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THE PUBLIC POLICY DOCTRINE IN CHOICE OF LAW: A RECONSIDERATION OF OLDER THEMES

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When presented with a cause of action not confined in its elements to the forum state, courts have on occasion announced that although the application of another jurisdiction's law is indicated in the instant case, they must decline to apply it because the law violates local public policy. In a classic formulation of the public policy doctrine, then-Judge Cardozo stated the test to be whether the foreign law can be said to "violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."¹ The impact on the party against whom this doctrine is invoked may vary. A plaintiff whose complaint is dismissed on public policy grounds² will find no hospitable court for his action in the forum state.

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1. *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 111, 120 N.E. 198, 202 (1918).

2. Cases involving a dismissal on grounds of local policy regarding the allocation of judicial resources are not within the scope of this Article. See generally *Hughes v. Fetter*, 341 U.S. 609 (1951); Comment, *Full Faith and Credit to Statutes of Sister States*, 37 CORNELL L.Q. 441 (1952). Rather, the focus of this Article is the rejection of the application of foreign law on substantive grounds—i.e. because of the content of the specific law. Also distinguishable from the public policy doctrine is rejection of a cause of action because it calls for enforcement of foreign penal laws. For the special considerations raised by the penal doctrine, see Leflar, *Extrastate Enforcement of Penal and Governmental Claims*, 46 HARV. L. REV. 193 (1932).

If the dismissal is made without prejudice, he may seek enforcement of his claim in another state. The latter possibility, however, may often prove illusory because of difficulties in obtaining personal jurisdiction over the defendant outside the state of the initial action.³ The fate of a defendant denied the opportunity to raise a defense for public policy reasons lacks any such ambiguities. Assuming no other adequate defense, he has lost on the merits, and a sister state is obliged under the full faith and credit clause to enforce the judgment against him.⁴

The dissent to this doctrine long took the form of moral indignation. For one state to declare another's laws too abhorrent to enforce was for Beach "an intolerable affectation of superior virtue."⁵ Goodrich, in a similar vein, counseled "mutual tolerance for each other's little idiosyncracies"⁶ and sought to persuade the doctrine's defenders that by applying foreign law in accordance with the mandate of basic choice of law rules,

it [a state] does not, by such reference, flaunt its local policy with an implied recognition of the other state's as better; it does not make an appraisal one way or the other, but simply applies the foreign rule as the appropriate one to determine this transaction.⁷

Nussbaum vehemently led the counterattack. He urged that "practicing liberalism becomes preposterous where it is exercised towards a foreign law which is plainly directed against the interests of the forum," and argued the consistency of the public policy doctrine with an informing principle of American federalism—namely, "territorially limited experimentation."⁸

Goodrich and others⁹ seemed to get the better of the argument, at

3. See B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 212 n.88 (1963) (and sources cited) [hereinafter cited as CURRIE]; cf. *Pearson v. Northeast Airlines, Inc.*, 309 F.2d 553, 562 & n.17 (2d Cir. 1962).

4. See *Fauntleroy v. Lum*, 210 U.S. 230 (1908); *Christmas v. Russell*, 72 U.S. (5 Wall.) 290 (1866); *Hampton v. M'Connel*, 16 U.S. (3 Wheat.) 234 (1818); R. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* 410-11 (1971).

5. Beach, *Uniform Interstate Enforcement of Vested Rights*, 27 *YALE L.J.* 656, 662 (1918).

6. Goodrich, *Foreign Facts and Local Fancies*, 25 *VA. L. REV.* 26, 35 (1938).

7. *Id.* at 33. But cf. CURRIE 182.

8. Nussbaum, *Public Policy and the Political Crisis in the Conflict of Laws*, 49 *YALE L.J.* 1027, 1048-49, 1054 (1940). The impact on Nussbaum's position of the then-existing Fascist threat, it may be noted, is unmistakable. See also Kronstein, *Crisis of "Conflict of Laws"*, 37 *GEO. L.J.* 483 (1949).

9. See, e.g., Nutting, *Suggested Limitations of the Public Policy Doctrine*, 19 *MINN. L. REV.* 196 (1935).

least in volume, with their indignant protests against parochialism. Some commentators, however, intimated that this umbrage might be fundamentally misguided. Courts invoke local public policy in choice of law, they argued, not so much out of dislike for the applicable foreign law but rather, in Cavers' terms, as a device to escape from the injustice or incongruity of applying the foreign law in a particular case.¹⁰ Because it provides an easy out from the result indicated by application of traditional rules, the public policy doctrine is objectionable as an escape from thoughtful articulation of better, more relevant conflict-of-law rules. With the development of Cavers' view in greater sophistication and detail by Paulsen and Sovern,¹¹ this conception of the doctrine appears to have relegated the more traditional criticisms of the public policy doctrine to the periphery, if not to total obscurity.¹² Indeed, if the doctrine is only a guise—its invocation not really a statement on the content of the other jurisdiction's law at all—and its vice an invitation to unrigorous analysis, one would seem well advised to direct one's anger about parochialism elsewhere.

The preemptive claim of the Paulsen-Sovern thesis, however, may not be as sound as is generally conceded. In this Article, I begin with the proposition that Professors Paulsen and Sovern have not wrested the field from the traditional critics. The parochialism argument against the public policy doctrine is one which can and should be made. It needs to be formulated, though, not in the metaphysical "right"- "wrong" terms in which Beach and his ideological brethren cast it, but instead contextually, in terms of the aggregate social consequences of the doctrine's employment. This Article attempts both to supplement and partly to supplant the Paulsen-Sovern contentions against the doctrine by reinvigorating—or, perhaps more precisely, bringing to maturation—arguments directed at the doctrine's parochial tenor.

I. THE LIMITATIONS OF THE PAULSEN-SOVERN PERSPECTIVE

The contribution of the Paulsen-Sovern study to an understanding of

10. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 180-84 (1933). See also Note, *The Public Policy Concept in the Conflict of Laws*, 33 COLUM. L. REV. 508, 513 (1933).

11. Paulsen & Sovern, "Public Policy" in the *Conflict of Laws*, 56 COLUM. L. REV. 969 (1956) [hereinafter cited as Paulsen & Sovern].

12. See E. CHEATHAM, E. GRISWOLD, W. REESE & M. ROSENBERG, *CONFLICT OF LAWS* 403 (5th ed. 1964); R. CRAMTON & D. CURRIE, *CONFLICT OF LAWS* 146-47 (1968); CURRIE 133 n.27, 181; Note, *Illegality and Public Policy in the Conflict of Laws*, 12 HOW. L.J. 331 (1966).

the application of the public policy doctrine is of unquestionable significance. Writing in the best legal realist tradition,¹³ the authors penetrated the courts' public explanations of their decision-making processes and set forth a view of the public policy doctrine attuned not to what courts say they are doing, but rather to what they are really doing:

In short, "public policy" is one way to avoid the application of a choice of law rule which the forum wishes to avoid. The objection of the forum, thus, is not to the content of the law but to its own choice of law rule. . . .

The overwhelming number of cases which have rejected foreign law on public policy grounds are cases with which the forum had some important connection. It is apparent, then, that in most cases the choice of local rather than foreign law cannot be regarded simply as a matter of parochialism.¹⁴

The attractiveness and basic plausibility of this thesis should not be allowed to obscure its limitations. For in two fundamental respects, one rooted in basic psychology and the other in the scope of the authors' focus on the social process, the Paulsen-Sovern view fails to displace the "classical concept"¹⁵ (as they disparagingly call it) of the public policy doctrine or to obviate the necessity for further development of the traditional criticisms.

A. *Suspicion of the Judicial Process*

Despite their basically cynical approach to a court's rendition of its grounds for decision, Paulsen and Sovern implicitly take a surprisingly roseate view of institutional bias. Any time a state court has before it two laws for possible application, one of the forum state and the other not, one should find little difficulty in assuming that the court, as an arm of the state governmental apparatus, will by nature tend to favor its own state's law. When comparing "our" law with "their" law, then, the judiciary's reasoning would always seem to be somewhat suspect due to an ingrained bias.¹⁶ An interest analysis, for example, would not unexpectedly be skewed in favor of forum state policies.¹⁷

13. See generally J. FRANK, *LAW AND THE MODERN MIND* (1930); W. MOORE, *LAW AND LEARNING THEORY* (1943); F. RODELL, *WOE UNTO YOU, LAWYERS!* (2d ed. 1957).

14. Paulsen & Sovern 981.

15. *Id.* at 972.

16. I have developed this we-they notion of suspicion of process at considerable length in another context. Note, *Mental Illness: A Suspect Classification?*, 83 *YALE L.J.* 1237 (1974).

17. This bias might take the form of (1) readiness to find forum policies implicated

And if one will grant that an endemic favoritism for local law is often operative sub rosa, why doubt the authenticity in many instances of the explicit judicial expressions of distaste for foreign laws made when applying the public policy doctrine? The public policy doctrine simply conforms too well to natural parochial tendencies—people's readiness to assume the good about themselves and the bad about others—to be characterized as almost always an escape device, something epiphenomenal to the substance of the court's reasoning.

This somewhat intuitive response to the Paulsen-Sovern view draws support from two rather separate lines of cases. On the one hand, various express invocations of the doctrine are so emphatic in their denunciation of foreign law, or are predicated on such minimal contacts with the forum state, that they seem inexplicable *except* as policy judgments on the content of the foreign law. *Aboitiz & Co. v. Price*,¹⁸ in which the court disallowed a defense based on penal laws of the Japanese Military Government of World War II, is a graphic illustration of this line. Also notable in this regard is *Jacobsen v. Saner*,¹⁹ in which an Iowa court dismissed an alienation of affections action having all relevant contacts in Minnesota (and rather obviously unenforceable outside the defendant's home state of Iowa). Similarly, in *Fox v. Postal Telegraph-Cable Co.*,²⁰ a Wisconsin court struck down a defense

and nonforum policies not, or (2) inclination to overestimate the magnitude of forum interests at stake and to underestimate the magnitude of nonforum interests. This latter possibility for expression of bias assumes some willingness to weigh forum against nonforum interests in the first place. A court might, however, simply always regard a forum interest, where present, as decisive regardless of the relative significance of nonforum interests.

18. 99 F. Supp. 602 (D. Utah 1951).

Performance of the obligation of these notes is not illegal in the United States. It is the assertion of a defense and the failure to perform in reliance upon a Japanese penal decree, which violates our most deeply held views of conscientious conduct and sound public policy

This is the kind of defense . . . which is "not merely contrary to the public policy of the forum, but distinctly pernicious thereto"

Id. at 626, quoting 6 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1792, at 5095 n.5 (rev. ed. 1938).

19. 247 Iowa 191, 72 N.W.2d 900 (1955). The Jacobsens were married in Minnesota, resided there during the alleged acts of Saner, then a Minnesota resident, alienating Mrs. Jacobsen from her husband, and received their divorce in a Minnesota court. Iowa, where defendant Saner resided at the time of suit, has a statutory bar to alienation of affection actions; Minnesota recognizes such suits. The Iowa Court found its statute to compel dismissal as "a clear and positive statement of the public policy of the state" rendering "the 'comity' rule . . . not applicable." *Id.* at 194, 72 N.W.2d at 901.

20. 138 Wis. 648, 120 N.W. 399 (1909). Defendant, a New York telegraph corporation, received for transmission from its New York office a message to a person in

available in the two states far more significantly connected with the transaction than Wisconsin.

On the other hand, there are cases not resting explicitly on public policy grounds but rather transparently affected by such considerations. Typical of this group is *Ayub v. Automobile Mortgage Co.*,²¹ in which a Texas court's extensive public policy dictum underlines the token nature of its ultimate place-of-contract characterization. In *Holzer v. Deutsche Reichsbahn-Gesellschaft*,²² the New York Court of Appeals adopted an analogous tack by outlining a route of statutory construction which averted the impact of the court's refusal to disallow as against New York public policy a defense predicted on a discriminatory Nazi edict. Basically, these tacit invocations of the public policy doctrine are the foil to the cases highlighted by Paulsen and Sovern. By sug-

Chicago. Despite notice by the plaintiff-sender of the importance of the message's timely arrival in Chicago, the message did in fact arrive there later than promised. As a result, the addressee made an unnecessary trip, the cost of which constituted the alleged damages in the case. At issue in *Fox* was the force of an exculpatory clause included in the company's standard transmission contract. Tersely characterizing the place of contract as New York and the place of tort as Illinois, and conceding the contract's validity in New York and its probable enforceability in either New York or Illinois, the Wisconsin court gave a lengthy disquisition on the public policy doctrine. It concluded by denying the aid of Wisconsin, which by statute affirms liability for such negligent transmission, in enforcing the clause. Cf. *Hare v. Family Publications Serv., Inc.*, 334 F. Supp. 953, 961 (D. Md. 1971).

21. 252 S.W. 287 (Tex. Civ. App. 1923). Appellee sued on two notes executed in Texas by appellants (and then assigned to appellee) to purchase stock in a Mexican corporation engaged, *inter alia*, in selling liquor. Any sale of liquor within Texas was at that time prohibited by the Federal and Texas Constitutions; any notes given pursuant to such a sale, therefore, would be uncollectible. After vigorously expounding the public policy doctrine and ostensibly conceding the validity of the instant transaction absent invocation of the doctrine, the court rather disingenuously found Texas to qualify as the *lex loci*.

22. 277 N.Y. 474, 479-80, 14 N.E.2d 798, 800 (1938):

In respect to the second cause of action, the result is necessarily different. We are dealing merely with pleadings. Assuming, as alleged, that plaintiff became unable without any fault on his part to continue his services subsequent to April, 1933, that part of the agreement which is alleged to provide "that in the event the plaintiff should die or become unable, without fault on his part, to serve during the period of the contract the defendants would pay to him or his heirs the sum of 120,000 marks, in discharge of their obligations, under the hiring aforesaid," must be interpreted according to German law and the meaning of German words. What that law is depends upon the solution of questions of fact which must be determined on the trial. If the English words "become unable" are a correct translation of the German words employed in the contract, then they would not appear to be limited to inability caused by physical illness but might be intended to apply to any factor which might prevent his service.

gesting a tendency of public policy considerations to insinuate themselves into the judicial process, these cases caution against a simplistic sequestration of cases like *Aboitiz* and *Fox* as anomalies. In so doing, they cast doubt upon Paulsen and Sovern's assertion of an almost complete divorce between what courts say and what moves them to say it in resolving choice-of-law problems on public policy grounds.

My point is not, I should emphasize, that Paulsen and Sovern have failed to provide a useful tool for understanding many public policy cases. Indeed they have. But they have erred in laying far too broad a claim for the utility of their insight. Close attention to their analysis of cases reveals various facile and dubious corroborations of their theory. They manage to isolate an "important connection";²³ yet, very simply, the mere *presence* of such contacts hardly excludes the possibility that a court was moved to invoke the public policy doctrine by genuine policy considerations and not by a desire to cloak a result-oriented decision process. In general, to prove a negative—that courts, in invoking the public policy doctrine, almost never mean what they say—far more cogent and comprehensive evidence than the authors offer would seem requisite.

Paulsen and Sovern's theory does not lack plausibility. Given, however, the basic psychological inferences to be drawn and the authors' inability to produce convincing evidence in rebuttal, it fails by a wide margin in its claim to virtual exclusivity. The public policy doctrine is, I submit, a far more accurate reflection of a court's objection to the content of foreign law than Paulsen and Sovern allow. Accordingly, the criticisms of the doctrine made by Beach and his fellow antagonists to judicial parochialism are very much in point. They coexist quite compatibly, moreover, with the Paulsen-Sovern "substitute for analysis"²⁴ line of attack because of the non-mutually exclusive nature of these competing characterizations of the public policy doctrine.

B. *The Perception of Authoritative Decision*

The second limitation of the Paulsen-Sovern thesis, one emerging from the authors' unduly narrow focus on the process of making decisions in the public sector, also invites further development of the traditional line of doctrinal criticism. Generally, Paulsen and Sovern fix their attention on the judge to the exclusion of his audience. Even

23. Paulsen & Sovern 981.

24. *Id.* at 1016.

if their explanation of the functional significance of the public policy doctrine were a perfectly accurate description of the judicial decision process, it would still provide an incomplete understanding of the doctrine. To be comprehensive, their explanation must also take into account *other* decision-makers' perceptions of the judge's application of the doctrine: the reasonable expectation would seem to be that others would generally understand invocations of the public policy doctrine to be statements of affirmation of local law and censure of foreign law. Even assuming that Paulsen and Sovern have discovered the essence of the doctrine, the fact remains that the type of legal realist perspective that informs their thesis would be alien to the great majority of non-lawyers in positions of power, as well as to many persons instructed in the ways of the law.²⁵ As a result of the authors' failure to consider the judicial statement as a symbolic communication understood and acted upon by the wide range of participants in the social process,²⁶ they overlook a cogent argument against the public policy doctrine. For if the *effect* of invoking the doctrine is to accentuate parochial tendencies at other points in the process, an attack on the doctrine as an agent of parochialism is plainly warranted.

To pinpoint parochializing effects would obviously necessitate extensive empirical research. On the other hand, available evidence does appear to support the inference of parochializing effects radiating from an invocation of the public policy doctrine. Thus, state courts—which a legal realist might suppose should know better—have taken umbrage at rejections of their states' laws by sister state courts on public policy grounds, and have even gone on record with thinly veiled affirmations of retaliatory intent. In one such display of pique, Arizona's high court in *Forgan v. Bainbridge* struck back at Texas' courts for invoking the doctrine against foreign chattel mortgage contracts:

The rule of comity is essentially based upon the principle of reciprocity. . . . It would seem therefore, that, when a sister state does not recognize and will not enforce in her courts the rule of law in regard to a certain class of contracts having their inception in this state, we are not required under the doctrine of comity to enforce similar contracts according to her rule, when such rule is directly opposed to our public policy.²⁷

25. See Miller, *The Role of the University Law School in the Evolutionary Scheme*, 1971 U. ILL. L.F. 1, 14-18.

26. Cf. H. LASSWELL, *POLITICS: WHO GETS WHAT, WHEN, HOW* 31-45 (1958).

27. 34 Ariz. 408, 415-16, 274 P. 155, 158 (1928). Basically, the Texas courts' re-

The group of potential agents for interstate retribution is not limited, however, simply to a state court's counterparts in other states. Judicial opinions—or at least some digest of their contents—come to the attention of many in positions of power other than judges. Legislators, administrators, “private” persons discharging informational, promotional, and often effectively prescriptive functions in decisions regulating the public sector—all are aware in varying degrees of court decisions touching upon their interests. Accordingly, it seems reasonable to assume that the above example of judicial retaliation against another state's court for its ostensible denigration of the forum state's law might be mirrored elsewhere in the process of interstate activity.

A legislature's response to an invocation of the doctrine against its state's laws might easily be imagined. It would probably take the form of a withdrawal of some indulgence, such as funds for ongoing or prospective joint activity or simply consent to a reciprocal agreement. Similarly, a response to another state's adverse use of the doctrine might be forthcoming at the administrative level with its network of informal agreements extending beyond state lines.²⁸ And the potential input of private groups affected or threatened in some way by the invocation of the doctrine against their state's laws should not be underestimated. Many private groups are in a position to convert their control over basic social goods into public decisions—that is, ones formally “made” by the authoritative officials—protective of their interests. From various

sort to the public policy doctrine took the form of a general rule: the rights of an innocent purchaser of a mortgaged chattel removed to Texas are superior to those of the foreign mortgagee despite the mortgagee's priority over such purchaser in the state of contract. In effect, Texas' courts overrode the usual *lex loci contractu* choice-of-law rule with its public policy favoring bona fide purchasers for value. See *Consolidated Garage Co. v. Chambers*, 111 Tex. 293, 231 S.W. 1072 (1921); *Wooten v. Amett Auto Parts Co.*, 286 S.W. 667 (Tex. Civ. App. 1926). *Forgan* required the Arizona court to decide the relative priority of a Texas and an Illinois title. The court spurned a *lex loci* tack and the concomitant application of Texas law which would have made the Texas title superior. Instead, emphasizing the reciprocity between Illinois and Arizona in such matters, the court invoked the Arizona local rule, with the result being to award priority in Arizona to the Illinois title. See also *Union Sec. Co. v. Adams*, 33 Wyo. 45, 236 P. 513 (1925).

28. While interstate agreements between legislators principally operate at levels of high visibility and formality (*e.g.*, compacts or reciprocity laws), those between administrators are characteristically of low visibility and formality. Exemplary of the latter are agreements to exchange information on tax returns. See Goldstein, *Interstate Enforcement of the Tax Laws of Sister States*, 25 STATE GOV'T 147, 161 (1952). See generally Reisman & Simson, *Interstate Agreements in the American Federal System*, 27 RUTGERS L. REV. 75 (1973).

quarters, the parochialism expressed in an invocation of the public policy doctrine stands to be answered in kind.

This is not to deny, of course, that a court may often invoke the doctrine without the materialization of any of these possible repercussions. Indeed, one would reasonably anticipate variation in response according to such factors as the size of the class whose interests are injured by the decision or jeopardized by its implications as precedent, the nature of the state interest behind the discredited law, and the probable magnitude of the injury or threat of injury to that state interest. Additionally, proof of effects may often be elusive because of their low visibility, time lag in surfacing, or inextricability from alternative possible causes. But these difficulties of substantiation hardly warrant the opposite inference that invocation of the doctrine produces no such effects. I assume, then, as a basic hypothesis for further discussion, that the judicial retaliation witnessed in *Forgan v. Bainbridge*²⁹ is no more than the tip of the iceberg.

II. THE JUDICIAL BALANCE REDRAWN

A. *General Considerations*

In deciding whether to invoke local public policy to render a foreign law inapplicable, a court typically considers its problem in terms of exclusive interests. In general, a court proceeds on the simple hypotheses that applying the foreign law serves the foreign state's interest and sacrifices its state's, and that not applying the foreign law promotes its own state's interest and disserves the foreign state's.³⁰ This rather competitive perspective is not peculiar to conflict-of-laws decisions of this variety alone. Indeed, the modern, more enlightened approach to choice of law basically casts the fundamental problem in similarly exclusive terms. Currie's representative formulation of the interest analysis method reveals such an emphasis:

When it is suggested that the law of a foreign state should furnish the rule of decision, the court should, first of all, determine the governmental policy expressed in the law of the forum. It should then inquire whether the relation of the forum to the case is such as to provide a legitimate basis for the assertion of an interest in the application of that policy [T]he court should similarly determine the

29. See note 27 *supra*.

30. See *Ciampittiello v. Ciampittiello*, 134 Conn. 51, 54 A.2d 669 (1947); Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 *YALE L.J.* 736 (1924).

policy expressed by the foreign law, and whether the foreign state has an interest in the application of its policy.³¹

Moreover, Currie's resolution of "true" conflict situations³²—essentially, uniform application of the forum state's rule³³—is hardly out of keeping with a balance of exclusive interests. For if competition is really what choice of law is all about, why be a good loser when victory is yours for the taking?

The usual interest analysis approach in general, and Currie's resolution of its balancing problems in particular, make little sense when one takes account of—and perhaps gives preponderant weight to—*inclusive* interests. Thus, a court making a choice-of-law decision might appropriately ask itself how the application (or nonapplication) of the forum or foreign law might promote (or disserve) interests common to the two states and, possibly, interests fundamental to a larger, national or global order. Admittedly, this consideration of inclusive interests would complicate the judicial balance considerably. But those troubled by the parochial tendencies of the judiciary may welcome this mandate for a broader, more disinterested, and creative role for local courts. Even those dubious of the general utility and practicability of an inquiry into inclusive interests may well concede its indispensability before a court declares a foreign law unenforceable as anathema to local public policy. For purposes of this Article, I seek only to demonstrate the significance of considering inclusive interests in this limited context of the public policy doctrine.

In terms of the public policy doctrine, then, two inclusive interests warrant careful consideration: (1) interstate and international cooperation; and (2) the unimpeded flow of commercial activity between the states of the United States and between the nations of the world. First, a court should hesitate to apply the doctrine insofar as its application may militate against the growth of functional units transcending state and national lines. Secondly, a judge should consider any adverse effects that

31. CURRIE 183-84.

32. A "true" conflict case is one that involves conflicting interests of two states as to the law to be applied to the instant case. This focus on interests is distinguishable from one on the presence of elements in the case involving more than one state, because a state's contact with the case does not necessarily imply any state interest in the case's resolution. The furtherance of local policies would not be implicated. *See generally id.* at 107-10, 185-93.

33. Compare *id.* at 183-84, with *id.* at 191 n.8, 370, and Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROB. 754, 757-59 (1963).

application would have on interstate or international commercial transactions by infusing those transactions with uncertainty.

Various commentators have emphasized and elucidated the latter of these inclusive interests.³⁴ Given the inherent flexibility and manipulability of words and legal doctrine, certainty can, of course, only be relative. As Yntema has argued, however, these intrinsic obstacles to uniformity of legal consequence hardly render futile all efforts to assure that "so far as possible and proper, a given situation should have equal legal treatment everywhere."³⁵ Despite the ultimate plasticity of legal standards, then, one may still affirm the social value of greater predictability in judicial use of doctrine. With regard to the public policy doctrine specifically, even Paulsen and Sovern, who characterize the doctrine as one of various escape devices, seem ready to concede that it is a particularly grave offender against interests predicated on predictability.³⁶

In light of the manifold uncertainties endemic to the choice-of-law process generally,³⁷ however, the force of this latter objection to the public policy doctrine is obviously limited. Although its place in a more inclusive balance warrants recognition, my emphasis will be on the first of the above-named interests, an interest more compelling and far-reaching in its implications for the choice-of-law process.

B. *Suggested Guidelines: The Foreign-Foreign and Domestic-Foreign Distinction*

Courts have typically failed to distinguish between application of the public policy doctrine to the law of a sister state and that of a foreign nation (or political subdivision thereof).³⁸ But the inclusive and exclusive interests implicated in the two types of decisions are markedly different in nature. If courts are to continue to wield this potentially

34. See, e.g., Goodrich, *Public Policy in the Law of Conflicts*, 36 W. VA. L.Q. 156, 165-71 (1929); Nutting, *supra* note 9, at 198-99; Yntema, *The Objectives of Private International Law*, 35 CAN. B. REV. 721, 735-37 (1957).

35. Yntema, *supra* note 34, at 735.

36. Paulsen & Sovern 981. Compare Santoro v. Osman, 149 Conn. 9, 174 A.2d 800 (1961), with Catalano v. Catalano, 148 Conn. 288, 170 A.2d 726 (1961).

37. See CURRIE 101, 132-33; Cavers, *supra* note 10, at 180-84.

38. See Scoles, *Interstate and International Distinctions in Conflict of Laws in the United States*, 54 CALIF. L. REV. 1599, 1610-22 (1966). Compare Mertz v. Mertz, 271 N.Y. 466, 3 N.E.2d 597 (1936), and Catalano v. Catalano, 148 Conn. 288, 170 A.2d 726 (1961), with Santoro v. Osman, 149 Conn. 9, 174 A.2d 800 (1961), and Holzer v. Deutsche Reichsbahn-Gesellschaft, 277 N.Y. 474, 14 N.E.2d 798 (1938).

destructive doctrine, they must approach it with far more refined analytic tools. The following discussion attempts to outline the form which the proposed interest analysis would take in the two categories of cases—foreign-foreign and domestic-foreign—and to suggest a general rule or presumption to guide courts in the resolution of each.

1. *Interstate and International Cooperation*

Professor Richard Falk offers a highly useful model for thinking about the national and international systems of law:

There is vertical or hierarchical order among formally unequal centers of legal authority; there is horizontal or nonhierarchical order among equal centers of legal authority.³⁹

In a vertical order, a centralized institution allocates to subordinate bodies the power to make decisions; in a horizontal order, interactions among decentralized institutions determine decision-making competence. Although the international legal order partakes of some centralized decision-making,⁴⁰ its restraints are characteristically of the horizontal variety.⁴¹

The difference in the inclusive interests threatened by application of the public policy doctrine to domestic-foreign law (a sister state's), as opposed to foreign-foreign law (a foreign nation's or its political subdivision's), follows from this basic structural distinction between interstate and international relations. In the interstate realm, cooperation assumes vital significance principally because of the increasingly substantial threat posed by a powerful center to the legal competence of the individual units. According to a recent study of interstate compacts, uniform state laws, and interstate associations,⁴² empirical re-

39. R. FALK, *THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER* 21-22 (1964) [hereinafter cited as FALK].

40. The United Nations and the International Court of Justice are prominent in this regard. The limitations of both institutions, however, are notable: the "domestic jurisdiction" exception in U.N. CHARTER art. 2, para. 7; and the mutual acceptance of compulsory jurisdiction required for submission of disputes to the International Court of Justice, I.C.J. STAT. art. 36.

41. Professor Falk lists several aspects of the existing horizontal power structure: self-imposed restraints (limited assertions of control); restraint imposed by circumstances (inability to enforce a claim); reciprocity (deference for mutual advantage); fundamental fairness (respect for procedural due process); international agreement (obedience to existing formal and express allocations of decision-making power); and defensive delimitation (deference to unequal distributions of power among horizontal decision-makers). FALK 39-50.

42. Reisman & Simson, *supra* note 28.

search detailing trends in the formation and persistence of interstate agreements, formal and informal, would indicate a substantial increase in joint activity among officials from different states in the following areas: (1) gathering and communicating information needed to make public decisions; (2) agitating for the adoption of certain policies as law; and (3) prescribing law for the individual states which they represent. Even accepting the survey's estimate that interstate activity has approximately doubled over the last forty years, one can hardly discount the threat posed to this formation of horizontal adhesive by the center's encroachment. Far more dramatic than the growth in interstate cooperation has been the center's appropriation of power to make decisions (including not only the prescriptive function, but also the preliminary decision-making activities) of major importance in determining the allocation of social goods.⁴³ In matters of health and welfare, for example, one sees the deluge of national legislation in only the last decade to protect the environment.⁴⁴ In the civil liberties area, it has been *federal* judicial activism⁴⁵ and complementary congressional efforts⁴⁶ which have begun to effect serious inroads into seemingly intractable patterns of discrimination. The same is true for the allocation of knowledge, wealth, and virtually all other values for which men compete.⁴⁷

Writing in the midst of the New Deal's surge in federal government activity, Goodrich supplemented his case against the public policy doctrine with a warning that the chaos in choice of law wrought by this provincial doctrine might well provoke the center to assume primary competence in the conflict-of-laws area.⁴⁸ Whatever disruption to reasonable expectations and commercial security the doctrine's persistence has caused and will engender in the future, though, neither the Supreme

43. See generally *id.* at 95-102.

44. See, e.g., Water Quality Improvement Act of 1970, Pub. L. No. 91-224, tit. I, 84 Stat. 91, amending 33 U.S.C. § 466 *et seq.* (1964, Supp. V, 1969) (codified at 33 U.S.C. § 1151 *et seq.* (1970)); Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485, amending 42 U.S.C. §§ 1857, 1857a-1 (1970).

45. See, e.g., *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

46. See, e.g., Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified at 42 U.S.C. §§ 1971, 1973a-p (1970)); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 28 U.S.C. § 1447 (1970); 42 U.S.C. §§ 1971, 2000a to h-6 (1970)).

47. An attempt is made to summarize these trends in Reisman & Simson, *supra* note 28, at 95-102.

48. Goodrich, *supra* note 6, at 34.

Court nor Congress has shown any noticeable desire to centralize the conflict-of-laws area, and the general assumption appears to be that no such measure is in the offing.⁴⁹ The probable failure of Goodrich's prophecy, however, should not obscure the progressive thrust of his insight. Although interstate cooperation in choice of law—specifically, cooperation taking the form of abandonment or severe limitation of the public policy doctrine—might not really be needed to fend off encroachment by the center in the conflict-of-laws area, it is vital to preserving state competence in other areas. That is, with the center expanding its legal competence apace, the public policy doctrine with its parochializing effects only serves to divide the already outnumbered forces engaged in turning back the center's aggrandizement. A very real battle is at hand, then, to maintain the states as viable competitors with the center for meeting society's ever-changing needs. And though some may perhaps unequivocally greet further usurpation of decision-making powers by the center, many are undoubtedly troubled by the implications of increasingly distant and centralized control of daily life. Indeed, the extent to which "bigness" will stand in the way of democratic government is a consideration not to be lightly dismissed. In deciding the advisability of invoking the public policy doctrine against the law of a sister state, therefore, a state court would do well to consider the potential ill effects of this invocation on local government and, concomitantly, on the quality of life in general.

The stakes in rejecting a law of a foreign nation on public policy grounds also reflect the nature of the power structure in which the two jurisdictions—here, the forum and foreign-foreign state—are set. A domestic court thus addresses foreign-foreign law in the context of almost exclusively horizontal restraints governing the relationships between the forum country⁵⁰ and the foreign one. Cooperative activities strengthen the bonds between nations. They provide greater assurance of stability in a decentralized system and enhance the possibilities of reaching consensus among nations as to standards of minimally acceptable distributions of knowledge, wealth, and other social goods.

49. See CURRIE 124-27; Cheatham, *Conflict of Laws: Some Developments and Some Questions*, 25 ARK. L. REV. 9, 28-33 (1971); Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315 (1972); notes 76-101 *infra* and accompanying text.

50. This shift from forum state to forum country assumes that foreign countries tend to associate the acts of domestic courts with national attitudes and policies. Cf. 5 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW § 527 (1943) (international responsibility of federal government for acts of member states).

In general, then, as cooperation reinforces horizontal restraints, it increases the global consciousness of individual nations and thereby promotes interests of the most inclusive nature. The lack of deference for another nation's law inherent in an application of the public policy doctrine, however, threatens the ultimate realization of these inclusive interests, for this parochial gesture signals a concern with exclusive interests. As such, it counsels, if not retaliation in kind, at least great caution and reserve in dealing with the forum nation. And with the failure of conditions of trust requisite for international cooperation to obtain, movement toward a more stable and distributively just world order is postponed and perhaps retarded.⁵¹

2. *Exclusive Interests*

The extent to which a state court would be more or less persuaded by the threat to inclusive interests in the domestic-foreign and foreign-foreign cases respectively would be expected to vary according to the court's particular orientation. That is, to most courts the protection of local autonomy would probably be the greater concern, and they would therefore tend to apply the public policy doctrine more sparingly to sister states' laws than to those of foreign nations. More internationally minded judges would probably adopt the opposite tack. In estimating the sacrifice of exclusive interests—the other key factor in the equation—generally resulting from nonapplication of the doctrine to domestic-foreign and foreign-foreign law, however, both sets of judges should be in fundamental agreement. Exclusive interests will typically be endangered far less by deference in the intranational case. A basic difference in the power relationship between the forum state and foreign jurisdiction in the two types of cases is again the controlling factor. Thus, a central consideration in gauging the sacrifice of exclusive interests in intranational as opposed to international application of the doctrine is the presence of vertical restraints upon the forum and foreign states in the former, but not in the latter, situation.

⁵¹. On the possibility of federal constitutional constraints based on the center's foreign affairs power actuating application or nonapplication of the public policy doctrine to foreign-foreign law, see *Zschernig v. Miller*, 389 U.S. 429 (1968) (Oregon escheat statute conditioning rights of nonresident aliens to inherit personalty found to intrude impermissibly into federal government's exclusive competence in foreign affairs, despite latter's noncrystallization in treaty form); *Kolovrat v. Oregon*, 366 U.S. 187 (1961) (Oregon inheritance statute held unconstitutional as circumscribing rights of Yugoslav nationals as established by 1881 Treaty).

In the American federal system, federal constitutional and statutory law basically operate to guarantee a significant realm of consensus among the states. As the center polices state legislation for consistency with these nationwide norms—and each state's judiciary maintains a similar vigil over its own state's laws in accordance with the supremacy clause—the need for one state court to sit in judgment on another state's laws is greatly relaxed. Particularly in light of the strictures placed by the center on state laws infringing on the fundamental human freedoms,⁵² a presumption that sister state law is compatible with, or at least tolerably deviant from, forum policies would seem to be eminently reasonable.⁵³ This presumption, together with the potential injury to inclusive interests from application of the public policy doctrine in the intranational case, makes out a *prima facie* case against application.

With international cases, on the other hand, the possibility is far less remote that application of the foreign law may effectuate policies truly repugnant to the forum state's deep-seated principles of morality and justice. Although horizontal restraints are of indubitable consequence in the relations of nation-states, a cursory survey of deprivations suffered by native populations at the hands of authoritarian regimes should leave little question of the magnitude of the consensus-building task remaining to be done.⁵⁴ At least for the present, the international system is characterized by horizontal restraints demonstrably limited in effectiveness in maintaining compliance with the fundamental norms upon which individual freedom and respect depend, and by a pronounced lack of vertical restraints to supply this deficiency. Accordingly, American courts are forewarned against automatic application of foreign-foreign law.

52. Although the first ten amendments to the Constitution directly relate to the federal government alone, *Barron v. Mayor & City Council*, 32 U.S. (7 Pet.) 243 (1833), a number of the rights granted therein have been held to be incorporated in the fourteenth amendment's due process clause. *See, e.g., Duncan v. Louisiana*, 391 U.S. 145 (1968) (jury in criminal trial); *Malloy v. Hogan*, 378 U.S. 1 (1964) (privilege against self-incrimination); *Gitlow v. New York*, 268 U.S. 652 (1925) (freedom of expression). The fourteenth amendment's equal protection clause is, of course, a major independent source of protection.

53. *Cf. Goodrich, Foreign Facts, supra* note 6, at 35; *Goodrich, Public Policy, supra* note 34, at 170-71.

54. *See, e.g.,* 2 L. Sohn & T. Buergenthal, *International Protection of Human Rights*, March 1972, at 589-834 (unpublished monograph on file in Yale Law School Library) (human rights in Eastern Europe and South Africa).

In this regard, Goodrich notes the probability that courts would need to invoke the public policy doctrine with the least frequency against the laws of other English-speaking countries because of their basic "similarity in law and point of view" with the American model.⁵⁵ On the other hand, Goodrich may dichotomize too sharply when he maintains that a presumption of offensiveness to local public policy should obtain generally in the foreign-foreign law context.⁵⁶ One cannot afford to lose sight of the significant inclusive interests threatened by application of the doctrine to a foreign nation's law, and Goodrich's presumption would appear to ensure precisely such a myopic perspective. Neither can one afford, however, to make the opposite presumption because excessive caution in applying the doctrine may also prove detrimental to inclusive interests. The enforcement of truly reprehensible laws only serves to legitimize their authority and thereby reduce the possibilities for global consensus on standards for the distribution of social goods, consistent with human dignity. Again, such considerations would not seem relevant to the American state court's decision in the intranational case.

C. *The Bounds of Legitimate Diversity*

Attention to the prejudice to inclusive and exclusive interests arising from application or nonapplication of the public policy doctrine yields a general distinction between the doctrine's employment in the intranational and international public policy cases. Furthermore, I would make an additional distinction between laws regulating economic matters and those touching upon human rights. Diversity between forum policies and those of other nations or sister states in the former area should be respected as a general rule; diversity in the latter should be tolerated within far narrower bounds.⁵⁷ Thus, a state court should countenance, in the interest of interstate or international cooperation, foreign laws incorporating economic policies quite different from its own. It should not, however, enforce a foreign law which infringes fundamental individual freedoms and human dignity.

This distinction rests upon a preferential ordering of "personal" rights before "property" rights. As such, it finds its counterpart in

55. Goodrich, *supra* note 6, at 35.

56. *Id.*

57. Cf. Falk, *Jurisdiction, Immunities, and Act of State: Suggestions for a Modified Approach*, in *ESSAYS ON INTERNATIONAL JURISDICTION* 1, 2-3, 13-18 (1961).

a long line of Supreme Court decisions, most notably perhaps in *United States v. Carolene Products Co.*⁵⁸ But the validity of this priority rule does not rest on its status in the Supreme Court. The proposed rule is a policy recommendation, not an attempted synthesis of constitutional doctrine. Indeed, recent Supreme Court pronouncements would seem to render suspect any claims that it has constitutionalized this rule.

One such statement is especially worth noting because it helps establish the limitations of the suggested rule. In *Lynch v. Household Finance Corp.*,⁵⁹ Mr. Justice Stewart wrote for the majority that

the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.⁶⁰

My policy recommendation, therefore, is made with recognition of the often ill-defined boundary between personal and property rights. *Lynch* itself exemplifies the gray area. For at least according to Mrs. Lynch, the garnishment of her savings account by HFC threatened her, a \$69 per week wage earner, with such financial hardship as to render her unable to protect herself and her family from the personal degradation accompanying lack of food and shelter.⁶¹ As studies correlating depressed political activity with nutrition levels indicate,⁶² the promise of the cherished political freedoms is illusory without adequate protection of property rights.⁶³

This merging of economic matters and human rights in certain contexts, however, does not imply that the general distinction is not serviceable in the great majority of cases. It is with this caveat that the distinction is proposed as a guideline for triggering the application or nonapplication of the public policy doctrine to foreign laws.⁶⁴

D. *A Public Law Perspective*

Public international law provides in the act of state defense an in-

58. 304 U.S. 144, 152-53 & n.4 (1938).

59. 405 U.S. 538 (1972).

60. *Id.* at 552.

61. *Id.* at 539, 552 n.21.

62. See generally A. KEYS, *THE BIOLOGY OF HUMAN STARVATION* (1950).

63. See generally Reich, *The New Property*, 73 *YALE L.J.* 733 (1964).

64. Since justice need not be blind to specifics, a court may well want to consider the extent to which a predominantly property-oriented law would work a deprivation of basic liberties in the instant case.

structive analogy to the type of review recommended under the public policy doctrine. As formulated by the Supreme Court in 1897, act of state requires that "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."⁶⁵ As thus described, the act of state principle would appear to constitute a blanket prohibition on inquiry into the validity (under domestic, international, or even the foreign state's own standards) of the act of state. Although some early cases may be read to support such a construction,⁶⁶ the Court's 1964 decision in *Banco Nacional de Cuba v. Sabbatino*⁶⁷ plainly rejected it. In rendering its most comprehensive explanation to date of the act of state doctrine, the Court in *Sabbatino* established that act of state involves not blind deference to the foreign act, but rather a "balance of relevant considerations."⁶⁸ As the Court's rather indulgent and unrigorous inquiry into the lawfulness of the expropriation at issue in *Sabbatino* intimates, however, the Court would not affirm lower court decisions that the foreign act of state is invalid unless a very strong case could be made for its illegitimacy under international standards.⁶⁹

On the other hand, among the conditions elucidated by the Court as illustrative of those which a court might regard as significant in its "balance of relevant considerations" is one which would lead courts to lean in the direction of a finding of invalidity where noneconomic deprivations are involved. If the court finds that the act of state violates a standard of customary international law presently supported by consensus among states—a description satisfied virtually exclusively by norms regulating deprivations of human rights—the court will not enforce any claim or allow any defense resting on the legality of the governmental act.⁷⁰ Thus, an act of state's consistency with socialist rather

65. *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

66. *See, e.g., American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

67. 376 U.S. 398 (1964).

68. *Id.* at 428.

69. Pursuant to its "balance of relevant considerations," the Court undertook to inquire into the Cuban government's violation of a customary norm of international law supported by a present consensus among nation-states. In canvassing international opinion on norms of possible applicability, the Court only discussed shared expectations regarding "foreign expropriations." *Id.* at 430. The Cuban government's taking, however, raised the more precise issue of the extent of international agreement in opposition to discriminatory (on the basis of nationality) and confiscatory expropriations. The Court skirted this harder question and instead rested its decision on the lack of consensus on the more general issue. *Id.* at 436-37. *See Falk, The Complexity of Sabbatino*, 58 AM. J. INT'L L. 935, 944 (1964).

70. 376 U.S. at 428 (dictum); *see Falk, supra* note 69, at 939.

than capitalist norms should be no objection to its validity, for neither set of norms can lay claim to international consensus in this age of rapidly changing ideological loyalties. But invidiously discriminatory acts would not be shielded from judicial declarations of invalidity by their governmental origin.⁷¹ Accordingly, the distasteful and consensus-debilitating spectacle of an American court rewarding acts of racial or religious discrimination can no longer be staged—if, indeed, it ever legitimately could—under the guise of act of state. The moral bankruptcy of the infamous *Bernstein v. Van Heyghen Freres Societe Anonyme*,⁷² in which the Second Circuit considered itself bound to accept the validity of a Nazi confiscation of a Jew's property, would thus hopefully be relegated to historical curiosity.

The balance struck in the act of state cases between respect for the foreign act and the claims for its invalidation⁷³ provides a general model for the suggested application of the public policy doctrine.⁷⁴ Invo-

71. Acts performed by private persons under compulsion of law, which qualify for the act of state umbrella, should thus be afforded no greater immunity. On the compulsion doctrine, see Fortenberry, *Jurisdiction over Extraterritorial Antitrust Violations—Paths Through the Great Grimpen Mire*, 32 OHIO ST. L.J. 519, 534-38 (1971); Maw, *United States Antitrust Law Abroad—The Enduring Problem of Extraterritoriality*, 40 ANTITRUST L.J. 796, 803-04 (1971). See also *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707 (1962); *Interamerican Ref. Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1297 (D. Del. 1970); *Holzer v. Deutsche Reichsbahn-Gesellschaft*, 277 N.Y. 474, 479, 14 N.E.2d 798, 800 (1938). *Holzer* exemplifies precisely the type of case against which the human rights analysis in the accompanying text is directed.

72. 163 F.2d 246 (2d Cir.), cert. denied, 332 U.S. 772 (1947). The second *Bernstein* case, which went the other way only after a state department letter (20 DEP'T STATE BULL. 592 (1949)) to Bernstein's attorneys indicating the executive's wish that the judiciary disregard act of state considerations in cases of Nazi expropriations, sheds no less discredit on the unreflectingly "neutral-principled" judiciary. See *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954), modifying 173 F.2d 71 (2d Cir. 1949).

73. The Court in *Sabbatino* did not cast the act of state balance in terms of deference to the foreign state. Rather, the perspective informing its treatment of act of state was intranational: concern that the judiciary accord appropriate deference to the Constitution's broad allocation of powers to the executive branch in international affairs. The functional significance of its formulation of the doctrine, however, also comports with a perspective of foreign deference, for the considerations which the Court elucidated for the judicial balance serve to isolate those occasions on which nondeference to the foreign act of state would most effectively promote global interests. See generally Falk, *supra* note 69.

74. Ten years after *Sabbatino* was handed down, it remains the authoritative statement on act of state. First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972), involved the "Bernstein exception" to the act of state doctrine—i.e. the rule,

cation of the doctrine in the *intranational* case would thus be an extremely rare, if not nonexistent, phenomenon. Given the basic agreement in human rights policies between the involved states, the considerations counseling nonrecourse to the public policy doctrine would be expected to prevail. In the *international* case, however, the reasons against invoking the doctrine would give rise to no such presumption against invocation because of the much more substantial possibility of foreign/forum state differences about matters of human rights.

E. *Justice to the Individual*

Since the approach to the public policy doctrine set forth in this Article attempts to describe a balance of interests, the impact of applying the doctrine to a particular plaintiff or defendant should be relevant to the court's decision in the instant case. Accordingly, if the application would leave the adversely affected party with an alternative forum, it would obviously be less objectionable than if it would not. First of all, as to defendants deprived of a defense, this mitigating circumstance will necessarily not obtain because the plaintiff can pursue his claim to a judgment on the merits. Secondly, unless courts are willing to take on the task of inquiring into the *factual* availability of alternative fora for plaintiffs, one can never be certain whether making the dismissal formally without prejudice is any fairer, and hence less objectionable, than dismissal with prejudice. Finally, it bears repeating that regardless of its solicitude for an individual's plight, a court has, in applying the doctrine, nonetheless declared foreign law to be anathema to local public policy and has thereby triggered all the adverse effects which such a pronouncement may incur. In terms of the weight to be assigned to this individual fairness factor in the judicial balance, I would make an assignment consistent with Goodrich's

stemming from the 1949 *Bernstein* case, that a court will follow an executive directive not to apply the doctrine to immunize a foreign act of state. By a 6-3 vote, the Court refused to engraft the exception onto the *Sabbatino* formulation of the act of state principle. And although the Court held 5-4 that *Sabbatino* did not control the instant case, only Justice Powell's concurrence questioned the validity of *Sabbatino*.

Nor did the "Sabbatino Amendment," 22 U.S.C. § 2370(e)(2) (1970), effect significant inroads into the 1964 decision. Though enacted to "reverse" the Court's decision, see generally Henkin, *Act of State Today: Recollections in Tranquility*, 6 COLUM. J. TRANSNAT'L L. 175 (1967), the statute has been rendered inconsequential by a hostile judiciary. See, e.g., *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92, 112 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972).

observation that while the dismissal without prejudice may recommend itself over that with prejudice, the former is "bad enough."⁷⁵ Although this consideration may sway a court in a close case, its role should be no greater than that.

III. THE CONSTITUTIONAL BACKDROP

The preceding analysis of the public policy doctrine addresses the "ought" rather than the "must" of the problem. It *invites* courts to broaden their scope of inquiry to comport with the actual social consequences of their decision. A very different tack would have been to argue that the Constitution *requires* abandonment of the doctrine in whole or substantial part. In this section, I shall review briefly the major constitutional objections which may be made to the doctrine. The emphasis will be on the limitations in constitutional theory which make the appeal to enlightened self-interest undertaken in this Article a far more promising approach.

A. *Full Faith and Credit*

The full faith and credit clause is the Constitution's most explicit statement regarding the effect to be given sister states' laws in local courts.⁷⁶ On the basis of the Supreme Court's affirmation of "the strong unifying principle embodied in the Full Faith and Credit Clause looking toward *maximum* enforcement in each state of the obligations or rights created or recognized by the statutes of sister states,"⁷⁷ one might well assume that this obvious candidate for attacking the public policy doctrine constitutes a potent weapon indeed. But despite the clause's mandatory direction and sweeping Supreme Court pronouncements like the above, the case law on the deference constitutionally required toward foreign laws reveals no more than peripheral control vested in the federal judiciary over local use of the public policy doctrine. In terms of the interest analysis approach to choice of law—a mode employed by the Court with reasonable consistency⁷⁸—full faith and credit is satisfied so long as "the state whose law is applied has a legitimate interest in its application."⁷⁹ As Paulsen and Sovern

75. Goodrich, *supra* note 6, at 31.

76. U.S. CONST. art. IV, § 1.

77. *Hughes v. Fetter*, 341 U.S. 609, 612 (1951) (emphasis added).

78. *See, e.g.*, *Carroll v. Lanza*, 349 U.S. 408 (1955); *Griffin v. McCoach*, 313 U.S. 498 (1941); *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532 (1935).

79. CURRIE 237. A notable exception to this general proposition is the Court's insistence on the use of the law of the state of incorporation in adjudicating the rights of

indicate, it will be exceedingly rare to find a court substituting forum law for foreign law in the absence of a more than minimal forum state interest.⁸⁰

Furthermore, since the public policy doctrine rests in part on the state's interest in protecting its judicial processes from corruption,⁸¹ this latter interest in nonapplication of foreign law would presumably support any dismissal without prejudice on public policy grounds.⁸² That this purity-of-process interest alone would also validate a decision on the merits applying forum law is less persuasive. But even assuming that it would not, full faith and credit makes a rather insubstantial dent in the doctrine's armor.

B. *Due Process*

Unlike the full faith and credit clause, the due process clause of the fourteenth amendment is not limited in its reach to domestic-foreign laws. Thus, if the only law reasonably applicable in the instant case is that of country *X* and a state court applies its own state's law (or perhaps state *Y*'s or country *Z*'s), the adversely affected party has been denied due process of law and can look to the Federal Constitution for a remedy.⁸³ In other respects the due process prohibition on arbitrariness offers perhaps somewhat less, but plainly no more,⁸⁴ am-

a member of a fraternal benefit society. *See* *Order of United Commercial Travelers v. Wolfe*, 331 U.S. 586 (1947); *Modern Woodmen of America v. Mixer*, 267 U.S. 544 (1925); *Royal Arcanum v. Green*, 237 U.S. 531 (1915).

80. Paulsen & Sovern 972, 980-81. As I indicated earlier, I do not quarrel with Paulsen and Sovern's findings about the presence of significant contacts. Rather, I differ with their readiness to conclude from the presence of contacts in a given public policy case that those contacts, and not considerations of local public policy, virtually always explain the result. *See* text following note 23 *supra*.

81. *Cf.* CURRIE 90.

82. But, again, unless courts attempt to inquire into prejudice in fact—an unlikely allocation of judicial resources—dismissals without prejudice will often achieve the same effects as dismissals with. And a dismissal without prejudice by a court in state *A* may simply be construed as one with prejudice by a court in state *B*. *See* *Pearson v. Northeast Airlines, Inc.*, 309 F.2d 553, 562 n.17 (2d Cir. 1962); Paulsen & Sovern 1012. Illustrative of the rare case constitutionally infirm for lack of a sufficient forum state nexus may be *Fox v. Postal Telegraph-Cable Co.*, 138 Wis. 648, 120 N.W. 399 (1909), in which the court disallowed a defense for reasons of local public policy, despite basically nonexistent forum state contacts with the transaction. *See* note 20 *supra*.

83. CURRIE 195-97; *cf.* *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930); *New York Life Ins. Co. v. Head*, 234 U.S. 149 (1914). *See also* R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 379-95 (1971).

84. *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 154-55 (1932), does indicate a difference in the strengths of the due process and full faith and credit clauses in the

munition than the full faith and credit clause in the conflict-of-laws area, particularly with regard to the public policy doctrine.

C. *Equal Protection*

Another line of attack, one principally championed and explored by Currie,⁸⁵ proceeds from the equal protection clause. In general, if the classification effected by application of the public policy doctrine lacks a plausible relation to the achievement of some discernible state policy, the equal protection clause would require that the doctrine not be applied.⁸⁶ Under exceptional circumstances, moreover, the doctrine would have to measure up to a stiffer standard. If the application would deprive someone of a "fundamental interest," the state policy served by application would have to be a compelling one.⁸⁷ And if the application somehow would carve out a "suspect classification," the relation between the classification effected and the informing goal must be not simply plausible, but virtually perfect.⁸⁸ These tests are formidable, but whether they come into play outside the realm of theoretical possibility as far as the public policy doctrine is concerned seems dubious. Thus, as a demand in this context for almost certainly no more than rational classification, the equal protection clause comprises but yet another brake on state court decisions verging on the aberrational.⁸⁹

choice-of-law area, suggesting that the latter is greater. The demise of *Clapper* and this distinction, however, has been persuasively argued. Currie, for example, not content simply to trace the Court's disinheritance of *Clapper*, proceeds to fit *Clapper* on its facts into the mainstream of later decisions. CURRIE 205-14. On the equality of the two tests, see *id.* at 195, 271-72; Paulsen & Sovorn 1015.

85. See CURRIE 526-83.

86. See, e.g., *McGowan v. Maryland*, 366 U.S. 420 (1961); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Railway Express Agency v. New York*, 336 U.S. 106 (1949).

87. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966); *Griffin v. Illinois*, 351 U.S. 12 (1956).

88. See, e.g., *Graham v. Richardson*, 403 U.S. 365 (1971); *Johnson v. Virginia*, 373 U.S. 61 (1963); *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Korematsu v. United States*, 323 U.S. 214 (1944). For further discussion of the proposition that the focus in this group of cases is the relative perfection of the classification rather than a compelling state interest, see Note, *Mental Illness: A Suspect Classification?*, 83 YALE L.J. 1237 (1974).

89. The implications of the Court's new sliding-scale equal protection standard, see Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972), for the public policy doctrine are not clear. But since the Court only appears to be applying this median standard to interests or classifications at least verging on, if

D. *Regulation of Commerce*

The commerce clause⁹⁰ has, on a few occasions, been used by the Court to prohibit state activity not precluded by congressional legislation but deemed by the Court to be in violation of the clause as unduly burdensome to interstate commerce.⁹¹ In line with this assumption of competence by the judiciary, one might argue that the Court should abolish or sharply delimit the public policy doctrine as a source of insecurity in interstate and international transactions. But to single out the public policy doctrine for this harsh treatment, from the morass of diverse and uncertainty-producing rules in the choice-of-law area, would be a feat of extraordinary myopia. Assuming that the Court would take a more intellectually defensible position, it would have to choose between (1) expounding and, almost necessarily, policing a set of choice-of-law rules or an authoritative general standard (such as a balancing of interests) to be employed by every state court, and (2) staying out of the matter altogether. There should be little question that a Court less than elated with its present caseload would opt for the latter. This scenario, furthermore, presupposes an initial readiness on the Court's part to extend dramatically the existing authority under the case law for federal judicial competence based on the commerce clause. A successful attack on the public policy doctrine via the commerce clause thus seems twice removed from the realm of possibility.

E. *Federalism*

A more freewheeling type of constitutional challenge might eschew reliance on any one constitutional provision. Rather than seeking to fit the public policy doctrine under one textually-based constitutional limitation or another, proponents of this view would argue that the doctrine is inconsistent with the structure of the federal union established by the Constitution. Aside from general philosophical notions of federalism,⁹² they could point to various provisions in the Consti-

not actually possessing, fundamental or suspect stature, *see, e.g.*, *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Reed v. Reed*, 404 U.S. 71 (1971), I assume that consideration of the new standard would not change my estimate in the accompanying text of the equal protection clause's constraints on employment of the public policy doctrine.

90. U.S. CONST. art I, § 8, cl. 3.

91. *See, e.g.*, *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960); *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945); *cf. Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 209 (1824) (dictum).

92. On the need for cooperation among the units of a federal system, *see E. McWHINNEY, COMPARATIVE FEDERALISM 19-20, 78-89 (1962).*

tution which, taken together, indicate the framers' intent that the center act to minimize causes for friction among the member states. The allocations of power made to the center by the full faith and credit, privileges and immunities,⁹³ commerce, guaranty,⁹⁴ and compact⁹⁵ clauses, as well as by the article III grant of jurisdiction to the federal judiciary over controversies between states, could be marshalled to support the claim. These provisions may be said to demonstrate an intent that the center guard against divisive tendencies inimical to both the stability of the whole and the possibilities for mutually beneficial interactions among the parts. Approaching the compact clause from this perspective, for example, one would find in capsule form the delicate equilibrium of the federal plan. On the one hand, the requirement of congressional approval for compacts between two states (or between a state and foreign country) evinces a concern—quite understandable in light of the then recent Confederation experience—that cliques of states (or state-foreign power alliances) might threaten the center's position of dominance. On the other hand, the clause does affirm that such agreements have a place in the federal structure.⁹⁶

The argument against the constitutionality of the public policy doctrine would thus be that, as a parochializing force, the doctrine is inconsistent with the basic design of the federal system. By destabilizing and militating against the formation of interstate agreements, the doctrine invites assumptions of power by the center which aggravate the existing disparity in power between the center and the states.

When Mr. Justice Jackson wrote of the full faith and credit clause that [i]t was placed foremost among those measures which would guard the new political and economic union against the disintegrating influence of provincialism in jurisprudence, but without aggrandizement of federal power at the expense of the states⁹⁷

he came as close as any commentator (or court) to advocating this structural line of constitutional attack in the conflict-of-laws area. And although many may find this mode of comprehensive constitutional interpretation attractive, one need not wonder at the dearth of comment supporting or exploring Justice Jackson's suggestion. As the leading

93. U.S. CONST. art. IV, § 2, c1. 1.

94. U.S. CONST. art. IV, § 4.

95. U.S. CONST. art. I, § 10.

96. See generally Reisman & Simson, *supra* note 28, at 84 n.53.

97. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 17 (1945) (footnote omitted).

proponent of the structural method has observed,⁹⁸ courts are simply not accustomed to thinking in such terms. Concomitantly, neither are courts' would-be persuaders, the commentators, accustomed to writing in such terms. Accordingly, the federalism argument against the doctrine, though cogent when cast in a policy mold, is virtually certain to receive short shrift as a constitutional objection.

IV. THE RETREAT FROM PAROCHIALISM

The likelihood that the federal judiciary will be the agent of serious inroads into the public policy doctrine is slight. The constitutional restraints on the doctrine are, at their current stage of development, peripheral indeed. But congressional competence to circumscribe the doctrine is a very different matter. Congress' article IV power to implement the full faith and credit clause by appropriate legislation would almost certainly be equal to the task. The seemingly infinitely expandable commerce clause⁹⁹ and perhaps the fourteenth amendment's enforcement provision¹⁰⁰ would also be available to supply any deficiency in Congress' article IV powers. The real question is not one of congressional competence to prescribe, but rather one of congressional inclination. In the latter regard, Congress appears to be determined to avoid such snarled matters as choice of law, its mystifying swipe at the conflicts area in 1948 notwithstanding.¹⁰¹

If the retreat from parochialism is to begin, the state courts themselves must be the ones to initiate it. As a veritable institution in choice of law, moreover, the public policy doctrine will undoubtedly not give way easily. But if courts ponder and articulate for other courts the inclusive interests at stake when local public policy is invoked to render foreign law inapplicable, this doctrine should before long begin to assume its appropriate and narrowly confined place.

98. See C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 11 (1969).

99. See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (Civil Rights Act of 1964); *Wickard v. Filburn*, 317 U.S. 111 (1942) (Agricultural Adjustment Act of 1938).

100. U.S. CONST. amend. XIV, § 5; see, e.g., *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

101. Act of June 25, 1948, ch. 646, 62 Stat. 947 (codified at 28 U.S.C. § 1738 (1970)). On Congress' amendment of the full-faith enabling legislation to include statutes, see CURRIE 200-01; Reese, *Full Faith and Credit to Statutes: The Defense of Public Policy*, 19 U. CHI. L. REV. 339, 343 (1952).

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