth Amendment has

tion will not be examined here.²⁷ The immediate discussion relates to the true choice of law. That is, once the forum undertakes to adjudicate a cause having foreign aspects, to what extent does the full faith and credit clause control its selection of the law by which the controversy is to be decided?

The Constitution itself is of little assistance. Full faith and credit is far from self-explanatory in this respect. For instance, in the *Alaska Packers* case²⁸ it is recognized that if the requirement as to public acts is given its broadest possible meaning, wherever states *A* and *B* both have statutes which are asserted to govern and both of which purport to govern, state *A* will be constitutionally required to apply the statute of *B* and state *B* will be constitutionally required to apply the statute of *A* in litigation brought before the courts of *A* and *B* respectively on the same set of facts. This absurdity did not manifest itself in litigation before the Supreme Court, however, until a number of cases had already brought to light narrower modes of interpretation by which it might be avoided. The history of this discovery is interesting.

In the earlier cases where there was argument over whether the forum was bound to apply the rule of a sister state, it was thought that the question was not raised, since the forum had merely misconstrued the sister state's statute.²⁹ *Dicta*, however,

also been invoked to force entertainment of a foreign cause of action, and rejected. *Chambers v. Baltimore & Ohio R. R.*, *supra*, and *Schofield*, *supra* note 7. See also Note (1924) 32 A. L. R. 6, 12; Note (1931) 74 A. L. R. 710, 719.

Compare also the situation where the state in which the cause of action arose attempts by statute to confine jurisdiction thereof to its own courts. A sister state need not be governed by such a statute. *Tennessee Coal, Iron & R. R. v. George* (1914) 233 U. S. 354.

For general criticism of the doctrine that a state should be forced to entertain sister state actions see Ross, *supra* note 4, 20 Minn. L. Rev. at 169, commenting on *Broderick v. Rosner*, *supra*. It may be suggested that the doctrine should apply only where, as in the *Broderick* case, the state's refusal results in clear discrimination in favor of its citizens, affording them sanctuary from obligations arising abroad which would be enforced had they arisen at home.

27. It is not suggested that its problems are not in need of clarification. For suggestion as to the possibility of clarification by congressional enactment, see Cook, *supra* note 14, at 426 *et seq.* Cf. Note, *The Enabling Clause of the Fourteenth Amendment: A Reservoir of Congressional Power?* (1933) 33 Col. L. Rev. 854, 864-868.

28. *Alaska Packers Ass'n v. Industrial Accident Comm.* (1935) 294 U. S. 532; cf. *Pacific Employers Ins. Co. v. Industrial Accident Comm.* (1939) 306 U. S. 493.

29. See Dodd, *supra* note 4, at 550. See also, *Glenn v. Garth* (1893) 147 U. S. 360; *Lloyd v. Matthews* (1894) 155 U. S. 222; *Banholzer v. New York*

early indicated that, had there been a forthright refusal to apply the statute, the constitutional provision would have governed.³⁰ One early case seems to hold flatly that the constitutional mandate did force recognition of the sister state's statute, but it has been overlooked to such an extent, and its language is so confused, that it does not detract from the general statement.³¹ Two later cases, however, forced the Supreme Court to take a further step. In *Supreme Council of the Royal Arcanum v. Green*³² and in *Modern Woodmen of America v. Mixer*,³³ cases substantially on all fours, the situation was presented where the forum had construed the statute of a sister state in a way which differed from constructions already given it by the courts of the sister state in litigation involving different parties.³⁴ In neither instance did the Court permit such disregard. But in the earlier case³⁵ it seemed to feel that, in compelling the forum to apply the law of the sister state, it was merely requiring recognition of its "judicial proceedings." In the later case³⁶ the broad and confusing questions³⁷ thus raised were apparently obviated by the recognition that the decision required the forum, as a matter

Life Ins. Co. (1900) 178 U. S. 402; *Johnson v. New York Life Ins. Co.* (1903) 187 U. S. 491; *Finney v. Guy* (1903) 189 U. S. 335; *Allen v. Allegheny Co.* (1905) 196 U. S. 458; *Smithsonian Institution v. St. John* (1909) 214 U. S. 19; *Western Life Indemnity Co. v. Rupp* (1914) 235 U. S. 261.

30. See *Chicago & Alton R. R. v. Wiggin Ferry Co.* (1887) 119 U. S. 615; *Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.* (1917) 243 U. S. 93. As to the attitude of the state courts, on the other hand, see *Notes* (1931) 74 A. L. R. 710, 711; (1936) 100 A. L. R. 1143, indicating that those tribunals felt no constitutional compulsion.

31. *Green v. Van Buskirk* (U. S. 1866) 5 Wall. 307; (U. S. 1869) 7 Wall. 139, where it was held that New York, in an action for conversion based on acts in Illinois done to property there located, could not ignore the Illinois law on the subject. The Court referred to Illinois "judicial proceedings" although plainly the statute was the relevant matter.

32. (1915) 237 U. S. 531.

33. (1925) 267 U. S. 544.

34. The forum tried to give to members of a fraternal society rights which had been denied by the courts of the state of the association's domicile to other members of the same society.

35. *Supreme Council of the Royal Arcanum v. Green* (1915) 237 U. S. 531.

36. *Modern Woodmen of America v. Mixer* (1925) 267 U. S. 544.

37. Prior to the *Royal Arcanum* case, "judicial proceedings" had been applied to mean simply causes of action reduced to judgment between the same parties. Had the term been broadened, as was done here, to include what was clearly *res inter alios acta*, the entering wedge might have been furnished for making the whole common law of the sister state obligatory upon the forum.

of full faith and credit, to make the proper choice of law by applying the foreign statute (public act) *as construed*.³⁸ If the language was not yet unequivocal, however, it has subsequently become well settled that, where a sister state's statute is involved and properly controls, it must be applied by the forum as a public act.³⁹

Once it is clear that a public act which properly controls is given sanction by the Constitution, the essential problem of choice of law appears: When does the statute of a state *properly* control in a given case? As has already been pointed out, for purposes of applying constitutional sanctions the criteria of propriety must be found in the Constitution. And, again, the full faith and credit clause speaks with Delphic obscurity. The cases decided under it, however, have read into its silence some fairly definite criteria, the ascertainment of which requires rather discursive analysis.

In a case antedating the *Royal Arcanum* decision by two years, *New York Life Insurance Co. v. Head*,⁴⁰ Mr. Chief Justice White stated:

* * * it would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State and in the State of New York and there destroy freedom of contract without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends. * * * The principle * * * lies at the foundation of the full faith and credit clause and the many rulings which have given effect to that clause.⁴¹

In this statement, the Chief Justice was apparently viewing the problem as one concerning the right of Missouri to apply its own statute, not its obligation to apply that of a sister state. This, manifestly, is a due process consideration, since the full

38. The finality of the construction placed upon a statute by the state of its origin is well illustrated in *Ohio v. Chattanooga Boiler & Tank Co.* (1933) 289 U. S. 439.

39. Notably in *Bradford Elec. Co. v. Clapper* (1932) 286 U. S. 145, explained in *Alaska Packers Ass'n v. Industrial Accident Comm.* (1935) 294 U. S. 532, and *Pacific Employers Ins. Co. v. Industrial Accident Comm.* (1939) 306 U. S. 493; *John Hancock Mut. Life Ins. Co. v. Yates* (1936) 299 U. S. 178.

40. (1914) 234 U. S. 149.

41. 234 U. S. at 161.

faith and credit clause refers only to the foreign statute and the necessity of applying it. And it is interesting to note that Mr. Justice McReynolds subsequently referred to the *Head* case as being decided under the due process clause.⁴² Again, in *Aetna Life Insurance Co. v. Dunken*,⁴³ evident confusion is shown as to which of the two clauses was the basis for that decision. And finally, after many of the problems involved had become greatly clarified, Mr. Justice Brandeis, in *John Hancock Mutual Life Insurance Co. v. Yates*,⁴⁴ cited a strictly due process case⁴⁵ in partial support of a statement of the grounds on which the forum was held to have violated the full faith and credit clause by refusing to apply a sister state statute to facts properly governed by it, and substituting its own common law rule. It was there stated:

In respect to the accrual of the right asserted under the contract, or liability denied, there was no occurrence, nothing done, to which the law of [the forum] could apply.

Compare *Home Insurance Co. v. Dick* * * *⁴⁶

Here, obviously, the relation of the *forum* to the case alone is touched. The final holding of the case is rested squarely upon the requirement of the full faith and credit clause that the statute of the *sister state* be recognized, and the ground for holding that statute properly controlling is primarily that the contract in question was made in the sister state, subject to the statute purporting to attach a rule of substantive law thereto.

This constant inter-relation or confusion of the effect of the two clauses is revealing in the search for the requirements of the full faith and credit clause in that it strongly suggests a similarity in the factors which underlie it and the due process clause. That is, it seems apparent that those factors which, by their presence in the case of a foreign statute, impel its application under the full faith and credit clause are similar to those which, by their absence in the case of a statute of the forum, prohibit its application as a matter of due process.⁴⁷

42. *New York Life Ins. Co. v. Dodge* (1918) 246 U. S. 357.

43. (1924) 266 U. S. 389. It is not thought necessary to repeat or re-examine here Dodd's analysis of this confusion. Dodd, *supra* note 4, at 552, 553.

44. (1936) 299 U. S. 178.

45. *Home Ins. Co. v. Dick* (1930) 281 U. S. 397, 74 A. L. R. 701.

46. (1936) 299 U. S. 178, 182.

47. See *Bradford Elec. Co. v. Clapper* (1932) 286 U. S. 145, and the comment thereon in *Alaska Packers Ass'n v. Industrial Accident Comm.*

These requirements are, simply, the "governmental interest" test which is not unlike the "reasonableness" test used in cases delineating due process in its relation to the police power of the states.⁴⁸ Thus it may be said that the forum must apply a foreign statute when the state of the statute's origin is found to have had a sufficient governmental interest in the facts sought to be controlled thereby, that is, when it seems reasonable to let the statute control owing to the interest of the state of its origin in some aspect of the subject matter affected. The existence of such interests is sometimes indicated by saying that the state has "legislative jurisdiction."

Clearly, however, such a test as this will not solve all the problems raised by the attempt to ascertain when the full faith and credit clause impels the application of a foreign statute. It seems obvious that two states may have statutes purporting to govern the same facts and that both states may have claims to governmental interest in them which could not be rejected as unreasonable. A striking recent example of this situation appears in *Pacific Employers Insurance Co. v. Industrial Accident Commission*,⁴⁹ where a California and a Massachusetts Workmen's Compensation Act each purported in terms to govern an injury which had occurred to the employee of a Massachusetts firm in California. Mr. Justice Stone, speaking for the Court, said:

We may assume that these provisions are controlling upon the parties in Massachusetts, and that since they are applicable to a Massachusetts contract of employment between a Massachusetts employer and employee, they do not infringe due process. * * * Similarly the constitutionality of the provisions of the California statute awarding compensation for injuries to an employee occurring within its borders * * * is not open to question.⁵⁰

Evidently, further light is needed on the precise factors necessary to bring into play the full faith and credit clause. Here Massachusetts had a sufficient governmental interest to justify the passage of its statute, yet California was not compelled to apply it. And, under the circumstances, it would be absurd if it

(1935) 294 U. S. 532, and *Pacific Employers Ins. Co. v. Industrial Accident Comm.* (1939) 306 U. S. 493.

48. See Ross, *supra* note 4, 20 *Minn. L. Rev.* 182-3. Cf. *Alaska Packers Ass'n v. Industrial Accident Comm.* (1935) 294 U. S. 532.

49. (1939) 306 U. S. 493.

50. *Id.* at 500.

were. Of the full faith and credit clause in this connection, Mr. Justice Stone says:

While the purpose of that provision was to preserve rights acquired or confirmed under the public acts and judicial proceedings of one state by requiring recognition of their validity in other states, the very nature of the federal union of states, to which are reserved some of the attributes of sovereignty, precludes resort to the full faith and credit clause as the means for compelling a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.⁵¹

Thus it is apparent that, when both the forum and the sister state have statutes based upon sufficient governmental interest, the full faith and credit clause will not interfere with the forum's application of its own. The question whether "governmental interest" is to be refined and made more definite still seems open. At present, only a hint in the *Pacific Employers* case is of assistance. It was there said:

Although Massachusetts has an interest in safeguarding the compensation of Massachusetts employees while temporarily abroad in the course of their employment, and may adopt that policy for itself, that could hardly be thought to support an application of the full faith and credit clause which would override *the constitutional authority of another state to legislate for the bodily safety and economic protection of employees injured within it. Few matters could be deemed more appropriately the concern of the state in which the injury occurs or more completely within its power.*⁵²

This language might be taken to suggest a test seeking in territorial power over physical presence the sole ground for refusing application of a foreign statute. It seems doubtful that such a narrow doctrine will be adopted. In the first place, it would entail a distribution of constitutional power between the two states involved only slightly less absurd than that achieved by refusing to the forum any power to decline application of foreign statutes. A state may have reasonable claims to control of compensation problems other than the fact that it happened to be the scene of the accident. And physical control in other matters may be no more conclusive.

51. Id. at 501.

52. Id. at 503 (Italics supplied).

It seems more likely that the test, where two statutes conflict, will not take a form which will necessitate the drawing of a precise line. The Court will probably leave at rest all cases in which the forum has had any reasonable grounds for applying its own statute,⁵³ unless the sister state retaliates.⁵⁴ In other words, full faith and credit lends its sanction only to statutes based on a sufficient interest in the state of their origin and then only when the state which resists their application has no sufficient reason for preferring its own.⁵⁵

Will the effect of the clause differ when the forum has no statute? There seems no ground for supposing that it will. Not only is it difficult to argue that a state may not as aptly express its governmental interest by common law rules as by those imbedded in statute, but the care Mr. Justice Brandeis took in *John Hancock Mutual Life Insurance Co. v. Yates*⁵⁶ to point out the forum's lack of interest as well as the interest of the foreign state indicates strongly that the test is the same: where the

53. Would the Court, in the Alaska Packers Ass'n case, have found a denial of full faith and credit had the litigation originated in Alaska and had California's statute been disregarded? Mr. Justice Stone plainly refrains from saying so; and the same silence is observable in the Pacific Employers case. The inference that, had Massachusetts or Alaska been the original forum, no violation of the clause might have been found is not destroyed by Mr. Justice Stone's statement in the earlier case, 294 U. S. at 547: "Unless by force of that [full faith and credit] clause a greater effect is thus to be given to a state statute abroad than the clause permits it to have at home, it is unavoidable that this Court determine for itself the extent to which the statute of one state may qualify or deny rights asserted under the statute of another." This statement simply indicates that some qualification or denial of those rights is possible and that the Supreme Court is to be the source of the rules showing how much.

54. Instances where insistence by two or more states claiming control will actually require final determination of the precise interest each may be allowed to assert will in all probability be rare in the extreme. See, as an example of the expectable behavior of state courts under circumstances affording a possibility for such insistence, *Tidwell v. Chattanooga Boiler & Tank Co.* (1931) 163 Tenn. 420, 648, 43 S. W. (2d) 221, rehearing den. (1932) 163 Tenn. 648, 45 S. W. (2d) 528. As to the desirability of awaiting clear evidence of actual controversy in a not dissimilar situation where the Supreme Court is involved in the determination of a knotty conflicts problem, see *Texas v. Florida* (1939) 306 U. S. 398, and especially Mr. Justice Frankfurter, dissenting, 306 U. S. at 428.

55. It seems possible that the desire to limit the all-inclusiveness of the power of sister state laws may serve to explain the much-disputed case of *Union Trust Co. v. Grossman* (1918) 245 U. S. 412. Compare the approach in *Worcester County Trust Co. v. Riley* (1937) 302 U. S. 292, where factual elements underlying the concept, domicile, were emphasized in avoiding review.

56. (1936) 299 U. S. 178.

sister state has sufficient interest to justify its statutes and the forum is so lacking in such interest that application by it of a statute on the subject would violate due process, full faith and credit will require application of the foreign statute.

It will be observed that such a test as this leaves considerable room for the exercise of state policy and for the application of conflicts rules which have no connection with constitutional mandate, whereas it involves the Supreme Court in the determination only of extreme cases of the type most properly subjected to constitutional control.

That such a test is a wise one for the Supreme Court to adopt may be indicated by the extreme difficulty of forcing into a geometric pattern the situation where not two only, but several states have claims to interest in part or all of the facts in dispute.⁵⁷ Even more properly to be avoided is the necessity for reducing to straight lines by mechanistic processes the meandering boundaries between "procedure" over which the forum presumably holds sway and "substance" which is the subject matter of choice of law,⁵⁸ or the task of settling authoritatively such dogmatic battles as those concerning the place governing the validity of a contract.⁵⁹ Finally, a constitutional argument may be made in favor of perpetuating the suggested gap in the absolute requirements of full faith and credit: the clause itself does delegate to Congress some power to legislate as to the effect to be given judicial proceedings, public acts and records. Unless

57. The suggestion is that in this way the Supreme Court may dispose of a case involving potential interests of three or four states some or all of which—excepting the forum—have statutes purporting to govern. By describing the forum's duty to give heed to these laws partly in terms of its own lack of interest, the Court may avoid giving what amounts to an advisory opinion as to which foreign statute has the best claim prior to a full and informed argument on the point, although, of course, that determination may ultimately be required.

58. *Tennessee Coal, Iron and R. R. v. George* (1914) 233 U. S. 354; *Anglo-American Provision Co. v. Davis Provision Co.* (1903) 191 U. S. 373; and explanatory reference in *Broderick v. Rosner* (1935) 294 U. S. 629.

See, on the perplexities now existing, Cook, "Substance" and "Procedure" in the Conflict of Laws (1934) 42 *Yale L. J.* 333. It is not urged here that nothing be done to clear up this maze, but it is suggested that it can best be done under flexible rules which leave considerable room for local variation, and that any rigid requirement that each of the vagaries of this field be settled by the Supreme Court might prove little short of disastrous by reason of the burden imposed.

59. See Cook, 'Contracts' and the Conflict of Laws (1936) 31 *Ill. L. Rev.* 143; and 'Contracts' and the Conflict of Laws: 'Intention' of the Parties (1938) 32 *Ill. L. Rev.* 899.

that power is to be rendered almost useless⁶⁰ the Court must take care not to solve by tests of reasonableness every problem which might be the subject of congressional action. Mr. Justice Stone, dissenting in *Yarborough v. Yarborough*,⁶¹ suggests this consideration in the statement:

The constitutional provision giving Congress the power to prescribe the effect to be given to acts, records and proceedings would have been quite unnecessary had it not been intended that Congress should have a latitude broader than that given the courts by the full faith and credit clause alone. * * * The play which has been afforded for the recognition of local public policy in cases where there has been called in question only a statute of another state, as to the effect of which Congress has not legislated, compared with the more restricted scope for local policy where there is a judicial proceeding, as to which Congress has legislated, suggests the Congressional power.⁶²

For those who desire to see an end to the local policy doctrine, with its attendant uncertainties, contradictions, and confusions,⁶³ it may be enough that the Court has already brought under constitutional control large sections of the field previously occupied by common law conflict of laws rules.⁶⁴ This, together with consideration of the burden on the Supreme Court already foreseeable when the full effect of its recent pronouncements has had time to swell its already heavy load, surely suggests the desirability of caution with respect to attempts to close up by ruthless application of the full faith and credit clause the indicated gap

60. See Ross, *supra* note 4, 20 Minn. L. Rev. at 183.

61. (1933) 290 U. S. 202.

62. 290 U. S. at 215, n. 2. And see *Pacific Employers Liability Ins. Co. v. Industrial Accident Comm.* (1939) 306 U. S. 493, 502.

63. See: Beach, *Uniform Interstate Enforcement of Vested Rights* (1918) 27 Yale L. J. 656; Goodrich, *Foreign Facts and Local Fancies* (1938) 25 Va. L. Rev. 26; Lorenzen, *Territoriality, Public Policy and the Conflict of Laws* (1924) 33 Yale L. J. 736, 751; but see Yntema, *The Hornbook Method and the Conflict of Laws* (1928) 37 Yale L. J. 468, 481.

64. And see, for the suggestion that the policy doctrine is already narrowed in scope, Smith, *supra* note 4, at 544-5, but cf. *id.* at 578, note 120, and Mr. Justice Brandeis speaking in *Broderick v. Rosner* (1935) 294 U. S. 629, 643: "For the States of the Union, the constitutional limitation imposed by the full faith and credit clause abolished, in large measure, the general principle of international law by which local policy is permitted to dominate rules of comity." But cf. *National Mutual Bldg. & Loan Ass'n v. Brahan* (1904) 193 U. S. 635; and see *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.* (1934) 292 U. S. 143; *Alaska Packers Ass'n v. Industrial Accident Comm.* (1935) 294 U. S. 532; *Pacific Employers Ins. Co. v. Industrial Accident Comm.* (1939) 306 U. S. 493.

between other states' governmental interests justifying legislation and the reasonable exercise by statute or judicial decision in the forum of such interests as it may legitimately claim.⁶⁵ The majority opinion in *Yarborough v. Yarborough*⁶⁶ does not, and it is submitted should not be taken to, contradict or weaken the statements of Mr. Justice Stone in dissent:

Between the prohibition of the due process clause, acting upon the courts of the state from which such proceedings may be taken, and the mandate of the full faith and credit clause, acting upon the state to which they may be taken, there is an area which federal authority has not occupied.

* * *⁶⁷

Can we not add that, between the requirement that the statute of the sister state must have a proper foundation of governmental interest and the requirement that the forum have a proper governmental interest before it refuses by judicial decision to apply the sister state statute, there is a similar area? This does not argue for the continuation of the state's power to refuse arbitrarily on grounds of policy. It argues only for recognition that two or more states may have legitimate interests, that the proper function of the Constitution is to handle large problems of federal statesmanship, not to seek perfectionistic uniformity by treading a maze of niggling detail, and that, in urg-

65. It will be argued below that some very considerable expansion of the Supreme Court's present scope of decision in the field previously occupied by common law conflicts rules is desirable and, perhaps, inevitable. This extension of constitutional control, however, differs greatly in kind from the ones here discussed. The latter are extensions into endless mazes of comparatively minor importance. Of course, the pettiest details could be avoided by a stringent application of the Court's procedural devices, typified by the "substantial federal question" test for review on appeal. Some such idea may have been the basis for the statement in *Smith*, supra note 4, at 553, "Whether or not the Supreme Court will proceed to remove the conflict by a rule of uniformity depends entirely on whether it feels a substantial question is presented." If so, it is submitted that the suggestion does not meet the objections raised here. First, because the procedural devices referred to are in themselves such fertile sources of confusion, and second, because they are not intended and should not be used to avoid actual undecided problems of extreme difficulty even when they may not possess great national importance (except, of course, in review on certiorari). See *Rubin and Willner*, supra note 25, at 540.

66. (1933) 290 U. S. 202.

67. 290 U. S. at 214. Indeed, it has already been suggested that the citation of *Home Ins. Co. v. Dick* (1930) 281 U. S. 397, 74 A. L. R. 701, in the majority opinion of *John Hancock Mut. Life Ins. Co. v. Yates* (1931) 299 U. S. 178, not only supports Mr. Justice Stone's view, but inferentially, at least forecasts extension of it beyond the exact situation of the *Alaska Packers* case where the due process clause was obviously involved.

ing further burdens on the Supreme Court, it is well to remember the dictum of one of its most energetic members: "to the capacity of men there is a limit."⁶⁸ So far as concerns the individual litigant or his attorney, the result suggested is that review may be had when the forum chooses to apply its own statutory or common law rule in disregard of a foreign rule asserted to control only if the forum clearly lacks any reasonable basis for applying its own rule to the facts at bar.

III. CHOICE OF LAW QUESTIONS SUBJECT TO THE DUE PROCESS CLAUSE

The full faith and credit clause requires the forum to apply the statute law of a sister state when two things are true: first, that the sister state has a sufficient interest in the subject matter to warrant allowing its statute to govern, and second, that the forum has no such interest to justify its governing the subject matter by statute or judicial decision inconsistent with the sister state's statute. It has also been seen that the full faith and credit clause does not apply at all where there is no statute of a sister state purporting to govern the subject matter.

But where a statute of the forum is improperly applied the due process clause⁶⁹ may be invoked whether the law of the state which should govern is embodied in a statute or not. There is also a possibility that improper application of the common law of the forum in disregard of a sister state's properly applicable common law may fall afoul of the due process clause. The questions involved here are primarily ones of the scope of the clause, not, as in the discussion above, of the criteria it contains for discovering the properly governing rule. The test of propriety seems clearly to be as already stated, reasonableness, or governmental interest. The question of the situations in which this test may be applicable, however, is more complex, and the development of the earlier cases is of interest in seeking an answer.

It is no cause for wonder that, in a federal system such as ours, where new interstate problems of many other kinds are solved by reference to the Constitution, the troublesome ques-

68. Mr. Justice Brandeis, concurring in *St. Joseph Stockyards Co. v. United States* (1936) 298 U. S. 33, 92.

69. The reference is, of course, to the Fourteenth Amendment to the Constitution, sec. 1.

tion of choice of law should in due course of time be referred to it for solution. Nor is it astonishing that the constitutional provisions to which the appeal could be made were not at once recognized or, when discovered, that their meaning and application were for a considerable time shrouded in mystery, awaiting the devious process of further judicial elaboration which is set in motion only as particular litigation arises. We have already traced the slow path threaded by the Court from *Van Buskirk v. Green*,⁷⁰ by way of *Supreme Council of the Royal Arcanum v. Green*,⁷¹ to *Modern Woodmen of America v. Mixer*⁷² and *Bradford Electric Light Co. v. Clapper*⁷³ in developing the doctrine that the full faith and credit clause requires the application of the statute law of a sister state in a proper case. No less difficult and slow has been the judicial discovery that the due process clause restricts the courts of American states in the choice of law in a conflicts situation. Nor has the outermost limit of this doctrine necessarily yet been reached or all of its subsidiary or qualifying rules developed.

One of the earliest cases in which it was urged that a failure to apply the proper law was a violation of due process is *New York Life Insurance Co. v. Cravens*.⁷⁴ The facts of that case were these: A New York life insurance corporation had solicited in Missouri an application for an insurance contract from a resident of Missouri. The application had been accepted in New York by the issuance of an insurance policy. After a period of years the policy had lapsed for nonpayment of premiums. Subsequently, an action was brought in Missouri for the recovery of the premiums paid in, less the usual deductions for carrying the insurance during the period of coverage, etc. By the statute law of New York a certain amount was recoverable under these conditions; a Missouri statute permitted a greater recovery. The Supreme Court of Missouri applied the Missouri statute and awarded the larger sum. On review before the Supreme Court of the United States it was urged that the New York law was the proper law of the contract and that failure to apply it constituted a violation of due process. The Supreme Court in affirm-

70. (U. S. 1866) 5 Wall. 307; (U. S. 1869) 7 Wall. 139.

71. (1915) 237 U. S. 531, L. R. A. 1916A 771.

72. (1925) 267 U. S. 544, 41 A. L. R. 1384.

73. (1932) 286 U. S. 145, 82 A. L. R. 696.

74. (1900) 178 U. S. 389, 53 L. R. A. 305.

ing the judgment of the Missouri court, apparently held that no such violation existed. But in a later case, *New York Life Insurance Co. v. Head*,⁷⁵ the decision in the *Cravens* case is put upon the ground that, under the circumstances, the law of New York was not the applicable law.⁷⁶ The language the Court used in the latter holding,⁷⁷ however, can be construed to mean both that the erroneous application of the law of Missouri was a denial of due process and also that the failure to apply the properly applicable statute law of New York was a denial of full faith and credit. Indeed the Court said further in its opinion⁷⁸ that its decision was " * * * so obviously the necessary result of the Constitution that it has rarely been called in question, * * * " but that the " * * * principle, however, *lies at the foundation of the full faith and credit clause* * * *."⁷⁹

Two years later, in *Kryger v. Wilson*,⁸⁰ the Supreme Court stated flatly that a mistaken choice of law resulting in application of the forum's statute was no violation of due process, but a mere matter of local common law with which the Constitution is not concerned.⁸¹ Yet in 1918, *New York Life Insurance Co. v.*

75. (1914) 234 U. S. 149.

76. 234 U. S. at 159. The *Head* case is indeed distinguishable from the *Craven* case on its facts. *Head*, a resident of New Mexico, while temporarily in Missouri, had applied for and obtained from the New York Life Insurance Company an insurance policy wherein it was stipulated that it be regarded as a New York contract. *Head* later assigned the policy to his daughter, also a resident of New Mexico, and sometime thereafter obtained a loan thereon from the company. The loan being unpaid when due, a settlement was arrived at under the New York law governing such transactions. Under the law of Missouri such loan settlements were void. Upon the death of her father, the daughter claimed the amount due under the policy as it would be computed under the law of Missouri and, upon being refused this amount, brought suit therefor in the courts of Missouri. The Missouri court, following, as it thought, the *Cravens* case, gave judgment for the plaintiff in the amount sought. The United States Supreme Court, in reversing this judgment, said: "The difference, therefore, between that case [the *Cravens* case] and this, is that which, in the nature of things, must obtain *between questions concerning the operation and effect of a state law within its borders and upon the conduct of persons confessedly within its jurisdiction, and its right to extend its authority beyond its borders so as to control contracts made between citizens of other states, and virtually, in fact, to disregard the law of such other states by which the acts done were admittedly valid.*" 234 U. S. at 160. (Italics supplied.)

77. See note 76, *supra*.

78. (1914) 234 U. S. 149, 161.

79. Italics supplied.

80. (1916) 242 U. S. 171.

81. See also *Pennsylvania R. R. v. Hughes* (1903) 191 U. S. 477, but cf. *Pinney v. Nelson* (1901) 183 U. S. 144.

*Dodge*⁸² clearly held that the application of the forum's statute to matters properly controlled by other law violated the Fourteenth Amendment; and it was strongly intimated that the *Head* case rested upon the same grounds, rather than upon full faith and credit.⁸³ The equivocal holding⁸⁴ six years later in *Aetna Life Insurance Co. v. Dunken*,⁸⁵ can at most be taken to show that the new rule was not yet clear in the minds of all the members of the Court.⁸⁶ Both these cases wholly ignored *Kryger v. Wilson*⁸⁷ and nothing has occurred since to suggest that the Court is likely to return to the denial that improper application of the forum's statute in a choice of law situation may not be a denial of due process.⁸⁸

The result of these cases is that the full faith and credit clause

82. (1918) 246 U. S. 357.

83. The Court stated: "[The contract in question] was one which the Missouri legislature could not destroy or prevent a citizen within its borders from making beyond them by direct inhibition; and applying the principles accepted and enforced in *New York Life Insurance Co. v. Head*, we think the necessary conclusion is that such a contract could not be indirectly brought into subjection to statutes of the state. * * * To hold otherwise would permit destruction of the right * * * freely to borrow money upon a policy from the issuing company at its home office and would, moreover, sanction the impairment of that liberty of contract guaranteed to all by the Fourteenth Amendment," 246 U. S. at 376.

84. See *Dodd*, supra note 4, at 533. Much of the language of this case creates the utmost confusion as to whether full faith and credit or due process was relevant. The emphasis on the forum's statute and the absence of discussion of the foreign one (if any) indicates that this was properly a due process decision. Nevertheless, the language of the Court strongly indicates otherwise.

85. (1924) 266 U. S. 389.

86. Note that the *Dodge* opinion was written by Mr. Justice McReynolds, while the *Aetna* opinion was by Mr. Justice Sutherland.

87. (1916) 242 U. S. 171.

88. On the contrary, see the *Pacific Employers* case (1939) 306 U. S. 493, and the *Alaska Packers* case (1935) 294 U. S. 532, where it is explicitly discussed as a possibility, and see also Mr. Justice Stone's dissent in *Yarborough v. Yarborough* (1933) 290 U. S. 202. *Home Ins. Co. v. Dick* (1930) 281 U. S. 397, 74 A. L. R. 701, contains even more unmistakable implications.

But see Comment (1937) 22 WASHINGTON U. LAW QUARTERLY 430, 432 for the suggestion that *Kryger v. Wilson* merely reflects the Court's determination to restrict its review of choice of law questions to those of "national importance"; and hence, it has not been overruled *sub silentio* by the subsequent cases. The present writers concur that "national importance" is probably the test, but are of the opinion that national importance depends rather upon the grossness of the violation of interstate proprieties than upon the subject matter of the cases in which the violation occurs. See *Western Union Tel. Co. v. Brown* (1914) 234 U. S. 532; *Young v. Masci* (1933) 289 U. S. 253; but cf. Notes (1930) 40 Yale L. J. 291, 299; (1932) 46 Harv. L. Rev. 291, 295; and compare Comment (1939) 52 Harv. L. Rev. 1002.

and the due process clause complement each other in choice of law situations involving the statute law of sister states: an erroneous application of the statute law of the forum in disregard of the statute law of a sister state may be at the same time a denial of due process and of full faith and credit.

But in one regard at least the due process clause has a wider scope in choice of law situations than the full faith and credit clause. In *Home Insurance Co. v. Dick*⁸⁹ the choice of law lay between the law of an American state, the forum, and that of a foreign nation. Here the full faith and credit clause could not be successfully invoked to require the application of the foreign law because that clause requires only that "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state."⁹⁰ But it was successfully urged that the application of the statute of the forum to a controversy not properly governed by its law was a denial of due process, which, under the Constitution, may not be denied to *any person* whether the citizen of a sister state or not. There seems no reason to question that the same result would be reached in any case where the local statute was improperly applied, regardless of whether the competing law was statutory or judge made and of whether it originated in a foreign country or sister state.

Three final questions remain: What will happen if the forum applies its own common law in a case where the common law of a sister state is asserted to be the law properly governing? May the due process clause ever apply to determine that the application of the local common law of the forum is improper? And if so, when? None of the cases so far discussed involved this situation.

It has been suggested that the due process clause has a limited application to choice of law situations:⁹¹ just as the full faith and credit clause requires only the application of the statute law of a sister state in a proper case, so the due process clause merely prohibits the forum's application of its own statute law to a controversy not properly controlled thereby. If this be true, we have the following result: A failure to apply the statute law of

89. (1930) 281 U. S. 397, 74 A. L. R. 701.

90. Italics supplied. See *Aetna Life Ins. Co. v. Tremblay* (1912) 223 U. S. 185, refusing to enforce a foreign judgment.

91. *E. g.*, Comments (1934) 34 Col. L. Rev. 951; (1935) 45 Yale L. J. 339.

a sister state and an erroneous application of the statute law of the forum instead may be both a denial of full faith and credit and of due process; a failure to apply the statute law of a sister state and an erroneous application of the common law of the forum instead may be a denial of full faith and credit; an erroneous application of the statute law of the forum in disregard of the common law of a sister state or of the law of a foreign state may be a denial of due process; but an erroneous application of the common law of the forum in disregard of the common law of a sister state or of the law of a foreign state is subject to no constitutional inhibition whatever.

Is there any necessity for this result? First, it seems apparent that a court may as gravely exceed the "territorial" bounds of jurisdiction of the state in which it sits by a common law decision as it may by a decision based on statute.⁹² And the mere fact that, in doing so, it does not refuse application of a statute of a sister state having legislative jurisdiction of the subject matter surely makes the local result no less unreasonable. Nor is it less painful to the defeated litigant or, most important of all from a constitutional standpoint, less violative of a proper disposition of powers among the members of the federal system. Thus it seems that, on principle, there is no sufficient reason why, in the situation where the common law of the forum is misapplied and extra-state common law ignored, there should be no constitutional restraint.

The argument that this situation cannot be remedied under the due process clause rests chiefly on the basis of the doctrine that erroneous determinations of common law rules do not deny due process. This is undoubtedly a frequently stated rule.⁹³ In the situations where it originated and in which it has since been largely applied, the present argument does not dispute its validity. Until a state's courts decide a novel case, there may be said to be no common law in that state for such cases. In later cases,

92. *E. g.*, *Fox v. Postal Telegraph Cable Co.* (1909) 138 Wis. 648, 120 N. W. 399, where the application of the state common law was no whit less "extraterritorial" or unreasonable than that in the *Dick* or *Dodge* cases. See *Ross*, *supra* note 4, 15 Minn. L. Rev. at 161.

93. See, for certain exceptions already recognized, *Note*, *Due Process as a Substantive Restriction upon Judicial Decisions* (1934) 34 Col. L. Rev. 891; and see criticism of the doctrine itself by *Schofield*, *The Supreme Court of the United States and the Enforcement of State Law by State Courts* (1908) 3 Ill. L. Rev. 195.

its courts may distinguish or overrule the previous decision. Where such action affects private interests adversely there should be held to be no denial of constitutional right, for so does the common law change and grow. Hence no one, it is said, has a vested interest in the continuance of any given rule of the common law. But because a state court without violating due process may disregard the correct common law rule, as enunciated in its own prior decisions or, in the absence of such, in the decisions of the courts of other common law jurisdictions, in deciding cases where the law of that state is admittedly the applicable law, it does not follow that a court may with equal constitutional propriety disregard the properly applicable common law of a sister state by applying its own common law. Without in any sense attempting to set up the due process clause as a device to force upon the states a uniform common law⁹⁴—even as to choice of law determinations⁹⁵—it may be argued that the Supreme Court could under this clause control obvious extensions of state power beyond proper boundaries by common law decision which falls afoul of no statute law abroad. Such extensions may well give rise to the very sort of interstate friction the Constitution was designed to prevent—a consideration not applying to strictly intrastate judicial error.

If this distinction between intrastate and interstate judicial error be conceded at least conceptual validity, what authorities sustain the contention that improper choice of law where no statute is involved may violate due process? Four cases are thought to offer some basis for this position. The first is *John Hancock Mutual Life Insurance Co. v. Yates*.⁹⁶ As already pointed out in the argument that the prerequisites of full faith and credit are twofold, this case clearly indicates that the forum's common law decision may overstep its legitimate boundaries. And it does so not only on the plain ground that a foreign statute properly controls. The language will bear repeating:

In respect to the accrual of the right asserted under the contract, or liability denied, there was no occurrence, nothing done, to which the law of Georgia could apply. Compare *Home Insurance v. Dick* * * *.⁹⁷

94. *Sauer v. New York* (1907) 206 U. S. 536, 546; *Tracy v. Ginzburg* (1907) 205 U. S. 170, 178.

95. See *infra* pp. 55, 56, as to the room left for flexibility.

96. (1936) 299 U. S. 178.

97. 299 U. S. at 182.

Certainly this language will stand the construction that it is the application of Georgia law, not merely the disregard of New York's, which is objected to at this point.⁹⁸ And it is again urged that if it is objectionable for Georgia to apply her common law without justifiable interest when an extra-state statute claims dominion, there is no reasonable argument that it is not when no such statute exists.

The second case in support of the general proposition is advanced with some hesitancy. The case of *Erie R. R. v. Tompkins*⁹⁹ holds unconstitutional the invasion by the United States Supreme Court of powers now found to be properly those of the several states. There can be no doubt that, in the opinion of the majority, it was *court* action, not any statute as construed, which violated the constitutional requirements. The Court said:

In disapproving [the doctrine of *Swift v. Tyson*] we do not hold unconstitutional §34 of the Judiciary Act of 1789 or any other Act of Congress. We merely declare that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States.¹⁰⁰

The writers are not unaware that in citing this case for the present point they are basing a suggestion that the Supreme Court occupy some part of a field which has hitherto been common law of the states upon its most striking effort to free itself from the doctrine that there is a federal common law. Nor is the fact overlooked that this case does not rest upon the constitutional provision here discussed. Yet the separation of state from federal powers—in this situation—is not greatly different in kind from the separation of those of one state from those of another. Both are the peculiar concern of the Constitution. And the renunciation by the Supreme Court of the power to determine the local law of a state for that state does not deny its power under the Constitution to prohibit attempts to extend that law improperly beyond state borders.

In the third case, *Young v. Masci*,¹⁰¹ the Supreme Court is thought to have taken the suggested step, possibly by inad-

98. The argument in the preceding section is that, under full faith and credit, it is *both*.

99. (1938) 304 U. S. 64.

100. 304 U. S. at 79, 80; cf. Comment (1939) 52 Harv. L. Rev. 1002, 1004.

101. (1933) 289 U. S. 253.

vertence. Here was the exact converse of *John Hancock Mutual Life Insurance Co. v. Yates*.¹⁰² New Jersey had, by judicial decision not governed by any local statute, applied the statutory law of New York to events taking place partly in each state. It was claimed that this local judicial determination violated the due process clause. The Supreme Court took jurisdiction on appeal¹⁰³ and affirmed. The opinion discusses chiefly the appellant's contention that New York's statute was improperly given extra-territorial effect. Perplexities abound which are not, it is submitted, to be solved by simple reference to any of the theories as to just what the New Jersey court does when it follows New York law.¹⁰⁴ But for present purposes, it is enough to observe that the action of New Jersey's court, unaided by New Jersey statute, was reviewed and affirmed as being a not improper choice of law under due process.

Finally, a dictum in *Bigelow v. Old Dominion Copper Mining and Smelting Co.*¹⁰⁵ seems to state the very principle here discussed. In holding, under circumstances shown clearly enough for present purposes in its statement, that Massachusetts was not required by full faith and credit to give effect to a New York doctrine of estoppel by judgment, the Court said:

The New York court had no jurisdiction to render a judgment *in personam* against Bigelow.* * * To say that nevertheless the judgment rendered there adverse to the plaintiff in that case may be pleaded by him [Bigelow] as a bar to another suit by the same plaintiff upon the same facts, because such is the effect of that judgment by the usage or

102. (1936) 299 U. S. 178.

103. The problem of federal jurisdiction here is a knotty one, but not relevant to this discussion: does New Jersey's decision here uphold the *validity* of a state statute against constitutional objection? If appellant had been right in his claim, would the New York statute be unconstitutional? This suggests another jurisdictional point upon which the Court has not spoken clearly. Dodd, *supra* note 4, at 560, 561, has pointed out the confusion in *Aetna Life Ins. Co. v. Dunken* (1924) 266 U. S. 389, as to whether review in full faith and credit cases can properly be had in error (now appeal). Two other cases clearly grant such review: *Nat'l Mutual Bldg. and Loan Ass'n v. Brahan* (1904) 193 U. S. 635, and *Olmsted v. Olmsted* (1910) 216 U. S. 386. In the former, jurisdiction was taken on both full faith and credit and due process claims, and both were decided. In the latter full faith and credit alone was involved. Nevertheless, the argument by Dodd, *supra*, that—since it is the disregard of a sister state statute which violates full faith and credit—review on error is improper seems unanswerable.

104. See Dodd, *supra* note 4, at 535, *et seq.* and authorities cited.

105. (1912) 225 U. S. 111.

law of New York, would be to give to the law of New York an extra-territorial effect, which would operate as a denial of due process of law.¹⁰⁶

The major holding is of no consequence here. The quoted passage, however, seems to say that an erroneous Massachusetts common law conflicts decision would violate due process.

At all events, the fact that full faith and credit may prevent application of local common law in a proper case,¹⁰⁷ the confusion often shown by the Court as to the differences between full faith and credit and due process, and the four cases last cited, in unison are suggested as buttressing the argument previously made on principle, that in at least some cases the Supreme Court should and does have power under the due process clause to review common law decisions which improperly apply the common law of the forum when no statute of a sister state purports to govern.

The question remains, when will the requirement of propriety found in the due process clause inhibit application of local common or statute law? A short answer may be made: When "There was no occurrence, nothing done, to which the law of [the forum] could apply;"¹⁰⁸ "when nothing in any way relating [to the subject matter of the suit] was ever done or required to be done in [the forum];"¹⁰⁹ or, in other words, whenever the forum, without any sufficient governmental interest to justify its action,¹¹⁰ attempts to settle by its own law matters claimed to be properly governed by the law of a sister state or states.

It will be noted that this answer makes no mention of the proper sister state law.¹¹¹ So stated, the answer is most in accord with what has been said above concerning full faith and credit, briefly summarized here: respect for the proper functions of the Constitution in laying down broad lines of guidance

106. 225 U. S. at 137 (Italics supplied). Cf. *Fauntleroy v. Lum* (1908) 210 U. S. 230, 237-238, referring to a case where no error in *conflicts* was committed.

107. *I. e.* where there is a sister state statute which properly controls, and the local law does not.

108. *John Hancock Mut. Life Ins. Co. v. Yates* (1936) 299 U. S. 178.

109. *Home Ins. Co. v. Dick* (1930) 281 U. S. 397, 74 A. L. R. 701.

110. *Alaska Packers Ass'n v. Industrial Accident Comm.* (1935) 294 U. S. 532.

111. Thus, when several states' laws may be involved, the Court need only forbid the unreasonable application of that of the forum, leaving the proper law undetermined.

for the states in the interplay of a complex federal system, and consideration of the already great burdens imposed on the Supreme Court in determining the location of those lines, both militate against the imposition of the burden, under either the due process or the full faith and credit clause, of determining in every controversy involving more than one state the precise habitat of the properly governing non-statutory law. It will be enough if the Supreme Court can outline the large and general principles of fairness or governmental interest implicit in the two clauses as thus far interpreted without attempting to put the stamp of uniformity upon the states' solutions of all the intricate and multitudinous problems involved in the choice of law.¹¹²

The writers do not overlook the undoubted fact that if the Court's jurisdiction does extend as far as is suggested above, it may be contended that it extends over the entire field.¹¹³ That is, it is arguably a distinction without a difference to say that the Court has jurisdiction over the improper choice of the common or statutory law of the forum but not over the improper ignoring of the extra-state common law. So also, the gap created by construing the full faith and credit clause as containing a double requirement—that the sister state have legislative jurisdiction *and* that the forum have no legitimate interest—may be considered closed by the statement that this is all a question of reasonableness in balancing the claims of both states. But matters of law have been matters of degree before this, and none the less substantial. And so long as the framework within which the degrees are placed can be stated understandably, it is submitted that arguments more cogent than mere statement of their character must be found to overthrow them. To the litigant this means that his contentions as to choice of law will involve constitutional issues only in extreme cases where a state court has done more than commit error in interpreting conflict of laws dogma. He must have suffered treatment which seems plainly

112. The Court's assumption of jurisdiction in *Young v. Masci* (1933) 289 U. S. 253, seems to indicate a broader scope for the due process clause than that suggested. But the case is equivocal on this matter because of the New York statute involved; and it is not thought to express any considered intent to expand the clause beyond the suggested point.

113. *E. g.*, Smith, *supra* note 4, at 578, and see footnote 120. Compare Restatement, *Conflict of Laws* (1934) sec. 42, pp. 72-74, *caveat* and comment.

prejudicial and based on no proper interest of the state which had jurisdiction of his case.

IV. CONCLUSION

The decided cases under full faith and credit and due process have extended constitutional control over wide areas previously covered by common law conflict of laws principles determining proper choice of law by the states. Where the statute of a sister state is asserted to govern a set of facts and the forum disregards it by the application of its own common law, there may be a constitutional question under the full faith and credit clause. Where the competing law of the forum is statutory, there may be a constitutional question under the due process clause as well. Where the forum applies its statute law in disregard of the statute or common law of a foreign nation asserted as controlling the due process clause may be violated. And there seems to be no reason to doubt that the same thing is true if the competing law is that of a sister state. Finally, while the Supreme Court of the United States has yet to speak unequivocally on the matter, it is submitted that *where a state applies its common law in disregard of the asserted control of the common law of a sister state, a due process question may be raised*. Thus, in any situation where a choice of law must be made, there may be a constitutional question referable to the Supreme Court for final solution.

This conclusion does not say that the Supreme Court has become, of necessity, the sole arbiter of every situation in which a choice of law may be made. True, it may be said that the Court's decisions have exposed a power in the Constitution which, applied to its logical extreme, would enable the Court to dictate the proper, and the only proper, result in each such case. But, at the same time, the Supreme Court in revealing this power has laid the basis for rules restricting its expansion to that logical extreme. Whether the restrictions be considered as a part of the power itself, demarking its scope, or whether, on the assumption that the power is all or nothing, the restrictions be said to apply only to its exercise seems immaterial.

The result of the available authorities is thought to be that the full faith and credit clause should be applicable only when: (1) the statute of a sister state is asserted to govern the subject matter of a controversy, (2) that state has obvious claims to

governmental interest in the outcome, and (3) the forum clearly has such claims only to a very limited extent; that the due process clause is applicable wherever the forum is attempting to apply its law without any justifiable claim to governmental interest in the outcome—in short, only in extreme cases. And under neither clause will the solution be obtained by the exercise of the rules applicable to common law conflict of laws cases. The Supreme Court has in the past and will in the future have little need to enter into the controversies revolving about “vested rights,” “*lex loci contractus*” and the like, while marking out the broad boundaries of reason which no court, in applying those rules, may transgress. The problems are constitutional problems, to be solved by constitutional principles, and may, as such, be kept in a separate and narrow category.

As to desirability, keeping in mind as a basic postulate the undesirability of over-burdening the Court, the following arguments are thought persuasive in favor of the rules just stated. The due process clause, as analyzed here, is the more restricted clause in scope, applying only in extreme cases, and is the easier one in application, looking only to the forum aspect of the problem. Under it, then, should fall all problems where the common law of a sister state or states is or may be involved, since thus the perplexities of discovering and applying such law may be avoided. The full faith and credit clause, on the other hand, while more broadly applied within the boundaries of its terms, refers only to situations in which the law primarily relevant (*i. e.* statute) is more easily ascertained.

It also seems probable that the conflicting claims of statutory law which require solution will exceed in importance those of conflicting common law rules as a result of the tendency to legislate upon the socially significant problems of the day which involve interstate relationships—as witness the Workmen’s Compensation Acts. And therefore the rules just stated promise the maximum efficiency in fulfilling the true significance of the constitutional mandates. Thus, under full faith and credit, a more exact evaluation of a sister state’s statute is permitted, and under due process attempts at unjustified extension of local policies may be checked. But in neither case will an absolute check upon the flexibility necessary to growth and adjustment in interstate problems not yet fully understood be imposed, nor

will the Court be burdened by the necessity of solving all conflict of laws problems regardless of their importance or the interstate friction they may create.

Finally, the most controversial suggestion above—that the constitutional control of some choice of law problems not involving statutes of either state is possible—may be supported on three grounds. First, that no reasons applicable to cases in which there are statutes are demonstrably less relevant to cases in which there are not. Second, that the control solely under due process will include but few cases involving such clear excess of territorial bounds as to require review. And finally, that the existing authorities seem to afford some justification for this position.

By means of these clauses, then, practitioner and student may look forward to seeing the Supreme Court, by cautious steps, demark the outer boundaries of the choice of law field in terms of reasonableness. They may expect to see review of extreme and difficult cases granted with more frequency as the idea of constitutional restraint on arbitrary exercise of state "policy" becomes more familiar. And they may find such review being granted without regard to the question whether any state involved has a statute for which controlling power is claimed. It seems altogether improbable, however, that the vast area of doubt in the field of choice of law will be touched excepting at its outer edges. The states will be left to find their own solution for the varied problems of the conflict of laws, their solutions being subjected to check only when they reach the stage of clear unreason of such magnitude as to compel constitutional intervention.