



1973

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## Recommended Citation

Leathers, John R. (1973) "Dimensions of the Constitutional Obligation to Provide a Forum," *Kentucky Law Journal*: Vol. 62 : Iss. 1 , Article 3.

Available at: <https://uknowledge.uky.edu/klj/vol62/iss1/3>

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# Dimensions of the Constitutional Obligation to Provide A Forum

BY JOHN R. LEATHERS\*

## AN OVERVIEW OF THE OBLIGATION

In the more than twenty years since the United States Supreme Court held in *Hughes v. Fetter*<sup>1</sup> that Wisconsin was obligated to provide a forum to hear an action based on the wrongful death statute of Illinois, the Court has done little to clarify the far-reaching implications of this case. This paper will attempt to interpret these implications in regard to the well-known choice of law concepts of the public policy veto, the refusal of a state to provide a forum for suits based on the penal statutes of other states, and the doctrine of *forum non conveniens*. The chief concern is the interaction of the constitutional obligation to provide a forum with the application of these three doctrines, each of which may in some circumstances allow a state to refuse to serve as a forum. The contention of this paper is that the boundaries of these three doctrines are constitutionally determined and that it is possible to predict the present dimensions of these boundaries.

*Hughes v. Fetter* involved a suit under the Illinois wrongful death statute.<sup>2</sup> The suit was brought in the state courts of Wisconsin, the domicile of the decedent, Harold Hughes, who had been killed in an auto crash in Illinois while a passenger in an auto driven by Fetter, also a domiciliary of Wisconsin. The Fetter auto was insured by a Wisconsin insurer, which was joined in the wrongful death action as a defendant.<sup>3</sup> The Wisconsin trial court had disposed of the case on a summary judgment

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<sup>1</sup> 341 U.S. 609 (1951).

<sup>2</sup> ILL. REV. STAT. ch. 70 §§ 1 & 2 (1971).

<sup>3</sup> *Hughes v. Fetter*, 42 N.W.2d 452, 453 (Wis. 1950).

motion by the defendants, and this decision was affirmed by the Supreme Court of Wisconsin<sup>4</sup> because of the unusual construction placed on the *Wisconsin* wrongful death statute by the Wisconsin Supreme Court. Having noted that the Wisconsin wrongful death statute could only apply to wrongful deaths which had occurred in Wisconsin, the Wisconsin Supreme Court concluded that this was indicative of a legislative policy against allowing the state courts of Wisconsin to hear suits for wrongful deaths occurring outside Wisconsin, even if the basis of such suits was not the wrongful death statute of Wisconsin but the wrongful death provisions of a sister state. Therefore, the Wisconsin Supreme Court held that it was contrary to the public policy of Wisconsin for a state court to entertain a suit under the Illinois wrongful death statute for a death which had occurred in Illinois.<sup>5</sup> In reaching this conclusion, the Wisconsin court ruled that their construction and application of the Wisconsin wrongful death statute did not violate the full faith and credit clause of the United States Constitution.<sup>6</sup>

In a short opinion by Mr. Justice Black, the Supreme Court in *Hughes* held that the refusal of Wisconsin to provide a forum for this action was violative of the full faith and credit provisions of the federal Constitution.<sup>7</sup> The Court reached this conclusion on the grounds that in reality Wisconsin had no public policy against actions for wrongful death,<sup>8</sup> as indeed they could not since they had a wrongful death statute of their own. The Court was quite careful in its holding to specify that it was merely requiring that Wisconsin provide a forum for the hearing of this wrongful death action and not holding thereby that Wisconsin was, after opening its doors to this suit, obligated to apply the Illinois wrongful death statute rather than its own.<sup>9</sup> Restricting the holding to the issue of access rather than to the issue of choice of law is one which will later be examined at length.

One year after the decision in *Hughes*, the policy against

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<sup>4</sup> *Id.* at 456.

<sup>5</sup> *Id.* at 455.

<sup>6</sup> *Id.* at 453. The United States Constitution provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. U.S. Consr. art. IV, § 1.

<sup>7</sup> 341 U.S. at 612, 613.

<sup>8</sup> *Id.* at 612.

<sup>9</sup> *Id.* at 612 n.10.

entertaining wrongful death suits for deaths occurring outside the state was once again faced by the Court in *First National Bank of Chicago v. United Air Lines, Inc.*,<sup>10</sup> a case which first arose in the Federal District Court for the Northern District of Illinois. Suit had been brought in federal court under the wrongful death statute of Utah<sup>11</sup> to recover for the death of an Illinois domiciliary in an airplane crash in Utah. The Seventh Circuit affirmed a summary judgment in favor of the defendant<sup>12</sup> on the basis of the Illinois wrongful death statute which provided that:

... [N]o action shall be brought or prosecuted in this State to recover for damages for a death occurring outside this State where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had on the defendant in such place.<sup>13</sup>

The Seventh Circuit distinguished this fact situation from *Hughes v. Fetter* on the grounds that whereas Justice Black had noted in *Hughes* that failure of Wisconsin to entertain the suit might result in the loss of a remedy, there was no such danger in *First National* since the Illinois statute explicitly allowed suit in Illinois if such suit were not possible elsewhere.<sup>14</sup>

The Supreme Court did not find this distinction to be material. In a very short opinion by Mr. Justice Black, it was held that the federal district court sitting in Illinois was obligated by full faith and credit to hear the case.<sup>15</sup> The case is of significance since the facts are such (death occurring in Utah without any strong human connection with Illinois and Utah being the most probable location of any witnesses) that the case would be one suitable for transfer from the federal district court in Illinois to a federal district court in Utah.<sup>16</sup> Accordingly, *First National* may

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<sup>10</sup> 342 U.S. 396 (1952).

<sup>11</sup> UTAH CODE ANN. § 78-11-7 (1953).

<sup>12</sup> *First Nat'l Bank of Chicago v. United Air Lines, Inc.*, 190 F.2d 493 (7th Cir. 1951), *cert. denied*, 342 U.S. 903 (1951), *cert. granted*, 342 U.S. 875 (1951).

<sup>13</sup> ILL. LAWS 916, § 1 [1935]. This restriction was deleted when this section was amended in 1963, ILL. LAWS 3248, § 1 [1963], *codified* at ILL. REV. STAT. ch. 70, § 2 (Supp. 1973).

<sup>14</sup> 190 F.2d at 494-95.

<sup>15</sup> 342 U.S. at 398.

<sup>16</sup> Transfer from one federal forum to another is available: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a) (1970).

be interpreted to mean that there is a *constitutional* obligation to provide a forum even where the forum provided may eventually be forsaken in favor of another.

A third case involved with the problem of the obligation to provide a forum pre-dates both *Hughes* and *First National*. In *Broderick v. Rosner*,<sup>17</sup> the Supreme Court held that full faith and credit obliged the state courts of New Jersey to entertain a suit against New Jersey residents who held stock in a New York bank.<sup>18</sup> The suit was brought to collect the full obligations of the New Jersey residents to the New York bank, as provided by New York statute.<sup>19</sup> The opinion by Mr. Justice Brandeis held that New Jersey was obligated to entertain the suit despite the fact that such suit might be contrary to the public policy of New Jersey.<sup>20</sup> Although *Broderick* might be distinguished from both *Hughes* and *First National* on the grounds that the obligation sought to be enforced in *Broderick* was contractual rather than tortious, this does not seem to be a material distinction.

Considering the Supreme Court decisions in *Hughes*, *First National*, and *Broderick*, it would seem that the Court has, within this narrow range of circumstances, held that the full faith and credit clause *obligates* states to provide a forum. However, even this seemingly clear conclusion is not free from question. A compelling argument has been made for the conclusion that the constitutional provision which required service as a forum in each of these three instances was the equal protection clause of the federal Constitution rather than the full faith and credit provision.<sup>21</sup> This position is of course directly opposed to the clear language of the Court in each of these cases. The proponent of the position, Brainerd Currie, felt that the result (*i.e.*, reversal of state court for refusal to provide a forum) would have been the same in *Hughes* had the decedent been killed in Canada rather than Illinois, and that this fact negated the possibility of

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<sup>17</sup> 294 U.S. 629 (1935).

<sup>18</sup> *Id.* at 647.

<sup>19</sup> N.Y. BANKING LAW § 113-a (McKinney 1971)

<sup>20</sup> 294 U.S. at 644.

<sup>21</sup> Currie, *The Constitution and the "Transitory" Cause of Action*, 73 HARV. L. REV. 36, 62-66 (1959). The United States Constitution provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV, § 1 (emphasis added).

the decision being based on full faith and credit. This is so because full faith and credit applies only to sister states and if the same result would follow in a case involving a foreign country, the source of the requirement must instead be equal protection.<sup>22</sup>

Substantial support for the equal protection argument seems to come from *Wells v. Simonds Abrasive Co.*,<sup>23</sup> in which the Supreme Court stated that the basis of the holdings in both *Hughes* and *First National* was discrimination,<sup>24</sup> but this is difficult to accept in the face of the language of the Court in *Hughes* explicitly indicating that full faith and credit was the basis of the holding. Of course, the statement in *Wells* does not preclude the possibility that the basis of the holding in both these cases was full faith and credit. One might conclude that when a state discriminates against the statutes of a sister state there is a full faith and credit problem. Currie asserted in his equal protection argument that "[o]ne does not discriminate against causes of action, but against people."<sup>25</sup> The fact that in the last analysis all discrimination affects persons does not mean that primary discrimination against statutes is permissible, especially in a federal union with a unifying principle such as full faith and credit. If the existing discrimination is against the statute of a sister state, the principle governing the area is full faith and credit. The position of full faith and credit manifested in *Hughes*, *First National*, and *Broderick* is not to be ignored just because the underlying basis of each case was discrimination. This is not in any way to question Currie's assumption that *Hughes* would have reached the same result had the accident occurred in Canada; in such instance the obligation to provide a forum would have come from equal protection. It is simply to say that this fact does not alter the conclusion that the basis of *Hughes* and the other cases was full faith and credit. One would not say that the basis of the holding in *John Hancock Mutual Life Insurance Co. v. Yates*<sup>26</sup> was not the full faith and credit clause (as the Supreme

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<sup>22</sup> Currie, *supra* note 21, at 62-66.

<sup>23</sup> 345 U.S. 514 (1953).

<sup>24</sup> *Id.* at 518-19.

<sup>25</sup> Currie, *supra* note 21, at 63.

<sup>26</sup> 299 U.S. 178 (1936).

*John Hancock* involved a suit on a life insurance policy which had been issued in New York to a New York domiciliary. At the time of the application for the policy in New York, the applicant had represented that he had not recently been

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Court clearly indicated that it was) simply because in a case similar on material facts the basis of a similar holding was said to be due process.<sup>27</sup>

While the exact constitutional provision giving rise to the obligation to provide a forum is quite important from a scholarly point of view, it is not necessary to know the exact source of the obligation in order to achieve the goal of this paper. It is enough to conclude that there exists in certain fact situations a constitutional obligation to provide a forum. The intent here is to map the limits of this obligation in relation to the concepts of public policy, penal statute enforcement, and *forum non conveniens*. An examination of the exceptions to this obligation should give a clearer picture of the dimensions of the obligation itself.

### THE BAR OF PUBLIC POLICY

Since the basis of the refusal of the various states in *Hughes*, *First National*, and *Broderick* was that access was against the

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under medical care. In fact the applicant was at that time being treated for cancer. This misrepresentation was a complete defense to a suit under the policy according to New York law. The insured died, and his widow moved to Georgia and there brought suit on the policy. The widow recovered under the Georgia rule that such misrepresentation would not defeat recovery if the agent soliciting the policy had knowledge of the misrepresentation. The question of misrepresentation had been determined by the jury in Georgia under the theory that this was a matter of procedure to be governed by the law of the forum. The Supreme Court reversed the decision due to a total lack of material contacts with the forum, finding such application of Georgia law to be violative of full faith and credit. The case indicates that an attempt to label a matter of substance as procedural will not save it from review if the state lacks sufficient contacts to justify application of its substantive law.

<sup>27</sup> *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930).

This case involved a lawsuit arising from the loss in Mexican waters of a boat insured by a Mexican insurance company. The insurer had reinsured the loss with two New York insurance companies. The original policy had been issued to a man named Bonner, who had assigned the policy to Dick. In addition to having been issued in Mexico, the policy provided that coverage only existed while the boat was in Mexican waters, that losses would be payable in Mexican currency, and the policy was to be subject to Mexican law. The policy contained a one year limitation on the bringing of actions for loss, a provision which was valid under Mexican law. The boat was lost and the assignee, Dick, brought suit more than one year after the loss in the state courts of Texas, which was his domicile. Texas invalidated the one year limitation on the basis of a statute forbidding a limitation of less than two years, and the case went to the United States Supreme Court on appeal, where it was held that Texas lacked sufficient contacts with the case to apply its statutory provision and that its having done so was violative of due process.

Both *Home Insurance* and *John Hancock* stand for the premise that a state forum which lacks sufficient contacts cannot constitutionally apply its own substantive law. This constitutional control comes from due process in the case involving a foreign country (*Home Insurance*) and from full faith in the case involving a sister state (*John Hancock*).

public policy of the forum, this concept of public policy as a bar to access will be examined first. It was a principle of conflicts law long before codification in the *Restatement (First) of Conflicts* that "[n]o action can be maintained upon a cause of action created in another state the enforcement of which is contrary to the public policy of the forum."<sup>28</sup> The same basic idea has been incorporated in the *Restatement (Second) of Conflicts* provision.<sup>29</sup>

It is necessary at this point to recall the implicit distinction in *Hughes* between the public policy veto as a choice of law rule and as a bar of access to a court. Under vested rights<sup>30</sup> the use of public policy as a choice of law rule was an absolutely necessary device which gave the system a flexibility without which it could not have functioned. As a choice of law rule the public policy veto has no place in an interest analysis system<sup>31</sup> since such

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<sup>28</sup> RESTATEMENT (FIRST) OF CONFLICTS OF LAWS § 612 (1934).

<sup>29</sup> The *Restatement (Second)* provides that "[n]o action will be entertained on a foreign cause of action the enforcement of which is contrary to the strong public policy of the forum." RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 90 (1969).

<sup>30</sup> Vested rights is that choice of law system espoused by Professor Beale, who was the reporter for the *Restatement (First) of Conflicts*. At the heart of the system is the concept of legislative jurisdiction. The basic idea is that at the moment a thing occurs, the rights surrounding it are vested and cannot thereafter be altered. Therefore, in an auto accident in State X, the rights of all the parties are vested under the law of X. Since the accident occurred within the physical boundaries of X, no other state law can determine the rights and liabilities of the parties. It is then the duty of whatever forum called upon to hear a suit involving the accident to apply the law of X to the case. It is said that this system is capable of uniformity and certainty due to this concept of attachment of rights and widespread enforceability thereafter. However, the system is subject to manipulation since the forum is required only to enforce the substantive rules of the state where the rights vested and may apply its own procedural rules. Furthermore, the forum is not required to enforce foreign rules which are contrary to its own public policy. Since the point of vesting will vary according to the type of case involved, the forum can manipulate the result by its characterization of the case, for example, denominating it as a contract case (or, for that matter, putting it into any one of numerous legal pigeon holes) rather than a tort problem.

<sup>31</sup> Interest analysis is a very broad description of the choice of law theories which have sprung up as alternatives to the rigid vested rights system. The approach of scholars has varied to such a degree that no brief summary of the area is possible. The outstanding works of the late Brainerd Currie have immense effects on all who work in this area. See generally B. CURRIE, *SELECTED ESSAYS ON THE CONFLICTS OF LAW* (1963). The work of Robert Leflar, see generally R. LEFLAR, *AMERICAN CONFLICTS LAW* (1968), seems to be finding a good deal of favor in recent court decisions. Though the various scholars may have differing methods of dealing with the choice of law process, they share a common factor which gives rise to the term "interest analysis." The basic idea is that before one can make a choice of law, it is necessary to analyze the policies which underlie the rules in question. In the case of two competing rules, it is often possible to see that the policy behind one rule will not be furthered by its application to the facts at hand. Obviously, in this simple situation, the rule whose policies will be furthered is the correct one to apply. The situation is a bit more difficult when both rules have relevant policies but one clearly outweighs the other, and of course, is most difficult when both rules have strong



system has by definition taken into consideration the public policy of the forum in reaching a decision to apply the law of a particular jurisdiction to a particular issue. In a situation in which a suit with contacts only in State *X* is brought in State *Y*, State *Y* would not choose to apply its own law under the interest analysis, and it would probably be forbidden by due process to decide otherwise. In this situation State *Y* might be able to avoid provision of a forum on the basis of *forum non conveniens*, but if the full faith and credit commands are to have optimum effect, State *Y* should not be able to avoid this responsibility on the basis of public policy. In the more common situation where there are sufficient contacts for State *Y* to apply either its own law or that of State *X*, if State *Y* decides that the law of State *X* is properly applicable, it should not be able to avoid that choice on the basis of public policy. To allow a public policy veto after an interest analysis choice, as was done in vested rights, would simply mean that the choice itself had been incorrect.

In contrast to use as a choice of law principle, however, the public policy veto may be used to deny access to a forum. As previously noted, the concept has no place in a modern choice of law system and, as correctly noted in the *Restatement (Second) of Conflicts*, it should not even be used in a vested rights jurisdiction to strike a defense based on foreign law once the decision to entertain a suit based on foreign law has been made.<sup>32</sup> The only remaining use, at least as limited herein and contemplated by the *Restatement (Second)*,<sup>33</sup> is that of a tool for denial of access to a forum. Even this very narrow use seems to be at odds with the prior position taken on the issue by the *Restatement (Second)* Reporter, Professor Willis Reese of Columbia Law School. Shortly after the decision in *Hughes v. Fetter*, Professor Reese argued for a hard and fast rule of access regardless of the public policy of the forum.<sup>34</sup> Whether this dichotomy between Reese in his

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policies and application of either rule will do violence to the policies of the other. It is in these more difficult situations that the scholarly camps of interest analysis differ in their handling of the choice of law. The variations are significant, but it is also important to note that all share the common ground of policy consideration prior to the making of a choice.

<sup>32</sup> RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 90, Comment *a* (1969).

<sup>33</sup> *Id.* at Comment *c*.

<sup>34</sup> Reese, *Full Faith and Credit to Statutes: The Defense of Public Policy*, 19 U. CHI. L. REV. 339 (1952).

early writings and the *Restatement (Second)* is a result of a change in his personal thinking or was made at the insistence of the American Law Institute is unknown. The position of this paper is that Reese's early theory calling for an absolute rule of access regardless of public policy is constitutionally required. This position is preferable not only because it is easier to administer, but also because it is the only rule which will correctly implement the constitutional requirement of full faith and credit. A weaker rule would not fully effectuate the strong unifying principle of full faith and credit.

It is well settled that a judgment rendered in one state is entitled to full faith and credit in the courts of sister states, even if such judgment would not have been rendered in the second state due to its public policy.<sup>35</sup> Given this strong constitutional compulsion in regard to judgments, it must be asked why a state statute is not entitled to at least enough faith and credit to gain access to forums in sister states. The clear language of the constitutional compulsion of full faith and credit certainly does not distinguish between judgments and statutes. Although it cannot be said that every state statute is entitled to prevail in the courts of sister states (since to do so would mean that in a two-state situation a forum would always have to defer to foreign law, and in a three-or-more-state situation a forum could not make a choice which would satisfy full faith and credit), the unifying principle of full faith and credit should surely go so far as to compel each state to serve as a forum for most actions based on the laws of sister states. As will be noted later, this strict rule of access may be relaxed in regard to penal statutes and under *forum non conveniens*, but the concept of public policy should not play any part in this decision. The rule here supported seems consistent with the spirit of the *Restatement (Second)*, although it would constitutionally remove the limited area of discretion allowed by the *Restatement*.<sup>36</sup> A survey of the cases in which public policy was used as a device to prevent access to a court will reveal the abuse to which the device has been subjected and should highlight the need for a clear holding that access is required by full faith and credit.

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<sup>35</sup> See, e.g., *Fauntleroy v. Lum*, 210 U.S. 230 (1908).

<sup>36</sup> RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 90, Comment c (1969).

The Supreme Court's earliest discussion of public policy as a device for denying access to a forum was in *Bank of Augusta v. Earle*.<sup>37</sup> In that case the Court held that Alabama was compelled to hear a suit by a Georgia banking corporation based on a contract to purchase notes which had been made in Alabama by an agent of the bank. The Court found that the Georgia corporation was authorized to make such purchases by its charter and that it could enforce its contracts in Alabama on the same basis as a natural person. Having reached this conclusion, the Court then held that it was not contrary to the public policy of Alabama to allow such suits for the enforcement of contracts to purchase notes.<sup>38</sup> Implicit in the decision is the assumption that had such suits actually been contrary to the public policy of Alabama, the suit need never have been entertained. Any attempt by the state courts of Alabama to interpret their public policy in a manner other than that found by the Supreme Court would have been a violation of full faith and credit. Although this holding clearly does not support an absolute rule of access, it does seem to indicate that the dimensions of public policy in regard to questions of access to a forum are set by the federal Constitution.

Subsequent to the early holding of the Supreme Court in *Bank of Augusta*, but still a considerable time prior to the holding in *Broderick*, the Court held that Wisconsin was obliged by full faith and credit to provide a forum for suit by the receiver of a Minnesota corporation on statutory double liability for stock price pursuant to Minnesota law.<sup>39</sup> The Wisconsin Supreme Court had held that to allow such suit by a receiver where the obligation had not been reduced to judgment in Minnesota was contrary to the public policy in Wisconsin.<sup>40</sup> The United States Supreme Court held that the nature of the double liability was such that only Minnesota could have any public policy on the matter, and hence such suit could not be contrary to the public policy of Wisconsin;<sup>41</sup> the error in defining public policy was violative of full faith and credit. This holding illustrates the ability of the Supreme Court to define the dimensions of public policy in much

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<sup>37</sup> 38 U.S. (13 Pet.) 519 (1839).

<sup>38</sup> *Id.* at 597.

<sup>39</sup> *Converse v. Hamilton*, 224 U.S. 243, 260 (1912).

<sup>40</sup> *Converse v. Hamilton*, 118 N.W. 190, 191 (Wis. 1908).

<sup>41</sup> 224 U.S. at 260.

the same manner that they have defined the dimensions of penal laws.<sup>42</sup> Given the fact that the same constitutional compulsion, full faith and credit, is operating in this area of access to a forum as was in force in the area of the interstate effects of judgments, it would seem to be constitutionally required that the Court undertake the definition of limitations placed on the public policy concept to an even greater extent. Since such work has been done in setting the limits of penal judgments, a similar effort is necessary in the area of public policy.

An example of the abuse of public policy and an instance in which application of a constitutional definition of public policy would have produced a better result is *Sunbeam Corp. v. Masters of Miami, Inc.*<sup>43</sup> Suit was brought for damages and for an injunction to prevent interference with fair trade contracts between Sunbeam and its distributors who were located in states having fair trade laws. Sunbeam alleged that Masters had induced these distributors to sell Sunbeam products to Masters at prices in violation of fair trade agreements. The trial court dismissed the action for failure to state a claim upon which relief could be granted, and the Fifth Circuit upheld the dismissal, reasoning that since Florida had no fair trade law the maintenance of such suit was contrary to the public policy of Florida.<sup>44</sup> Although this was dicta since the actual holding of the case was that no right to sue for a violation of a fair trade agreement existed under Florida law, it is clear evidence of the lengths to which the concept of public policy may preclude provision of a forum. It seems possible that the suit was based on the fair trade legislation of sister states. The majority cited no authority to show that the public policy of Florida was opposed to such a suit based on the law of sister states, only that it was opposed to such suits based on its own law. The lack of such contrary public policy was evidenced by the repeated passage of fair trade legislation by the Florida legislature.<sup>45</sup> The only reason that Florida had no fair trade legislation in force was that the Supreme Court of Florida

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<sup>42</sup> For the definition of penal laws required in deciding whether or not a judgment is entitled to full faith and credit see *Huntington v. Attrill*, 146 U.S. 657 (1892), and text accompanying notes 98-101 *infra*.

<sup>43</sup> 225 F.2d 191 (5th Cir. 1955).

<sup>44</sup> *Id.* at 198.

<sup>45</sup> *Id.* at 199 (Rives, J., dissenting).

had repeatedly held such legislation to be unconstitutional.<sup>46</sup> *Sunbeam* is a clear example of the courts of one state discriminating against the laws of sister states. Since the *Sunbeam* Court misinterpreted the public policy of Florida, the resulting denial of access to a forum for the suit based on the laws of a sister state is a violation of the constitutional requirement of full faith and credit. Under no circumstances should the public policy of Florida be allowed to close the doors of the Florida courts to this particular suit, and surely such closing cannot be tolerated when based on a faulty interpretation of the public policy of that state.

Some light on the question of access for intervention purposes is shed by *Peresipka v. Elgin, Joliet and Eastern Railway*,<sup>47</sup> a case in which the Seventh Circuit held that Indiana was constitutionally obliged to provide a forum to hear the claim of an Illinois attorney in regard to compensation for his work on a case in Illinois. The attorney had been retained in Illinois to handle a claim made under the Federal Employers Liability Act.<sup>48</sup> After the attorney commenced the suit in Illinois on behalf of the injured party, he was dismissed and the plaintiff then retained new counsel and brought the action in Indiana. The plaintiff recovered a judgment in Indiana, and the Illinois attorney sought to share in the judgment under an Illinois statute creating an attorney's lien under such circumstances.<sup>49</sup> The federal trial court refused to allow such intervention on the grounds that this would be contrary to the public policy of Indiana. The Seventh Circuit reversed, holding that enforcement of the claim was not contrary to the public policy of Indiana and adding that such intervention was constitutionally required by the full faith and credit clause as construed in *Hughes*.<sup>50</sup> *Peresipka* stands for the proposition that, in addition to the constitutional obligation to serve as a forum discussed above, there are circumstances in which there is a constitutional obligation to allow intervention in a suit already being heard. This is a wise expansion of the *Hughes* doctrine

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<sup>46</sup> *Id.*

<sup>47</sup> 231 F.2d 268 (7th Cir. 1956).

<sup>48</sup> 45 U.S.C. §§ 51 *et seq.* (1970).

<sup>49</sup> ILL. REV. STAT. ch. 13, § 14 (1963), *as amended* ILL. REV. STAT. ch. 13, § 14 (Supp. 1973).

<sup>50</sup> 231 F.2d at 275.

since failure to intervene will often result in a claim which could have been asserted by intervention becoming barred by *res judicata*. Intervention in such cases is quite close to the forum provision problem of *Hughes*, since the only forum in which the claim may be asserted may be the one initially hearing the claim. Problems of *res judicata* and long arm jurisdiction could make intervention a right of constitutional dimensions, although it is difficult to believe that a claim denied intervention would be barred by *res judicata*.

In addition to the issue of intervention, the constitutional obligation to provide a forum has significance in the area of third party practice. In *Millsap v. Central Wisconsin Motor Transport Co.*,<sup>51</sup> the Supreme Court of Illinois held that in a suit brought by an Illinois resident against an Illinois corporation, the corporation must be allowed to implead the estate of a decedent joint tortfeasor for contribution as provided by Wisconsin law,<sup>52</sup> since Illinois had no policy against contribution. It is interesting to note that the Illinois court felt obliged to reach this result because of the full faith and credit clause as construed in *Hughes* and *First National*. And though this opinion in regard to the constitutional obligation is at most dicta since Illinois had no public policy against contribution, the implication is that impleader would have been allowed due to full faith and credit even had Illinois had such a policy. Since Wisconsin law was properly applicable to the litigation, impleader was constitutionally required regardless of the public policy of Illinois.

Furthermore, the issue of substitution of parties also seems to have a constitutional dimension. The Court of Appeals for the Seventh Circuit in *Jones v. Schellenberger*<sup>53</sup> held that in a suit by a Texas administratrix against an Illinois resident in an Illinois federal court for the death of a Texas resident, refusal to substitute an administrator appointed in Illinois for the Texas administratrix was correct.<sup>54</sup> The Court of Appeals felt that such substitution would be violative of full faith and credit as construed in *First National* because it would discriminate against the

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<sup>51</sup> 189 N.E.2d 793 (Ill. App. 1963).

<sup>52</sup> *Id.* at 796-97.

<sup>53</sup> 196 F.2d 852 (7th Cir. 1952), *cert. denied sub nom.* LeReau v. Jones, 344 U.S. 876 (1952).

<sup>54</sup> *Id.* at 855.

Texas administratrix.<sup>55</sup> However, the application of *First National* is dicta since the actual holding in *Jones* is that the question of substitution in a federal court is to be governed by the Federal Rules of Civil Procedure rather than by state rules. Nevertheless, once again it is the implication of the case that is significant, and the clear implication is that such substitution would have been improper even in a state court since it would have been discriminatory and hence violative of full faith and credit.

The question of whether a state is constitutionally obliged to provide a forum for suits under the direct action statutes of sister states has caused considerable difficulty, although there are few states with direct action statutes and hence this troublesome question has not often been faced. The difficulty of the problem is illustrated by the experience of the Illinois judiciary in dealing with suits based on the direct action statute of Wisconsin. In *Posner v. Traveler's Insurance Co.*,<sup>56</sup> the first Illinois case on the issue, the Federal District Court for the Northern District of Illinois held that Illinois was obliged to provide a forum for a suit under the Wisconsin direct action statute<sup>57</sup> by a resident of Illinois against a Connecticut insurance company doing business in both Michigan and Illinois when the policy in question had been issued in Michigan to a Michigan resident and the accident which gave rise to the suit had occurred in Wisconsin.<sup>58</sup> The trial court found that although the Wisconsin direct action statute purported to limit suits based on it to those brought in the courts of Wisconsin, this was a mere venue restriction which was invalid under the holding of the United States Supreme Court in *Tennessee Coal, Iron, and Railroad v. George*,<sup>59</sup> and hence suit was

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<sup>55</sup> *Id.*

<sup>56</sup> 244 F. Supp. 865 (N.D. Ill. 1965).

<sup>57</sup> WIS. STAT. § 260.11(1) (1957), as amended WIS. STAT. § 260.11(1) (Supp. 1973).

<sup>58</sup> 244 F. Supp. at 870.

<sup>59</sup> 233 U.S. 354 (1914), which involved a suit brought in Georgia by an employee of the railroad who had been injured in the course of employment in Alabama. The basis of the suit was an Alabama statute making the railroad liable to the employee if the injury had been caused by the machinery of the railroad during the course of employment. The issue was whether or not the claim could be heard in a Georgia court in view of the fact that the Alabama statute creating the right provided that actions to enforce such liability were required to be brought in the state of Alabama. The Supreme Court held that this venue limitation could not keep the courts of a sister state from entertaining a transitory claim for damages, therefore entertaining the suit was held not to be violative of full faith and credit to the laws of Alabama.

appropriate under the statute in Illinois. The trial court concluded that suit under the statute was not contrary to the public policy of Illinois, and indicated that any attempt to prevent this suit by the device of public policy would be violative of full faith and credit as construed in both *Hughes* and *First National*. Once again this is dicta since Illinois was held to have no such policy, but it would have been dispositive had such a policy existed. Although the contention here is that both the dicta and the holding in *Posner* were correct, unfortunately neither are the law in Illinois at this time.

A federal court in Illinois hearing a case similar to *Posner* at the present time would no longer be able to allow suit under the Wisconsin direct action statute because of the holding of the Illinois Supreme Court in *Marchlik v. Coronet Insurance Co.*<sup>60</sup> This involved a suit by a Wisconsin plaintiff against two Illinois insurance companies for injuries sustained in an auto crash in Wisconsin. The driver of the car in which the plaintiff was a passenger was a Wisconsin resident, the driver of the auto with which they collided was a Wisconsin resident, and both autos were registered in Wisconsin.<sup>61</sup> The Illinois Supreme Court refused to hear the case because suit based on the direct action statute of Wisconsin was allegedly contrary to the public policy of Illinois.<sup>62</sup> A concurring opinion indicated that this refusal to provide a forum because of the public policy of Illinois might be violative of full faith and credit under the Supreme Court's reasoning in *Hughes* and *First National*.<sup>63</sup> The concurring opinion was correct in noting that, although the majority had refused to base their holding on *forum non conveniens*, this case presented a factual situation in which dismissal could have been properly justified on that basis, but was unconstitutional when based on public policy.<sup>64</sup>

Unfortunately the *Marchlik* decision regarding the public policy of Illinois has since been held by the Seventh Circuit not

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<sup>60</sup> 239 N.E.2d 799 (Ill. 1968).

<sup>61</sup> *Id.* at 800.

<sup>62</sup> *Id.* at 803.

<sup>63</sup> *Id.* (Ward, J., concurring).

<sup>64</sup> *Id.* Although it is the author's position that the concept of public policy is inappropriate in regard to access to a forum, it will subsequently be seen that the doctrine of *forum non conveniens* is still available in deciding the question of access.



to be violative of full faith and credit in *Reishus v. Maryland Casualty Company*,<sup>65</sup> a suit brought in Illinois by Illinois residents to recover for injuries sustained in an auto crash in Wisconsin. The Seventh Circuit held that to allow a suit under the Wisconsin direct action statute would be violative of the public policy of Illinois as set forth in *Marchlik*.<sup>66</sup> The court went into considerable detail to distinguish the case from *Hughes* and *First National*, arguing that the key to those cases was discrimination and that there could be no discrimination in this instance since the courts of Illinois were closed to all direct action statutes, Illinois having no direct action statute of its own.<sup>67</sup> This distinction is not persuasive when one considers that there actually is discrimination present in *Reishus*. It is quite true that the sort of discrimination present in *Hughes* is not evident, since in *Hughes* both Illinois and Wisconsin had wrongful death statutes and in *Reishus* only Wisconsin had a direct action statute. In *Hughes* the discrimination was between statutes, whereas the discrimination in *Reishus* is between a statute and the lack of a statute. The scheme of suit provided for by Illinois is preferred over the scheme provided for by Wisconsin. This preference is not implemented by application of a choice of law rule to say that Illinois rather than Wisconsin law is properly applicable, but rather the simple device of denial of access to a forum. This seems to be very similar to the discrimination encountered in both *Hughes* and *First National*, and such denial of access is therefore violative of full faith and credit. The only practical means of preventing such violation is adherence to a rigid rule of access to a forum without reference to its public policy. If the public policy of the forum is indeed so strong and is offended, it will later be possible to choose to apply forum law rather than the foreign rule, assuming that such a choice is permissible within the constitutional restraint of due process. This simply is not a decision to be made under the guise of denial of a forum.

The issue of applicability of statutory ceilings on recovery has occasionally been treated as involving the same principles confronted in *Hughes*, *First National* and *Broderick*. Some courts have used the concept of the public policy veto to deny applica-

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<sup>65</sup> 411 F.2d 776 (7th Cir. 1969).

<sup>66</sup> *Id.* at 778.

<sup>67</sup> *Id.*

tion of such statutory ceilings. In *Hellrung v. Lafayette Loan & Trust Co.*,<sup>68</sup> doubt was expressed about the constitutionality of a refusal to apply the no-ceiling rule of a sister state in an Indiana federal court. The states involved were Indiana, the forum state which had a \$1000 ceiling on recovery in survival actions, and Illinois, which had no ceiling on survival actions and whose survival statute was the basis of the suit. The court in *Hellrung* was able to avoid the constitutional issue by holding that the Indiana ceiling was by the clear terms of its language applicable only to suits brought under it, and therefore it was not applicable to a suit based on the survival statute of a sister state.<sup>69</sup> Dicta in the decision suggests that the court would have, if the rejection on the basis of construction had been impossible, held that application of the Indiana ceiling was violative of full faith and credit as outlined in *Hughes* and *First National*.<sup>70</sup> This same court was to note three years later in *Zirkelbach v. Decatur Cartage Co.*<sup>71</sup> that any attempt to apply the Indiana limitation of \$15,000 on wrongful death actions to a wrongful death suit brought under the Ohio wrongful death statute would violate the requirements of full faith and credit.<sup>72</sup>

The issue of application of statutory ceilings was faced by the New York Court of Appeals in the famous case of *Kilberg v. Northeast Airlines, Inc.*<sup>73</sup> in which the public policy of New York was used to escape application of the \$15,000 Massachusetts limitation on wrongful death recovery. The suit in *Kilberg* was brought for the death of a New York resident in an airplane crash in Massachusetts. A New York constitutional provision against such limitations<sup>74</sup> led the court to hold that such ceilings were contrary to the public policy of New York.<sup>75</sup> A concurring opinion in *Kilberg* indicated that application of the Massachusetts ceiling was compelled by full faith and credit as construed in *Hughes*,<sup>76</sup> but this does not seem to be a contention which was given any serious consideration by the majority of the court.

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<sup>68</sup> 102 F. Supp. 822 (N.D. Ind. 1951).

<sup>69</sup> *Id.* at 823.

<sup>70</sup> *Id.*

<sup>71</sup> 119 F. Supp. 753 (N.D. Ind. 1954).

<sup>72</sup> *Id.* at 754.

<sup>73</sup> 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

<sup>74</sup> N.Y. Consr. art. 1 § 16.

<sup>75</sup> 172 N.E.2d at 528, 211 N.Y.S.2d at 136.

<sup>76</sup> *Id.* at 535, 211 N.Y.S.2d at 146 (Frossel, J., concurring).

The possibility of a constitutional compulsion to apply statutory ceilings was given much consideration and appears to have been settled in *Pearson v. Northeast Airlines, Inc.*<sup>77</sup> *Pearson* involved a suit brought in a New York federal district court under the Massachusetts wrongful death statute to recover for the death of a New York resident in the same airplane crash in Massachusetts. The trial court had held, as one might expect, that application of the Massachusetts ceiling was contrary to the public policy of New York as announced by the Court of Appeals in *Kilberg*.<sup>78</sup> The Second Circuit first held that failure to apply the Massachusetts ceiling was violative of the full faith and credit compulsion explained in *Hughes*.<sup>79</sup> However, this holding was reversed when the case was reheard by the Second Circuit sitting *en banc*.<sup>80</sup> This decision is quite correct. The fact that there is no constitutional obligation to enforce the statutory ceiling of a sister state is in no manner inconsistent with the thesis that there should be access to a forum regardless of the public policy of the forum state. The results reached in both *Kilberg* and *Pearson* were correct and serve as perfect examples of the dichotomy between access and choice of law. Mr. Justice Black was extremely careful in *Hughes* to say that in that situation all that was required by full faith and credit was the provision of a forum; his opinion clearly shows that the choice of law to be applied is open once a forum has been provided.<sup>81</sup>

In all of the cases discussed above regarding the application of a statutory ceiling, each state has done exactly what was constitutionally required of it by full faith and credit as construed in *Hughes*—*i.e.*, providing a forum for the hearing of the claim. If after having provided a forum a state then chooses to escape from the sister state's ceiling on damages, this is constitutionally permissible. In *Pearson* the Second Circuit was correct in saying that full faith and credit did not compel application of the Massachusetts ceiling. One might ask whether this is in reality the striking of a defense on the grounds of public policy, an action

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<sup>77</sup> 307 F.2d 131 (2d Cir. 1962).

<sup>78</sup> *Pearson v. Northeast Airlines, Inc.*, 199 F. Supp. 539, 540 (S.D.N.Y. 1961).

<sup>79</sup> 307 F.2d at 133.

<sup>80</sup> *Pearson v. Northeast Airlines, Inc.*, 309 F.2d 553, 556 (2d Cir. 1962), *cert. denied*, 372 U.S. 912 (1963).

<sup>81</sup> *Hughes v. Fetter*, 341 U.S. 609, 612 n.10 (1950).

which the *Restatement (Second)* says is not permissible,<sup>82</sup> and is clearly forbidden by the holding of the Supreme Court in *Home Insurance Co. v. Dick*<sup>83</sup> unless the forum has some substantial connection with the controversy. However, a ceiling does not constitute a defense to liability, but rather is a device for limiting the amount of such liability. In view of this, it is quite permissible in circumstances of significant contacts for a state to entertain a suit based on the statutes of a sister state and then decide not to apply a portion of the statute of the sister state which imposes a ceiling on recovery.

A very disturbing example of a public policy based refusal to provide a forum is found in *Hartness v. Aldens, Inc.*,<sup>84</sup> a survival action brought in an Illinois federal district court for injuries and suffering prior to the death of a South Carolina resident pursuant to the South Carolina survival statute.<sup>85</sup> The injury had been caused by a faulty lawnmower in South Carolina. The manufacturer of the lawnmower was an Indiana corporation, and the lawnmower had been purchased by the South Carolina resident through Aldens, an Illinois mail order corporation. The trial court held that the action was barred by the public policy of Illinois, since several state court decisions had not allowed survival actions.<sup>86</sup> This decision was upheld by the Seventh Circuit despite a claim that if such a policy barred this survival action, it was violative of full faith and credit as construed in *Hughes* and *First National*.<sup>87</sup> The Seventh Circuit distinguished this from a full faith and credit situation on the grounds that both *Hughes* and *First National* involved discrimination against non-residents, whereas *Hartness* involved no such discrimination since the courts of Illinois were not open to survival actions by either residents or non-residents.<sup>88</sup> This is merely another instance of the failure of a court to recognize that the discrimination struck down in *Hughes* and *First National* was discrimination against laws, not against persons. *Hartness* was further distinguished from a full faith and credit situation on the grounds that here

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<sup>82</sup> RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 90, Comment *a* (1969).

<sup>83</sup> 281 U.S. 397, 408 (1930).

<sup>84</sup> 301 F.2d 228 (7th Cir. 1962).

<sup>85</sup> S.C. CODE ANN. § 10-209 (1962).

<sup>86</sup> 301 F.2d at 228.

<sup>87</sup> *Id.* at 229-30.

<sup>88</sup> *Id.* at 230.

Illinois was not the only forum available to hear the suit.<sup>89</sup> It is impossible to say how anyone could seriously accept this contention when a statute based on exactly the same premise, *i.e.*, availability of another forum, was struck down in *First National*.

If full faith and credit is to have the unifying effect on the federal system which it was intended to have, it must at least be strong enough to compel states to serve as forums despite public policy to the contrary. The presence of a hostile public policy is not strong enough to overcome full faith and credit.

The position taken here does not negate the concept of public policy in the choice of law process, nor should it even imply that there is no place for the public policy veto. In those jurisdictions which adhere to the vested rights system of choice of law, the public policy veto is an absolutely necessary tool for bringing essential flexibility to the system. The nature of the federal system allows states to have competing policies and for them to prefer their policy to that of a sister state.<sup>90</sup> The relevant question is at what particular point in time those compelling policies are to be allowed to operate. The contention here is that although there is such a point, it is not that point at which the decision on access to a forum is made. The decision to deny access is equally objectionable whether made on the basis of a judicial determination of public policy or on the basis of a state statute clearly setting forth the contrary state policy on the matter.<sup>91</sup>

Although the United States Supreme Court has not as yet held that public policy cannot play a part in the determination of access to a forum, indicative language in *Hughes*, *First National*, *Broderick*, and most particularly in *Angel v. Bullington*,<sup>92</sup> shows

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<sup>89</sup> *Id.*

<sup>90</sup> See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), and *Carroll v. Lanza*, 349 U.S. 408 (1955).

<sup>91</sup> For a clear illustration of the effect of a statutory enactment of public policy on access, see *Angel v. Bullington*, 330 U.S. 183 (1947).

<sup>92</sup> *Id.* at 188-89. In that case a resident of Virginia sold land in Virginia to a North Carolina resident. The total purchase price of the land was not paid, but security was given in the form of notes and a trust deed executed by the purchaser. When the purchaser defaulted on the notes, the seller brought suit in a state court in Virginia and the land in question was sold to cover the judgment. The sale price of the land was not sufficient to pay the judgment, so the seller then filed suit in a state court in North Carolina to recover the deficiency, which had not been reduced to judgment in Virginia. A trial court decision in favor of allowing suit was reversed by the Supreme Court of North Carolina, *Bullington v. Angel*, 16 S.E.2d 411 (N.C. 1941), on the grounds that such suit could not be maintained in North Carolina due to a state statute forbidding suits to recover

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that this is a correct conclusion to draw. Although these cases do not contain holdings which directly support this conclusion, they do clearly restrict the application of public policy in the area, and it is possible to logically conclude that public policy should play no part in the question of access to a forum. For full faith and credit to have the very strong position opted for in these opinions, an absolute requirement of access is the only viable rule, and, one might add, it is the simplest one to administer. Yet the indications are clear that public policy has the position in the federal system which has already been discussed—public policy is useful as a choice of law rule. Certainly a state should not be compelled to reach a result which is clearly contrary to its public policy provided it has sufficient contact with the litigation to constitutionally apply its public policy.

The implications in the above cases need to be put onto more solid footing by the United States Supreme Court. The Court should reiterate clearly the strong unifying principle of full faith emphasized by Mr. Justice Black in *Hughes v. Fetter*,<sup>93</sup> and squarely hold that this principle of unity demands no less than an absolute rule of access to a forum regardless of contrary public policies.<sup>94</sup>

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deficiency judgments under these circumstances. This holding was made in the face of a claim by the seller that full faith and credit obliged North Carolina to provide a forum for this suit on the deficiency based on the laws of Virginia. The decision of the Supreme Court of North Carolina could have been reviewed in the United States Supreme Court by appeal rather than by writ of certiorari. Instead of taking this step, the seller filed suit on the same claim in a federal district court in North Carolina and allowed his time for appeal to expire. This strange move may be justified in part by the fact that the decision of the North Carolina Supreme Court seemed to rest on procedural grounds, but this would only negate a res judicata effect and would not overcome the *Erie* problem found in a suit in federal court on the same claim. The seller prevailed at trial in the federal court, *Bullington v. Angel*, 56 F. Supp. 372 (W.D.N.C. 1944), and this result was affirmed in the Court of Appeals, *Angel v. Bullington*, 150 F.2d 679 (4th Cir. 1945). The decision in favor of the seller was reversed by the United States Supreme Court. Although the case contained no holding of relevance to the issue of obligation to provide a forum, had counsel appealed the adverse decision of the North Carolina Supreme Court to the United States Supreme Court, it would have been the most significant case in the area. The inference from the tone of the opinion in the United States Supreme Court is that the decision of North Carolina denying access would have been overturned as an unconstitutional denial of access.

<sup>93</sup> 341 U.S. 609, 612 (1951).

<sup>94</sup> It should be recognized that when this rule of access is applied to a vested rights jurisdiction it will often be difficult to determine whether there has been a denial of access or a choice of law, but this should not deter the formulation of the rule. The reason for the added difficulty in a vested rights jurisdiction is that the situation in which a court has based its decision on a public policy veto of the otherwise applicable law will look very much like the situation in which it

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## THE BAN AGAINST SUITS BASED ON PENAL STATUTES

It has been an oft-stated principle of conflicts since the Supreme Court decision in *The Antelope*<sup>95</sup> in 1825 that the courts of one nation will not enforce the penal statutes of another nation. *The Antelope* involved a controversy between an American captain of a privateer and the consuls of Spain and Portugal over the right to possession of African slaves who had been captured when the privateer was seized by an American cutter. Of course, *The Antelope* could not possibly determine the extent that this premise concerning penal statutes is applicable within a federal union. The position of the *Restatement (First)* on the issue was that "[n]o action can be maintained to recover a penalty the right to which is given by the law of another state,"<sup>96</sup> and this is a position followed by the *Restatement (Second)* which provides that "[n]o action will be entertained on a foreign penal cause of action."<sup>97</sup> It is very difficult to predict just how the Supreme Court will hold on this issue, but it is the contention here that there are two possible holdings; the more desirable is unlikely, and the other is the absolute minimum which can be done in this area. The more desirable of the two would be an absolute rule of access to a forum; the other would be at least a federal test to control the definition of "penal".

Whether or not a state may refuse to enforce a judgment rendered under the penal statutes of another state is subject to some doubt. The Supreme Court held quite clearly in *Huntington v. Attrill*<sup>98</sup> that the courts of Maryland were obliged by full faith and credit to enforce a judgment rendered in New York under a New York statute providing for personal liability of a corporate director who participated in the submission of a false certificate

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has denied access on grounds of public policy. In both cases the losing party will have lost on the basis of the public policy of the forum. In a jurisdiction which uses the interest analysis it should be a good deal easier to determine whether a suitor has lost on the merits or merely been denied access to a forum since the interest analysis (at least in theory) articulates more clearly the reasons for a decision. The vested rights problem was present in *Hughes*, but the Court had no difficulty in correctly determining that access had been denied. Given the duty of the Court to supervise the full faith and credit command, difficulty in application should not be a factor of any concern. Only an absolute rule of access regardless of public policy will satisfy the unifying principle of full faith and credit.

<sup>95</sup> 23 U.S. (10 Wheat.) 66 (1825).

<sup>96</sup> RESTATEMENT (FIRST) OF CONFLICTS OF LAWS § 611 (1934).

<sup>97</sup> RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 89 (1969).

<sup>98</sup> 146 U.S. 657 (1892).

for incorporation.<sup>99</sup> It is unfortunate that the facts did not present the issue of full faith and credit to judgments based on penal laws, since the Court concluded that the New York statute was not penal in nature. However, since full faith and credit was involved, the determination of whether or not the statute was penal was one to be made by a federal standard.<sup>100</sup> The test for whether or not a statute was penal in nature was “. . . whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual. . . .”<sup>101</sup> Although the decision in *Huntington* seems to have been based on the assumption that had the judgment been based on a statute properly classified as penal it would not have been entitled to full faith and credit, it is important to note that the issue was not directly confronted.

Indeed the precise issue of whether or not a judgment based on a penal statute is entitled to full faith and credit has never been ruled upon by the United States Supreme Court. The class of judgments not entitled to full faith and credit is very narrow, and the Court has even required recognition of judgments involving gambling and clear errors of law.<sup>102</sup> It is quite possible that if the issue were now faced by the Court, the concept of full faith and credit would be held to apply even to judgments based on penal laws. If the Court were willing to extend the full faith and credit protection to penal judgments, it would probably limit that protection to those judgments involving only monetary sanctions. It hardly seems within the realm of possibility that it would be held that one state must execute persons sentenced to death in another state or even to imprison persons given sentences in other states. However, there should be no problem with extending the protection to monetary judgments based on penal statutes.

If the Supreme Court would hold that judgments based on penal statutes are entitled to full faith and credit, one could then ask why there should not also be full access to a forum to sue on a claim based on a penal statute but not yet reduced to judgment. If the Court were willing to so hold in regard to penal statutes, again it would almost certainly want to limit the class of penal

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<sup>99</sup> *Id.* at 686.

<sup>100</sup> *Id.* at 666.

<sup>101</sup> *Id.* at 668.

<sup>102</sup> *Fauntleroy v. Lum*, 210 U.S. 230 (1908).



statutes so treated to those involving only monetary sanctions. The question then is whether or not full faith is strong enough to compel a state to enforce the penal laws of another state which impose fines as sanctions. As indicated in previous discussion, the full faith and credit command does not distinguish between judgments and statutes. Full faith should certainly be held to be strong enough to compel a state to open the doors of its courts to suits based on the penal statutes of a sister state.

The prejudice against penal statutes probably has its roots in the idea of legislative jurisdiction. The idea that the laws of a state have no effect outside its territorial boundaries may have some validity when one is concerned with sovereign nations, but it is not a concept which should be absolute in a federal union. Subject to constitutional limitations, the laws of one state often can have effect outside that state. Legislative jurisdiction has certainly been a die-hard concept, but a holding of a constitutional right to access to sue on a penal statute would do much to eradicate it. An absolute rule of access for suit on penal statutes is the more desirable of the two available alternatives, but it is unlikely to be implemented. Such a rule depends on a favorable ruling in regard to judgments and an extension of that rule to include statutes. Although the first is a possibility, the odds against both happening are high. In view of that reality, a rule should be formulated to minimize the damage of not going as far as is desirable.

The alternative to an absolute rule of access is a rule which would deny access to suits based on penal statutes but which would make the determination of whether or not a statute is penal specified by federal law. This is a rule which seems quite possible in view of the decision in *Hughes*. Would the result in that case have been any different had the denial of access been based on a finding that the Illinois wrongful death statute was penal in nature? Could Wisconsin have escaped its obligation to provide a forum by the simple device of using a penal classification instead of a public policy denial? Both questions must clearly be answered in the negative. The denial of a forum would still have been violative of full faith and credit because the Illinois wrongful death statute was not penal in nature. The implication is that the question of whether or not a statute is

penal is a question to be determined according to a federal test since an error in classification would be violative of full faith and credit. Application of the *Huntington* standard to the question of access for statutes will surely preclude access to statutes requiring either execution or incarceration as a penalty and will preclude suits on most statutes involving fines.

Although there is dicta in *Texas & Pacific Railway v. Cox*<sup>103</sup> to suggest that a state need not serve as a forum for suits based on the penal statutes of sister states, the case may stand for the idea that the determination of whether or not a statute is penal is to be made according to a federal standard. Suit had been brought in a federal court in Texas to recover for the wrongful death of a Texas resident which had occurred in Louisiana. The Texas administratrix brought suit under the Louisiana wrongful death statute against the railroad's receivers who had been appointed in Louisiana. The Court found that the Louisiana wrongful death statute was not penal in nature because its intent was to compensate for a wrong to an individual rather than for a wrong to the public.<sup>104</sup> Since *Texas & Pacific* was decided the same year as *Huntington*, and the two involve similar tests for determining whether or not a statute is penal in nature, the inference may be drawn that this is a determination to be made in either case according to a federal standard. This is admittedly contrary to some unfortunate dicta in *Huntington* which indicates that when suit is brought on a statute, rather than to enforce a judgment based on the statute, the state is free to determine for itself whether or not the statute is penal.<sup>105</sup> Since an erroneous classification of a statute as penal would be violative of full faith and credit, it seems obvious that the ultimate supervision in this area must be on the basis of a federal test. There would be little point in allowing each state to have its own test when the final judgment will be based on a federal standard.<sup>106</sup>

The first instance of application of the *Huntington* test to a suit brought directly on a statute rather than to enforce a judgment is *James-Dickinson Farm Mortgage Co. v. Harry*.<sup>107</sup> The

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<sup>103</sup> 145 U.S. 593 (1892).

<sup>104</sup> *Id.* at 605.

<sup>105</sup> *Huntington v. Attrill*, 146 U.S. 657, 683 (1892).

<sup>106</sup> For an example of the correct application of a standard similar to the federal test for penal statutes, see *Kennealy v. State*, 51 A. 475 (N.J. 1902).

<sup>107</sup> 273 U.S. 119 (1927).

suit was filed by an Illinois resident against a Texas resident and a Missouri corporation. A portion of the liability asserted by the plaintiff was based on a Texas statute imposing exemplary damages on a person who made false representations in a real estate or stock purchase transaction. Application of this statute was resisted on grounds that it was penal. The United States Supreme Court rejected this contention on the ground that the statute was not penal according to the *Huntington* test,<sup>108</sup> thus refuting the dicta in *Huntington* that a state may make an independent determination of the issue when suit is on the statute itself rather than to enforce a judgment. *James-Dickinson* signifies that whenever the statute of a sister state is resisted on grounds that it is penal, classification is to be made on the basis of the *Huntington* test. It should not matter that a suit is brought in state court rather than in federal court based on diversity as in *James-Dickinson*. Since an error in classification is violative of full faith, the test for such classification must be federal.

The classic example of a violation of the federal test for penal statutes is found in *Doggrell v. Southern Box Co.*<sup>109</sup> This involved a suit brought in federal court in Tennessee, the domicile of two of the would-be incorporators, by a seller of goods against persons who had attempted to form a corporation under Arkansas law. Another would-be incorporator was domiciled in Arkansas. The basis for the suit against the incorporators personally was an Arkansas statute which provided that incorporators would be liable as partners for debts incurred after a faulty attempt at incorporation. The attempt at incorporation in this case was faulty because the incorporators had failed to comply with an Arkansas statute requiring the articles of incorporation to be filed with the county clerk of the county in which the corporation had its principal place of business. The trial court had found for the plaintiff, and this holding was initially affirmed by the Sixth Circuit, which held that the Arkansas statute was not penal and therefore could be enforced in Tennessee.<sup>110</sup> Unfortunately *Doggrell* did not end with this correct result because the Sixth Circuit was petitioned for a rehearing by the defendants, and while this

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<sup>108</sup> *Id.* at 126.

<sup>109</sup> 208 F.2d 310 (6th Cir. 1953).

<sup>110</sup> *Doggrell v. Great Southern Box Co.*, 206 F.2d 671 (6th Cir. 1953).

petition was pending the issue of the status of the Arkansas statute was faced by the Supreme Court of Tennessee in *Paper Products Co. v. Doggrell*.<sup>111</sup> In *Paper Products* the Tennessee court applied the *Huntington* test for penal statutes, and concluded that the Arkansas statute was penal in nature, and would not be enforced in Tennessee.<sup>112</sup> The Sixth Circuit on rehearing held that it was bound by the determination of the Tennessee court that the statute was penal and therefore the Arkansas statute would not be enforced in a federal court in Tennessee.<sup>113</sup>

The original determination of the Sixth Circuit was undoubtedly correct. Judge Martin, dissenting in the second opinion, accurately noted that the *Huntington* test for penal statutes was binding on both the state and federal courts because an incorrect classification would deny full faith and credit to the Arkansas statute. Since the test was federal in origin, the Sixth Circuit could not be foreclosed from making its own determination by any decision rendered in the Tennessee state courts.<sup>114</sup> Under the *Huntington* test, the Arkansas statute was not penal because the compensation was for a wrong to an individual, not a wrong to the public, and the recovery for the wrong was to go to an individual. Even if there is room within our federal system for one state to refuse to enforce the penal statutes of sister states, this is clearly an issue which must be controlled by a federal standard if full faith and credit is to have any meaning at all.<sup>115</sup>

A fairly recent correct application of the *Huntington* test for penal statutes is found in *Texaco, Inc. v. Vanden Bosche*.<sup>116</sup> In that case suit was brought in a state court in Maryland on the basis of a Virginia statute which imposed personal liability upon the directors, officers and agents of foreign corporations for contracts made or torts committed within Virginia prior to the corporation having secured a certificate of authority to transact business in Virginia.<sup>117</sup> The case is not as strong as it might be since the Supreme Court of Maryland found that the plaintiff had failed

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<sup>111</sup> 261 S.W.2d 127 (Tenn. 1953).

<sup>112</sup> *Id.* at 131.

<sup>113</sup> 208 F.2d at 311.

<sup>114</sup> *Id.* at 312 (Martin, J., dissenting).

<sup>115</sup> For another example of an erroneous classification of a statute as penal, see *Tobin v. McGrath*, 103 A.2d 795 (R.I. 1954).

<sup>116</sup> 219 A.2d 80 (Md. 1966).

<sup>117</sup> VA. CODE ANN. § 13.1-119 (1973).

to state a claim arising under the Virginia statute.<sup>118</sup> Nevertheless, there is some very interesting language in the case concerning the status of the Virginia statute. The Maryland Supreme Court assumed that the courts of Maryland must be open to suits based on the statutes of sister states unless such statutes came within the *Huntington* definition of penal.<sup>119</sup> Of even more interest is the fact that the court further noted that absent such penal classification or a proper case for *forum non conveniens*, the courts of Maryland would be obliged by full faith and credit as outlined in *Hughes* and *First National* to be open to such suit.<sup>120</sup> This seems to support an absolute rule of access regardless of the public policy of the forum. *Texaco* provides a clear example of a court which has correctly recognized that the question of access to a forum is one of constitutional dimension, that the test for denial on the basis of a penal statute is a federal one, and that failure to apply that test or error in application would be violative of full faith and credit.<sup>121</sup>

A difficult area which is included within the ban against penal statutes but which in reality involves its own separate problems is that of access to a forum for suit based on the revenue laws of a sister state. The *Restatement (First)* provided that "[n]o action can be maintained on a right created by the law of a foreign state as a method of furthering its own governmental interests,"<sup>122</sup> but the *Restatement (Second)* has been quite careful to take no position at all on this issue.<sup>123</sup> The question to be faced is whether or not this discrimination against revenue laws, well settled in choice of law problems between sovereign nations, is applicable to sister states within a federal union. Although there may be justification for the position that, in the absence of a treaty provision to the contrary, one nation may refuse to enforce the revenue laws of another nation, this is a position which should not be allowed in a federal union bound by the unifying principle of full faith and credit.

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<sup>118</sup> 219 A.2d at 82.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 83, 84.

<sup>121</sup> It might be added that, although not called for in the decision in *Texaco*, the Virginia statute in question would not be penal under the *Huntington* test. The plaintiff was constitutionally entitled to a forum and had he been able to state a valid claim he would have prevailed.

<sup>122</sup> RESTATEMENT (FIRST) OF CONFLICTS OF LAWS § 610 (1934).

<sup>123</sup> RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 89, Comment c (1969).

Strangely, the problem of access to a revenue statute of a sister state seems not to have arisen in the United States until 1911 in the case of *Maryland v. Turner*.<sup>124</sup> This involved an action brought by the state of Maryland in a New York court to recover for personal property taxes levied on the defendant while he was a resident of Maryland. The New York Court of Appeals noted that this was the first instance it could find of a suit being sought on the basis of revenue statutes of a sister state.<sup>125</sup> The court equated the issue of access in this case to that of access to penal statutes, and concluded that under the *Huntington* test the Maryland revenue statute was penal and hence need not be enforced in New York.<sup>126</sup>

Despite this inauspicious beginning, there has been a great deal of recent case law to indicate that a state should provide a forum for suit based on the taxing statutes of sister states. The Supreme Court of Illinois held in *City of Detroit v. Gould*<sup>127</sup> that the Michigan city could sue in Illinois to recover from the defendant's personal property taxes not previously reduced to judgment.<sup>128</sup> This suit had been dismissed by the Illinois trial court despite an argument that full faith and credit compelled access for such suit. The Illinois Supreme Court reserved decision on the full faith and credit claim,<sup>129</sup> but concluded that the modern view was not to treat revenue statutes as penal.<sup>130</sup> If such statutes are not penal in nature, then full faith and credit clearly compels access to a forum.<sup>131</sup>

The relationship between taxing statutes and penal statutes is well illustrated in *Nelson v. Minnesota Income Tax Division*.<sup>132</sup> In that case suit was brought in Wyoming to collect Minnesota income taxes which had become due in the period of time which the Wyoming defendant had resided in Minnesota. The Supreme Court of Wyoming allowed the suit to recover the amount of tax

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<sup>124</sup> 132 N.Y.S. 173 (1911).

<sup>125</sup> *Id.* at 174.

<sup>126</sup> *Id.*

<sup>127</sup> 146 N.E.2d 61 (Ill. 1957).

<sup>128</sup> *Id.* at 65.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 63.

<sup>131</sup> A similar conclusion that the modern view is against classifying revenue statutes as penal led to the allowance of suit by the state of Utah in Nevada on a claim concerning state income taxes. *State Tax Comm'n of Utah v. Cord*, 404 P.2d 422 (Nev. 1965).

<sup>132</sup> 429 P.2d 324 (Wyo. 1967).

due, but refused to allow Minnesota to recover a penalty called for by the tax statute.<sup>133</sup> It is possible then to adhere to the idea that one state does not enforce the penal statutes of another state and still allow suit based on portions of the revenue laws of sister states.

The question which must be considered is whether revenue statutes are penal under the *Huntington* test.<sup>134</sup> *Ohio Department of Taxation v. Kleitch Bros., Inc.*,<sup>135</sup> contains dicta implying that revenue statutes are not penal. The issue in that case did not involve suit based on the taxing statutes of a sister state, because the suit was brought in Michigan to collect on three tax judgments previously rendered against the defendants in Ohio.<sup>136</sup> There can be no doubt that judgments based on the tax laws of a sister state are entitled to full faith and credit.<sup>137</sup> The Michigan court in *Kleitch* noted that even if these taxes had not been reduced to judgment, full faith and credit would still require Michigan to allow the suit to collect on the taxes incurred by these defendants.<sup>138</sup> The feeling of the Michigan Supreme Court was that since Michigan obviously had no public policy against the collection of taxes (indeed we might ask what state would have such a policy), the unifying principles of full faith and credit enunciated in *Hughes* would compel the provision of a forum.<sup>139</sup> Although this language is dicta, it is illustrative of the proper determination of the problem.

Most taxing statutes will not fit within the definition of penal in *Huntington* because taxes are not assessed to redress for wrongs either to individuals or to the public. A tax in a *fee* which a person must pay for services which he has received from the state. A portion of a tax statute may be penal, but this is no reason for a denial of access to a suit based on other sections. As indicated in *Nelson*, the correct way to handle such a situation is to entertain suit for the collection of taxes but refuse to enforce the penalty.<sup>140</sup> Since revenue statutes are not penal within the federal

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<sup>133</sup> *Id.* at 325.

<sup>134</sup> See text accompanying note 98 *supra*.

<sup>135</sup> 98 N.W.2d 636 (Mich. 1959).

<sup>136</sup> *Id.* at 638.

<sup>137</sup> *Milwaukee County v. M.E. White Co.*, 296 U.S. 268 (1935).

<sup>138</sup> 98 N.W.2d at 643.

<sup>139</sup> *Id.*

<sup>140</sup> 429 P.2d 324, 325 (Wyo. 1967).

definition, a denial of access to a forum would be violative of full faith and credit under the *Hughes* reasoning. Surely since tax *judgments* are entitled to full faith and credit, it is not asking too much of the unifying principle to compel access to a forum for suits on revenue statutes.

Unfortunately, some states still refuse to allow suits based upon the revenue statutes of sister states. For example, the courts of Texas have followed the traditional rule of no access for such suits, as evidenced by their refusal in *Hamm v. Berrey*<sup>141</sup> to allow Alabama to bring suit against Texas residents in a Texas court for failure to file a non-resident income tax return. However, the problem may not be too serious since a properly drafted long arm statute would allow a state to reach persons liable for taxes. The long arm statute could be used to procure a valid judgment, then the state could simply sue to collect the judgment, a tactic which would be successful since such *judgments* are entitled to full faith and credit. The problem has also been alleviated by the execution of agreements between some states to enforce tax claims on a reciprocal basis. Neither of these alternatives would be necessary if the Supreme Court of the United States would clearly hold that suits based on revenue statutes must be given access because of the constitutional demand of full faith and credit.

An absolute rule of access to penal statutes could of course settle the issue of whether or not the revenue statutes of sister states can be denied access to a forum. Even if the penal bar is upheld, this should not be allowed to act as an absolute bar to suits based on revenue statutes. The very least which should be done is to compel the question of access to hinge on whether or not an individual revenue statute is penal as defined in *Huntington*. Further, penal portions of revenue statutes should be separable from non-penal sections, so that the latter can be enforced even if the former cannot. It is probable that when measured against the *Huntington* test most revenue statutes will not be penal since they are assessed for services rendered rather than compensation for wrongdoing. In no event should the question of access to suits on revenue statutes be allowed to be made

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<sup>141</sup> 419 S.W.2d 401 (Tex. Civ. App. 1967).



under state law. Here, as in the other areas closely tied to full faith and credit, only a federal test will suffice. The unifying principle of full faith and credit cannot exist with less.

#### FORUM NON CONVENIENS AS A BAR TO ACCESS

Although it is clearly necessary that a forum have adjudicatory authority before proceeding to determine the merits of litigation, it has long been recognized that there might be some circumstances in which the forum might decline to exercise its adjudicatory authority. The ideas of public policy and non-enforcement of penal laws previously discussed are two of the devices used to justify this refusal. In addition, it has been thought that matters solely related to convenience and economy could justify a refusal to serve as a forum. The core concept of this doctrine of *forum non conveniens* has been well outlined in the *Restatement (Second) of Conflicts*, which provides that "[a] state will not exercise jurisdiction if it is a seriously inconvenient forum for the trial of the action provided that a more appropriate forum is available to the plaintiff."<sup>142</sup>

Although *forum non conveniens* seems to have no further applicability in the federal courts since the enactment of a transfer provision,<sup>143</sup> there is still quite clearly a close relationship between the doctrine and the holding in *Hughes v. Fetter*. The relationship is obvious if one will only ask whether or not the result in *Hughes* would have been any different had the basis of the Wisconsin holding been *forum non conveniens* rather than public policy. Since the Supreme Court indicated in dicta in *Hughes* that this was not an appropriate case for the use of *forum non conveniens*,<sup>144</sup> the answer is that it probably would not have changed the outcome. A mere change in the wording of the Wisconsin decision could not negate a constitutional duty if this was indeed not an appropriate place for the use of the doctrine. It might be added that, as will be seen *infra*, *Hughes* was not such a case because all relevant parties connected with the action were Wisconsin residents. Indeed under interest analysis there would seem to be little doubt that Wisconsin law was properly applied to govern

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<sup>142</sup> RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 84 (1969).

<sup>143</sup> 28 U.S.C. § 1404(a) (1970).

<sup>144</sup> *Hughes v. Fetter*, 341 U.S. 609, 613 (1951).

the wrongful death suit in *Hughes*. Since the result in *Hughes* would have been the same had the basis of the Wisconsin decision been *forum non conveniens*, this apparently means that the dimensions of the doctrine are constitutionally determined by full faith and credit. In addition to the implication in *Hughes* that *forum non conveniens* is a constitutionally vital doctrine, there are similar indications in other cases.<sup>145</sup>

Given the fact that the doctrine is constitutionally viable, the question remains as to its dimensions. Since an erroneous application would be violative of full faith and credit, based on the fact that *Hughes* would have been unaltered by the basis of the state court decision being *forum non conveniens*, the test for application of the doctrine must be federal in nature. Surely the protection of full faith and credit cannot be left up to the states.

The scope of the doctrine of *forum non conveniens* as determined according to federal standards is best illustrated by the decision of the United States Supreme Court in *Gulf Oil Corporation v. Gilbert*.<sup>146</sup> *Gulf Oil* was a diversity action, brought by a Virginia resident against a Pennsylvania corporation doing business in both Virginia and New York, in a federal trial court in the Southern District of New York. The basis of the claim was the allegation that the defendant was negligent in the delivery of gasoline to the warehouse of the plaintiff. It was alleged that this negligence caused a fire which damaged plaintiff's Virginia warehouse as well as property placed in the care of the plaintiff by his customers.<sup>147</sup> The Supreme Court of the United States found that the doctrine of *forum non conveniens* was available for use in the federal courts<sup>148</sup> and outlined quite clearly the factors which were to be considered in deciding whether or not to exercise the doctrine. It is quite important to note that the Court indicated that any application of the doctrine was based on the assumption that there existed at least two forums in which the defendant was amenable to suit.<sup>149</sup> The other considerations involved were set forth by the Court as follows:

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<sup>145</sup> *E.g.*, *Alabama Pub. Serv. Comm'n v. Southern Ry.*, 341 U.S. 341, 345 n.6 (1951).

<sup>146</sup> 330 U.S. 501 (1947).

<sup>147</sup> *Id.* at 502-03.

<sup>148</sup> *Id.* at 505.

<sup>149</sup> *Id.* at 507.

Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of the premises, if a view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained. . . .

Factors of public interest also have place in the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. . . . There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflicts of laws, and in law foreign to itself.<sup>150</sup>

From the facts in *Gulf Oil* the Court concluded that the trial court had not abused its discretion in finding that New York was not the most convenient forum for the trial of the action.<sup>151</sup>

The most important factor in application of the doctrine is the assumption that if a dismissal is secured on this basis the plaintiff will be able to bring his action in another forum. This is an assumption explicitly included in the *Restatement (Second) of Conflicts*,<sup>152</sup> and is a condition which is constitutionally required as well. That the result in *Hughes* would not have differed had the basis of the decision in the Supreme Court of Wisconsin been *forum non conveniens* rather than public policy shows that an erroneous application of the doctrine may be violative of full faith and credit. The assumption of the Court in *Gulf Oil* that there should be more than one forum available before the doctrine is applied, when coupled with the constitutional mandate of *Hughes*, indicates that a dismissal on the basis of *forum non conveniens* when no other forum is available would be violative of full faith and credit.

Although there is no question that *forum non conveniens* cannot be constitutionally applied when there is no other forum available, the other relevant considerations in the application of the

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<sup>150</sup> *Id.* at 508-09.

<sup>151</sup> *Id.* at 512.

<sup>152</sup> RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 84 (1969).

doctrine are much more difficult to regulate under the full faith and credit provisions. As noted previously in *Gulf Oil*, access to proof, ability to secure appearance of witnesses, cost of securing evidence, availability of a view, enforceability of judgments, and conditions of court dockets are all relevant factors to be considered.<sup>153</sup> The interrelationship of these criteria in deciding whether or not to apply *forum non conveniens* is governed by full faith and credit, but the degree of that control is uncertain. As noted *supra*, the boundaries of the doctrine must be controlled by a federal test, because errors in application of the doctrine are violative of full faith and credit. The problem is that the area is one in which concrete dimensions cannot be formulated. It would be undesirable for the full faith and credit restraints to govern this area with great strictness. Since all these factors would be extremely difficult to judge at the appellate level, the area would seem to be one which should be left within the discretion of the trial judge. However, the Supreme Court should make it understood that this is an area of federal control and federal standards, and that decisions are to be made within constitutional guidelines. Such decisions, although discretionary, will be subject to review for abuse of federal requirements. There will be instances in which *forum non conveniens* will be used simply to implement a local bias against serving as a forum. Such bias must be prevented if the unifying theory of full faith and credit is not to be subverted.

A ready example of an abuse of discretion in the administration of *forum non conveniens* would be the case of *Hughes v. Fetter*<sup>154</sup> had the basis of that decision in the Wisconsin Supreme Court been *forum non conveniens* instead of public policy. The decedent, the administrator of the Hughes estate, the driver of the auto in which Hughes was a passenger at the time of death, and the insurer of the auto in which he was a passenger were all residents of Wisconsin. The only factual connection of Illinois with the suit was that Illinois was the place of the one-car accident which caused the death of Hughes. Though there was some doubt about the possibility of suit against the insurer in Illinois, there was definite availability of a forum in Illinois for

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<sup>153</sup> See text accompanying note 150 *supra*.

<sup>154</sup> 341 U.S. 609 (1951).

a suit against the driver of the auto. The assumption of availability of another forum would not bar application of *forum non conveniens* to these facts. Despite this, any application of the doctrine to these facts would have been violative of full faith and credit, because the connection of Wisconsin with the action was so substantial that there was no room for discretion in making the decision to exercise adjudicatory authority in Wisconsin. Any decision to the contrary by the Wisconsin courts would have denied full faith and credit to the Illinois wrongful death statute.

Numerous examples of the proper exercise of this discretionary function are available. In *Flaiz v. Moore*,<sup>155</sup> a Texas court held that the doctrine precluded the hearing in Texas of a suit by a Maryland resident against residents of Arkansas and Oklahoma for injuries sustained in an auto crash in South Dakota.<sup>156</sup> Suit had been commenced against the Arkansas resident while he was temporarily in Texas and against the Oklahoma resident as provided for by a statute pertaining to service on non-residents. The Texas court noted that in this case *Hughes* did not oblige Texas to serve as a forum, since in *Hughes* all parties were residents of Wisconsin, whereas none of the parties in *Flaiz* were Texas residents.<sup>157</sup> The Texas court was correct in noting that this was a classic case for the application of *forum non conveniens*. A similar result was reached by the Supreme Court of Illinois in *James v. Grand Trunk Western Railway*,<sup>158</sup> in which it was said that Illinois need not serve as a forum for a suit under the Michigan wrongful death statute for the death of a Michigan resident which had occurred in Michigan.<sup>159</sup> Although this was dicta since no dismissal on the grounds of *forum non conveniens* had been sought by the defendant, it does not alter the fact that the factual situation here was such that dismissal on those grounds would have been constitutionally permissible.

The consideration of *forum non conveniens* outlined above is applicable only to the doctrine as used in state courts; however, this limitation does not alter the fact that the test for application

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<sup>155</sup> 353 S.W.2d 74 (Tex. Civ. App. 1962).

<sup>156</sup> *Id.* at 77.

<sup>157</sup> *Id.* at 75.

<sup>158</sup> 152 N.E.2d 858 (Ill.), *cert. denied*, 358 U.S. 915 (1958).

<sup>159</sup> *Id.* at 862.

of the concept is federal. It should be noted that the general rule of inapplicability of *forum non conveniens* in the federal courts<sup>160</sup> applies only when transfer is available to another federal forum. The doctrine is still appropriate in those rare instances, such as *Vanity Fair Mills, Inc. v. Eaton Co.*,<sup>161</sup> where the only other available forum is a foreign nation.<sup>162</sup>

It is, as has been done *supra*, possible to outline to some extent the constitutional dimensions of situations in which a state is forbidden to deny access to a forum on the basis of *forum non conveniens*. The question left open earlier was whether or not there existed a similar constitutional compulsion to *apply* the doctrine to forbid access in some situations. The decision of the United States Supreme Court in *Home Insurance Co. v. Dick*<sup>163</sup> indicates that when a forum lacks a substantial connection with a controversy, it is forbidden by due process to apply its substantive law to the litigation.<sup>164</sup> When such an instance of lack of substantial connection involves a sister state rather than a foreign nation such as was involved in *Home Insurance*, the bar against application of substantive law comes from full faith and credit rather than due process. This is a distinction well illustrated by *John Hancock Mutual Life Insurance Co. v. Yates*.<sup>165</sup> Despite their obvious importance, neither of these cases provides any insight into the question of whether or not the appropriate constitutional provision (due process or full faith and credit) compels the application of *forum non conveniens* in some fact situations. In both *Home Insurance* and *John Hancock*, the states of Texas and Georgia were allowed to serve as forums despite the lack of a connection substantial enough to warrant application of their substantive law. The two cases may by implication stand for the

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<sup>160</sup> See note 143 *supra*.

<sup>161</sup> 234 F.2d 633, 646 (2d Cir.), *cert. denied*, 352 U.S. 871 (1956), *rehearing denied*, 352 U.S. 913 (1956).

<sup>162</sup> For a discussion of the demise of the doctrine of *forum non conveniens* in the federal system, see *Collins v. American Automobile Ins. Co.*, 230 F.2d 416 (2d Cir.), *appeal dismissed*, 352 U.S. 802 (1956). Whether or not the doctrine of *forum non conveniens* has been codified by 28 U.S.C. § 1404(a) for the federal system is not such a simple question as might first appear, see, e.g., *Hoffman v. Blaski*, 363 U.S. 335, 364 (1960) (Frankfurter, J., dissenting), and *National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311, 327 (1964) (Black, J., dissenting).

<sup>163</sup> 281 U.S. 397 (1930).

<sup>164</sup> *Id.* at 410.

<sup>165</sup> 299 U.S. 178 (1936).

proposition that there is nothing in the constitutional provisions of full faith and credit or due process which will prevent a state from serving as a forum provided that it is willing to apply the substantive law of a jurisdiction which has the necessary minimum connection with the controversy.

Although there seems to be no constitutional compulsion to apply *forum non conveniens* arising from either full faith and credit or due process, such a compulsion may come under very limited factual instances from the interstate commerce clause. In *Davis v. Farmers Co-Operative Equity Co.*,<sup>166</sup> the Supreme Court held that in some circumstances the maintenance of a suit might be an unconstitutional burden on interstate commerce.<sup>167</sup> This case involved a suit brought by one Kansas resident against another Kansas resident in a Minnesota state court. The defendant did not own or operate any business in Minnesota, but it did have an agent in Minnesota for the solicitation of business. The claim sued upon involved damage to a quantity of grain while it was being shipped from one point in Kansas to another point in Kansas. Assuming that it is permissible to sue a corporation having minimum contacts with a jurisdiction on a claim not arising from those minimum contacts, there would seem to be no problem with getting jurisdiction over the Kansas resident in Minnesota under modern theories of long arm jurisdiction. The holding of the Supreme Court against the maintenance of suit was not based on jurisdictional grounds, so the above assumptions would appear to be correct.

Since *Davis* involved a situation in which *forum non conveniens* certainly could have been invoked to deny access to a forum, the Supreme Court may by inference be saying that a constitutional duty exists to use the doctrine in order to prevent an unconstitutional burden on interstate commerce. This implication is as close as the Court has ever come to holding that, in addition to the constitutional bar against the use of *forum non conveniens* in some situations, there is also in some situations a constitutional compulsion to apply the doctrine.

The narrowness of *Davis* can be seen from the subsequent treatment of the area by the lower federal courts. The First

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<sup>166</sup> 262 U.S. 312 (1923).

<sup>167</sup> *Id.* at 315.

Circuit distinguished *Davis* from *Canadian Pacific Railway v. Sullivan*<sup>168</sup> on the grounds that in *Sullivan* the plaintiff was a resident of the forum, a fact not present in *Davis*.<sup>169</sup> The suit was for personal injuries and wrongful death which had occurred in Canada, and the central issue was whether a Massachusetts statute requiring foreign corporations to give written appointment of the Corporations Commissioner of Massachusetts as agent for service of process could be applied to claims arising outside Massachusetts without violating the interstate commerce provisions of the federal Constitution.<sup>170</sup> The First Circuit replied that such application was constitutional since the plaintiff was a resident of the forum.<sup>171</sup> Although the doctrine of *forum non conveniens* could probably have been applied under the constitutional guidelines set out above, there was no constitutional compulsion to apply the doctrine.

A similar distinction can be seen in *Scanapico v. Richmond, Fredericksburg, and Potomac Railroad*.<sup>172</sup> There, in addition to the plaintiff being a forum resident, there was a much more substantial connection between the railroad and the forum than was present in the single-agent-for-solicitation-of-business situation found in *Davis*. Similar considerations were identified but not relied upon in *Pillsbury Co. v. Southern Railway*.<sup>173</sup>

From these cases it could be concluded that there may be instances in which a state will be precluded from serving as a forum, but the limitation seems to be restricted to the very narrow set of circumstances in which the state seeking to serve as a forum has virtually no connection with the litigation and, more importantly, to circumstances which involve interstate commerce. The reason for the narrowness of these cases is the fact that the constitutional limitation comes not from due process or full faith and credit, but from the interstate commerce clause. In cases not involving interstate commerce, and in some cases involving such commerce, a state is free to serve as a forum so long as it has sufficient contacts for jurisdiction. Such a state may apply its own substantive law provided it has sufficient connection with

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<sup>168</sup> 126 F.2d 433 (1st Cir.), *cert. denied*, 316 U.S. 696 (1942).

<sup>169</sup> *Id.* at 438-39.

<sup>170</sup> *Id.* at 436.

<sup>171</sup> *Id.* at 438.

<sup>172</sup> 439 F.2d 17 (2d Cir. 1970).

<sup>173</sup> 336 F. Supp. 1377 (D. Minn. 1972).



the litigation to do so without violating the requirements of *Home Insurance Co. v. Dick*.<sup>174</sup> A state can always serve as a forum for cases not concerned with interstate commerce so long as it does not unconstitutionally apply its substantive law. In regard to interstate commerce, there is a middle ground between the point at which it cannot serve as a forum. Instances of inability to serve as a forum should be severely limited, as has been done by the cases subsequent to *Davis*. In a federal union the basic assumption should be in favor of access to any forum and exceptions to this should be made sparingly.

There are some very definite conclusions which can be drawn in regard to the use of *forum non conveniens* at this time. It is clear that the doctrine still exists and is available for use in the state court systems. The dimensions of the doctrine are to be determined by a federal test since an erroneous application of *forum non conveniens*, like erroneous applications of public policy and penal classifications, so as to deny access to a forum, would be violative of full faith and credit. Lack of such a federal test to control the area would leave the states free to defeat the constitutional mandate of full faith and credit. Access to a forum should never be denied on the basis of *forum non conveniens* when no other forum is available to the plaintiff. Beyond this very basic point of availability of an alternate forum, application of the doctrine should be based on considerations of fairness, convenience, and judicial economy. Although this will be a discretionary decision on the part of the trial judge, it is not one which can be free from review in higher courts. It should never be forgotten that this is a decision based on a federal standard and subject to ultimate review by the United States Supreme Court.

These considerations apply to determine whether a court may refuse to serve as a forum. It has no application in the federal courts in view of transfer availability. There may be circumstances in which a state will be precluded from serving as a forum but these should be very limited. If a state wishes to serve as a forum to hear a case in which it cannot constitutionally apply its substantive law, it should be free to do so unless this would be an unreasonable burden on interstate commerce. Such

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<sup>174</sup> 281 U.S. 397 (1930).

impairment will arise only when a state has virtually no connection with the litigation. Aside from this very limited circumstance, the spirit of full faith and credit requires access.

#### THE FUTURE OF THE AREA

The interaction of the demands of full faith and credit with the concepts of public policy, penal statutes, and *forum non conveniens* is one of very great importance to our federal system. Although the broad scope of these three concepts may have some validity in deciding whether or not to allow access to suits based on the laws of foreign nations, such sweeping application is out of place in a federal union. If a federal union is to function in an effective manner, the broad dimensions of all three of these doctrines must bow to some degree to the constitutional mandate of full faith and credit.

The principle that the concept of public policy functions within a framework prescribed by full faith and credit was established by *Hughes v. Fetter*,<sup>175</sup> *First National Bank of Chicago v. United Air Lines*,<sup>176</sup> and *Broderick v. Rosner*.<sup>177</sup> These cases imply that the constitutional framework also governs the workings of the bar of access to penal statutes and the doctrine of *forum non conveniens*. It may be concluded from these cases that an erroneous application of any of these concepts so as to deny access to a forum would be a denial of full faith and credit. In view of this constitutional dimension, it would appear that the precise limits of each of these three ideas are to be determined according to a federal test. To allow the individual states to develop tests for each of these concepts is to allow the fox to guard the henhouse.

The purpose of this paper has been to outline the dimensions of the doctrines and to suggest both the possible and probable ways in which the United States Supreme Court could deal with these issues. It is acknowledged that a great deal of this is conjecture due to a lack of precedent in the area. It is possible that the trends noted in some lower courts will not be adopted when the Supreme Court confronts the issues. Although a feeling of

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<sup>175</sup> 341 U.S. 609 (1951).

<sup>176</sup> 342 U.S. 396 (1952).

<sup>177</sup> 294 U.S. 629 (1935).

personal discomfort with the recent appointees to the Supreme Court might lead one to conclude that there is little hope for substantial work being done in the area, this is probably an unfair reaction. It was, after all, the Warren Court which dodged these issues for most of these last twenty years, and no one would deny that the present Court is far removed from the Warren era. It would seem, however, that the present Court is well on its way to making a reputation for itself. It is possible that the reputation of this Court could be made by its ability to deal with the technical aspects of the law which were ignored during the social engineering period of the Warren Court. If this is true, we may yet see significant work by the Supreme Court in the area of choice of law, and it is suggested that there is no more appropriate subject than that of the issue of access to a forum. It is sufficiently narrow to allow a meaningful contribution without opening up the broader area of choice of law rules which may not yet be ripe for work either by the Supreme Court or by Congress. Whatever course the future may take, it is to be hoped that it will be one which will increase the unity of our federal system. The inclusion of the full faith and credit provisions in the federal system was surely no accident and one can only hope that the early reach for unity contained therein will yet prevail.