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CONGRESSIONAL ENACTMENT OF UNIFORM JUDICIAL NOTICE ACT

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THE National Conference of Commissioners on Uniform Laws approved in 1936 the Uniform Judicial Notice of Foreign Law Act,[1] which has since been adopted by fourteen states.[2] This act was drafted to make uniform a legislative movement of the past twelve years proposing to change two rules of the common law. One is the rule that a state court will not notice the law of sister states in the

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[1] "Section 1. (Judicial Notice.) Every court of this state shall take judicial notice of the common law and statutes of every state, territory and other jurisdiction of the United States.

"Section 2. (Information of the Court.) The court may inform itself of such laws in such manner as it may deem proper, and the court may call upon counsel to aid it in obtaining such information.

"Section 3. (Ruling Reviewable.) The determination of such laws shall be made by the court and not by the jury, and shall be reviewable.

"Section 4. (Evidence as to Laws of Other Jurisdictions.) Any party may also present to the trial court any admissible evidence of such laws, but, to enable a party to offer evidence of the law in another jurisdiction or to ask that judicial notice be taken thereof, reasonable notice shall be given to the adverse parties either in the pleadings or otherwise.

"Section 5. (Foreign Country.) The law of a jurisdiction other than those referred to in Section 1 shall be an issue for the court, but shall not be subject to the foregoing provisions concerning judicial notice.

"Section 6. (Interpretation.) This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

"Section 7. (Short title.) This act may be cited as the Uniform Judicial Notice of Foreign Law Act.

"Section 8. (Repeal.) All acts or parts of acts inconsistent with the provisions of this act, are hereby repealed.

Section 9. (Time of Taking Effect.) This act shall take effect ————." 9 UNIFORM LAWS ANNOTATED (Supp. 1941), pp. 107-109.

[2] Ill. Stat. (Smith-Hurd, Supp. 1940), c. 51, §§ 48g-48n; Ind. Stat. Ann. (Burns, Supp. 1941), §§ 2-4801 to 2-4807; Me. Laws (1939), c. 75; Md. Code Ann. (1939), art. 35, §§ 56-62; Minn. Stat. (Mason, Supp. 1940), §§ 9852-1 to 9852-7; Mont. Rev. Code (Supp. 1939), §§ 10532.1 to 10532.7; N. J. Laws (1941), c. 81, Rev. Stat. § 2:98-28; N. D. Laws (1937), c. 196; Ohio Code (Baldwin, Supp. 1940), §§ 12102-31 to 12102-37 [judicial notice of statutes only; see 6 OHIO L. J. 37 (1939)]; Ore. Comp. Laws (1940), §§ 2-503 to 2-509; Pa. Stat. Ann. (Purdon, Supp. 1940), §§ 291-297 [see 14 TEMP. L. Q. 267 at 271 (1940)]; R. I. Laws (1940), c. 939; S. D. Code (1939), § 36.0702; Wyo. Sess. Laws (1941), c. 78.

United States; [3] and the other is the rule that the determination of such law shall be made by the jury and not by the judge.[4] Accordingly, the Uniform Act provides (1) that state courts shall take judicial notice of the common law and statutes of every state, territory, and other jurisdiction of the United States,[5] and (2) that laws of sister states and foreign countries shall be determined by the judge.[6] These two provisions are complementary to each other, since a corollary of the requirement of judicial notice is the requirement that sister state law shall be decided by the judge and not by the jury.

In drafting the Uniform Act the commissioners were motivated not only by the desire for uniformity, but also by the need for a statute that would accomplish the desired reforms.[7] Twenty-two states have already adopted judicial notice statutes which vary materially in their phrasing and which have, with various degrees of success, achieved their purpose.[8] In the opinion of the commissioners, this experience has demonstrated the need for more effective legislation. The Uniform Act represents an attempt to meet this need. It was drafted in the light of previous experience with state judicial notice statutes and was intended as a model for state legislation in this field.

If the necessity for an effective, uniform statute exists (and the Commissioners on Uniform Laws feel that it does), it would seem that the reforms contemplated could better be accomplished by Congressional action than by state action. It would be easier to secure adoption by one federal legislature than by many state legislatures, and even though all of the states did adopt the act without amendment, different interpretations probably would be made by the courts in some. Complete uniformity is only to be achieved through enactment of a federal law, which becomes effective immediately in every state and which is subject to one rule of construction. These reasons apparently establish

[3] 9 WIGMORE, EVIDENCE, 3d ed., § 2573 (1940).

[4] 9 WIGMORE, EVIDENCE, 3d ed., § 2558 (1940); 30 MICH. L. REV. 747 at 748-749 (1932).

[5] Sec. 1, quoted note 1, supra.

[6] Secs. 3 and 5, quoted note 1, supra.

[7] This is one of the objectives of the uniform law movement. See: Paper by Freund in 22 IND. STATE BAR ASSN. PROC. 153 at 160-161 (1918); 16 ILL. L. REV. 227 at 229-230 (1921); Lapp, "Uniform State Legislation," 4 AM. POL. SCI. REV. 576 at 580 (1910).

[8] 30 MICH. L. REV. 747 at 761-765 (1932); 37 YALE L. J. 813 (1928); 10 BOST. UNIV. L. REV. 417 (1930); 46 HARV. L. REV. 1019 (1933). To the fifteen statutes enumerated in these notes should be added the statutes cited in note 2, supra.

a prima facie case for Congressional rather than state action, provided that Congress possesses the requisite constitutional power.[9]

It is proposed to discuss here the political and constitutional aspects of this possible solution of the problem.

I

THE UNIFORM JUDICIAL NOTICE OF FOREIGN LAW ACT

A. *Need for Changing Common Law*

Section 1 of the Uniform Act provides that state courts "shall take judicial notice of the common law and statutes of every state, territory, and other jurisdiction of the United States." This provision abolishes the so-called common-law rule that state courts will not take judicial notice of the law of sister jurisdictions of the United States.[10] It imposes a duty to take notice of that law, which is like the duty to notice the domestic law.

The so-called common-law rule was derived from the English rule that English courts will not take judicial notice of the law of foreign countries. This latter rule was, and still is, supported by considerations not present today with respect to jurisdictions within the United States.[11] The relative inaccessibility of foreign law reports and statutes, and the necessity for their translation and interpretation by persons familiar with the foreign system, which frequently differed from the common law, were the grounds upon which the English courts based their refusal to take judicial notice of foreign law and required instead that it be proved as a fact.[12] For reasons of expediency they rejected

[9] Although this article will treat only of the Uniform Judicial Notice Act, the thesis advanced will have broad implications. Conceivably Congress may have the power to adopt other uniform acts such as Uniform Acknowledgements Act; Uniform Foreign Depositions Act; Uniform Proof of Statutes Act; Uniform Wills Act, Foreign Probated; and Uniform Act to Secure Attendance of Witnesses from Without a State in Criminal Proceedings. See texts in 9 UNIFORM LAWS ANNOTATED (1932).

[10] See note 3, supra.

[11] 3 BEALE, CONFLICT OF LAWS, § 621.3 (1935); Explanatory Note, 9 UNIFORM LAWS ANNOTATED (Supp. 1941), p. 106. In Hammond Motor Co. v. Warren, 113 Kan. 44 at 46, 213 P. 810 (1923), the court said: "Nor would it be indiscreet to add that the old rule that a court cannot consider and apply the general statutes of another state unless they are specially pleaded and formally proved, even to prevent a miscarriage of justice, is an anachronism which comes down from the times when statutes of other states were not readily accessible, and the judiciary will not wait much longer for legislative assistance to get rid of it altogether."

[12] 9 UNIFORM LAWS ANNOTATED (Supp. 1941), p. 106; 13 HALSBURY, LAWS OF ENGLAND, 2d ed., §§ 685-689 (1934).

a rule which would burden them with a difficult task of investigation.[13] However, none of these considerations exists today as between jurisdictions within the United States, whatever the situation may have been a hundred years ago. There is only one official language; a vast majority of the states have the same legal system; and the reports and statutes of the various states are widely circulated. Judges can familiarize themselves with the law of other states as easily as they can determine their own law.[14] It is submitted, therefore, that the refusal to take judicial notice is no longer justified by considerations of convenience.

Aside from the fact that the common-law practice is an anachronism,

[13] The development of the doctrine of judicial notice was concerned with defining matters which were so notorious that the court could notice and act upon them without formal proof. Although at first the doctrine apparently was extended primarily to facts notorious to all men, it later was applied to facts known to educated men or easily ascertainable by the judges. Thus, the English courts began to notice the contents of statutes in 1537 and 1553, although as a matter of fact they probably had no actual knowledge of them. 9 HOLDSWORTH, HISTORY OF ENGLISH LAW 135-136 (1926). But where the foreign law was pertinent to the decision of a case the necessity for expert testimony was recognized, since the judges neither had actual knowledge of the law nor were they equipped to ascertain it without the assistance of experts. In Buckley v. Rice Thomas, 1 Plowden 120 at 124-125, 75 Eng. Rep. 186 (1554), the court said per Saunders, J.: "I grant that if matters arise in our law which concern other sciences or faculties, we commonly apply for the aid of that science or faculty which it concerns. . . . And therefore in 7 H. 6 in a case that came before the Judges, which was determinable in our law, and also touched upon the civil law, they were well content to hear Huls who was a batchelor of both laws, argue and discourse upon logic, and upon the difference between *compulsione praecisa et causativa*, as men that were not above being instructed and made wiser by him." See 5 HOLDSWORTH, HISTORY OF ENGLISH LAW 419-420 (1926). See also: Sussex Peerage Case, 11 Cl. & Fin. 85, 8 Eng. Rep. 1034 (1844).

[14] In Gorman v. St. Louis Merchants' Bridge Terminal Ry., 325 Mo. 326 at 332-333, 28 S. W. (2d) 1023 (1930), the court said per Ragland, J.: "In support of its first assignment appellant has cited Illinois cases as exemplifying the principles of law which it insists are controlling with respect thereto, the cause of action having arisen in the State of Illinois. The law as so interpreted would be controlling if we were cognizant of it. It was neither pleaded nor proven and we cannot take judicial notice of it. This last seems an absurd thing to say when it is considered that the official reports of the courts of last resort of our sister state are lying here before us and that we frequently cite cases reported in them as persuasive authority in support of our own rulings. But until the Legislature sees fit to fully release us from this archaic rule . . . we are supposed to abide by it."

The effect of the Uniform Act would be to shift the duty of ascertaining the foreign law from counsel to the court, but the duty imposed would not unduly hinder the judge. The act specifically provides that he may inform himself as to the law in such manner as he pleases, and he may ask the assistance of counsel (§ 2). The obligation which rests upon the judge to ascertain the domestic law is similar in nature and is not considered to be onerous. It is unlikely, therefore, that the provisions for judicial notice can be objected to on this score. See 20 COL. L. REV. 476 at 477-478 (1920).

there are affirmative reasons for suggesting that the courts should notice sister state law. At present it must be proved as a fact when under conflicts rules it determines the rights of the litigants.[15] If a party relying upon the foreign law fails to prove it, however, the courts consider the grant of a nonsuit or a directed verdict in favor of the opposing party too harsh.[16] Here most courts make a presumption as to the foreign law.[17] In many instances the presumption is reasonable and the result is the same as though the court judicially noticed the applicable law, but in other cases the presumption has no reasonable basis and its adoption in effect abrogates the rules of conflict of laws. This anomalous and unequal operation would be avoided if the courts were obligated to take judicial notice and thus avoid the use of presumptions.

No attempt will be made here to examine and criticize extensively the presumptions which are employed: that has been done adequately by others.[18] It will be sufficient for present purposes to consider these presumptions generally. Three different rules have been formulated. (1) Some courts presume that the law of the sister state is similar to the common law of the forum as it existed prior to statutory modifications.[19] (2) Others presume that the law of the sister state is the same as the law of the forum (including statutes of the forum).[20] (3) Other courts make a combination of the first two: as to those states which were formed from territory formerly under English control the presumption is that the law there is the common law unchanged by statute; as to the other states no presumption is made, and the law of the forum is applied.[21]

[15] 3 BEALE, CONFLICT OF LAWS, § 621.5 (1935); 9 WIGMORE, EVIDENCE, 3d ed., § 2558 (1940).

[16] 3 BEALE, CONFLICT OF LAWS, § 622A.1 (1935).

[17] 3 BEALE, CONFLICT OF LAWS, § 623.1 (1935); 9 WIGMORE, EVIDENCE, 3d ed., § 2536 (1940); 67 L. R. A. 33 at 38-61 (1905); 113 AM. ST. REP. 868 at 875-881 (1907).

[18] 3 BEALE, CONFLICT OF LAWS, § 623.1 (1935); Kales, "Presumption of the Foreign Law," 19 HARV. L. REV. 401 (1906); von Moschzeisker, "Presumptions as to Foreign Law," 11 MINN. L. REV. 1 (1926); 30 MICH. L. REV. 747 at 755-761 (1932); 33 HARV. L. REV. 315 (1919); 20 COL. L. REV. 476 (1920).

[19] Cases collected in 30 MICH. L. REV. 747 at 755-757, note 25 (1932). See also: 3 BEALE, CONFLICT OF LAWS, § 623.1 (1935); 9 WIGMORE, EVIDENCE, 3d ed., § 2536 (1940); Kales, "Presumption of the Foreign Law," 19 HARV. L. REV. 401 (1906).

[20] Cases collected in 30 MICH. L. REV. 747 at 758-759, note 30 (1932). See also other authorities cited in note 19, supra.

[21] Cases collected in 30 MICH. L. REV. 747 at 760, note 35 (1932). See also: 3 BEALE, CONFLICT OF LAWS, § 623.1 (1935); 9 WIGMORE, EVIDENCE, 3d ed., § 2536, note 2 (1940).

All three rules, and especially the third, are open to criticism. It may be said with respect to the first that in the ordinary case involving jurisdictions which have the common law it is proper to presume that the law of the sister state is similar to the common law. Yet so much of the common law has been altered by statute that to presume its existence in all cases runs counter to reasonable probability. Similarly, the second view is undesirable since there is no basis for the presumption that the statutes of the forum are similar to the law of the sister state. The third view lacks the simplicity of the first two without more nearly approaching the actual facts. To the extent that it makes no presumption at all as to the foreign law, and requires application of local law, it completely violates conflicts principles. The desirable remedy seems obvious: a judicial notice statute which eliminates presumptions entirely and requires the court actually to determine the law of the sister state.

A desirable consequence of the requirement of judicial notice is that the foreign law shall be found by the judge and not by the jury. Accordingly, the Uniform Act abrogates the rule which exists in some states that sister state law is a matter of "fact" determinable by the jury,[22] by providing that the judge shall make this determination.[23] The rule which leaves this question to the jury has been severely criticized; it has never been defended as a matter of policy or convenience.[24] Whether sister state law is "fact" or "law," it would seem that the judge should decide what it is since he is better qualified to determine that question than the jury.

B. *Need for Uniformity*

Admittedly there is less need for uniform practice among the states with respect to a procedural matter such as judicial notice than there is for uniformity of substantive laws regulating commercial and other matters.[25] Nevertheless, uniform procedure is desirable because of the increasing amount of litigation involving interstate transactions and transactions which occur outside the forum.[26] The Commissioners on

[22] See note 4, supra.

[23] Section 3, quoted note 1, supra.

[24] 9 WIGMORE, EVIDENCE, 3d ed., § 2558 (1940); 31 HARV. L. REV. 896 (1918); 20 HARV. L. REV. 575 (1907).

[25] Hemphill, "The Uniform Law Craze," 18 LAWY. & BANKER 170 (1925), reprinted 60 AM. L. REV. 312 (1926); Ailshie, "Limits of Uniformity in State Laws," 13 A.B.A.J. 633 at 635 (1927); Young, "Uniform State Laws," 19 VERMONT BAR ASSN. PROC. 137 (1926).

[26] Walsh, "Uniform Laws and Court Procedure," 3 LAWY. & BANKER 165 at 168-169 (1910); Shelton, "Fixed Interstate Judicial Relations," 14 MINN. STATE BAR ASSN. PROC. 23 at 37-38 (1914).

Uniform Laws have recognized this by proposing a number of laws which are primarily procedural in nature.[27] Furthermore, uniformity is particularly desirable in the judicial notice of sister state law since the mode of ascertaining that law is inseparably connected with the extra-state enforcement of causes of action. We have seen that the use of presumptions sometimes results in the application of the "wrong" law or the "wrong" principles of law,[28] and to the extent that the rules of conflict of laws are based upon sound policy this method of determining the applicable rule by presumption must be deprecated. The adoption of the Uniform Act will not only, by abolishing presumptions, facilitate the application of conflicts principles, but it will also render their application more uniform and certain.

Apart from the desirability of a uniform statute, necessity does exist for an adequate statute. Some of the state judicial notice statutes have been criticized on the ground that they are too explicit, others because they are too general.[29] It may be concluded that the reforms attempted in these states have not been wholly successful.

C. *Provisions of the Act*

It has already been observed that the Uniform Act has a twofold purpose.[30] It provides (1) that state courts shall take judicial notice of the common law and statutes of every state, territory, and other jurisdiction of the United States; and (2) that such laws shall be determined by the court.[31] These purposes are effectuated by sections 1 and 3, which are as follows:

> "Section 1. Every court of this state shall take judicial notice of the common law and statutes of every state, territory, and other jurisdiction of the United States."

[27] Uniform Acknowledgments Act; Uniform Acknowledgments Act, Foreign; Uniform Act to Secure Attendance of Witnesses; Uniform Official Reports as Evidence Act; Uniform Act for Extradition of Persons of Unsound Mind; Uniform Foreign Depositions Act; Uniform Proof of Statutes Act; Uniform Wills Act, Foreign Executed; Uniform Wills Act, Foreign Probated.

[28] See p. 179, supra.

[29] 30 MICH. L. REV. 747 at 761-765 (1932); 46 HARV. L. REV. 1019 at 1020 (1933); 37 YALE L. J. 813 (1928); 24 CAL. L. REV. 311 at 312 (1936); 10 BOST. UNIV. L. REV. 417 (1930); 42 HARV. L. REV. 130 (1928); 14 ST. LOUIS L. REV. 440 (1929).

[30] See pp. 174-175, supra.

[31] Sec. 5 of the Uniform Act provides that the law of foreign countries shall be an issue for the determination of the court, but that such law shall not be subject to the provisions of the act concerning judicial notice. In the absence of a treaty, Congress probably could not enact this section and for this reason the act will be discussed as

"Section 3. The determination of such laws shall be made by the court and not by the jury, and shall be reviewable."

The duty imposed upon the court by section 1 to take judicial notice of the foreign law does not necessarily imply, if the section stood alone, that the court exclusively shall determine such law in all cases.[32] The purpose of this section is to expedite proof; but in case the "evidence" is conflicting, the foreign law noticed by the judge could be disputed by evidence of the opposing party.[33] This is the usual practice in judicial notice cases, which is recognized by section 4 of the Uniform Act.[34] In this situation, then, the judge would not be precluded by the terms of section 1 from submitting the evidence to the jury, who could negative the judge's ruling.[35] To avoid this possibility the framers of the Uniform Act specifically provided in section 3 that it is the function of the court in all instances to determine the foreign law.[36]

The remaining sections designate the procedure to be followed by the courts in carrying out the foregoing provisions. They are merely explanatory, describing in greater detail the intention which is more

though § 5 were omitted. Since the cases involving the law of a foreign country are comparatively few, the omission of § 5 will not seriously impair the usefulness of the statute. Moreover, once the act becomes effective the practice established of having the judge decide the law of other states may well be extended by the courts, upon their own initiative, to foreign law. Should the United States negotiate treaties on the subject with foreign countries, Congress probably would have the power to prescribe how the law of those countries shall be determined by the state courts. See 23 ILL. L. REV. 732 at 736 (1929).

[32] 9 WIGMORE, EVIDENCE, 3d ed., § 2567 (1940).

[33] Id., THAYER, A PRELIMINARY TREATISE ON EVIDENCE 308 (1898): "Taking judicial notice does not import that the matter is indisputable. It is not necessarily anything more than a *prima facie* recognition, leaving the matter still open to controversy."

[34] Sec. 4 provides, "Any party may also present to the trial court any admissible evidence of such laws," presumably for the purpose of rebutting the evidence of the opposing party and to show the court what the rule of law is which should be noticed.

[35] Some courts might hold that a statutory duty to take judicial notice of the law of another state also requires the court to decide the law without submitting the issue to the jury. See Hale v. New Jersey Steam Navigation Co., 15 Conn. 539 at 549 (1843); Lockwood v. Crawford, 18 Conn. 361 at 370 (1847); Thomson-Houston Elec. Co. v. Palmer, 52 Minn. 174 at 177, 53 N. W. 1137 (1893). But, as pointed out above, the duty to take judicial notice does not also make the judge's determination exclusive, in the absence of a statutory provision therefor. The rulings in these cases are referable rather to the doctrine that, at common law, the foreign law should be evidenced to the court and not to the jury. See 9 WIGMORE, EVIDENCE, 3d ed., § 2567, notes 3, 4, and 5 (1940).

[36] Should the judge's determination be contrary to the weight of the evidence, his decision would be reviewable. See § 3, quoted supra, note 1.

generally expressed in sections 1 and 3.[37] They were inserted in the act out of an abundance of caution as a guide to the courts in interpreting the provisions set out above.[38]

II

A FEDERAL ACT

A. *Desirability of Congressional Enactment*

If there is need for a statute such as the Uniform Judicial Notice Act, Congressional enactment would seem to be preferable to state enactment because it is easier to overcome the inertia of one legislative body than of fifty-three.[39] Only eight[40] of the sixty-eight uniform laws which have been proposed have been adopted by a majority of the

[37] Thus, § 2 provides: "The court may inform itself of such laws in such manner as it may deem proper, and the court may call upon counsel to aid it in obtaining such information." This section visualizes the possibility that the court may not actually know the law of another jurisdiction. It states in broadest terms that the court may investigate the law for itself or may ask counsel to assist in the investigation. Even though § 2 were not in the act, § 1 might have been interpreted to permit the court to call upon counsel for assistance. This practice exists with respect to the ascertainment of domestic law, which the court judicially notices, and there would seem to be no reason why the practice should not be observed in ascertaining the foreign law. It is generally recognized in judicial notice cases of all kinds that the judge may investigate the facts for himself or may ask the help of counsel. See THAYER, A PRELIMINARY TREATISE ON EVIDENCE 280, note 2 (1898). This practice can reasonably be read into the judicial notice requirement of § 1, so that § 2 is hardly needed.

Sec. 4, quoted supra, note 1, provides that the party who wishes to invoke the law of another jurisdiction must give adequate notice to adverse parties of his intention. Fairness requires that opponents be notified so they can prepare to introduce countervailing evidence. In some states where persons relying upon the foreign law must plead it, notice is given by the pleadings, but in those states where the law need not be pleaded notice should otherwise be given. Sec. 4 was inserted to remove any doubt about this matter. Like § 2, however, it may be regarded as surplusage since § 1 might have been construed as imposing a duty to give reasonable notice.

The provision of § 3 that the determination of the foreign law shall be reviewable merely describes the procedural consequence of requiring the judge to decide the issue and not the jury. The decision of the judge would be reviewable in the absence of this provision, so this clause adds little to § 3. See 9 WIGMORE, EVIDENCE, 3d ed., § 2573 at p. 561 (1940).

[38] Commissioners' Explanatory Note, 9 UNIFORM LAWS ANNOTATED (Supp. 1941), pp. 107-108.

[39] The uniform laws are proposed for adoption by the forty-eight states and by Alaska, Hawaii, the District of Columbia, Puerto Rico and the Philippine Islands.

[40] Number of adoptions: Uniform Act to Secure Attendance of Witnesses, 35; Uniform Criminal Extradition Act, 31; Uniform Sales Act, 37; Uniform Warehouse Receipts Act, 49; Uniform Negotiable Instruments Act, 53; Uniform Bills of Lading Act, 28; Uniform Narcotic Drug Act, 42; Uniform Veterans' Guardianship Act, 33. See annotations to the various acts in Uniform Laws Annotated.

jurisdictions, and only one has been accepted by all.[41] Complete uniformity has not been realized in most cases, and there is no reason to believe that the Uniform Judicial Notice Act will fare any better in this respect than the others.[42]

Moreover, it will be enacted in some states with amendments of various kinds, if past experience is an accurate basis for prediction; and even those provisions which are adopted without amendment will be susceptible to diverse interpretations by the courts.[43] For these reasons, real uniformity can only be accomplished by a federal statute which will become immediately the law in all the states and territories, and which will be subject to one construction.

Two practical objections might be made to enactment by Congress, neither of which is conclusive when properly considered: (1) A federal judicial notice statute would constitute an unwarranted encroachment upon states' rights; and (2) such a statute would unduly burden the federal courts with litigation that might better be decided by the state courts. These objections will be considered separately.

The states' rights contention has merit in those instances where differences in local conditions require diversity of laws among the states rather than uniformity.[44] Indeed, those differences in conditions which are reflected in dissimilar state policies may partially explain why some of the uniform laws, particularly the "social" measures, have not been

[41] Uniform Negotiable Instruments Act.

[42] The uniform acts which have been most successful, such as the Negotiable Instruments Act, Warehouse Receipts Act, Bills of Lading Act, and Sales Act, have dealt with strictly "legal" problems; those which have been least successful have been "social" measures, such as the Marriage and Marriage License Act; Child Labor Act; Workmen's Compensation Act. Young, "Address of President," 51 A.B.A. REP. 651 at 657 (1926). It would seem, too, that the most successful acts have dealt with commercial matters where the need for uniformity is greatest. Although the Judicial Notice of Foreign Law Act deals with a "legal" matter as distinguished from a "social" matter, it is not likely to be so successful as the commercial statutes mentioned above, since the need for uniform procedure probably is not so great as the desire for uniform substantive laws respecting commerce.

[43] Shelton, "An American Common Law in the Making—the Habit of Thinking Uniformity," 30 LAW NOTES 50 at 53 (1926); Crook, "Uniform State Laws," 4 TEX. L. REV. 316 at 325-326 (1926); 43 WASH. L. REP. 67 (1915); Barratt, "The Tendency to Unification of Law in the United States," 5 J. COMP. LEG. & INT. L. 3d ser., 227 at 230-231 (1923).

[44] Hemphill, "The Uniform Law Craze," 18 LAWY. & BANKER 170 (1925), reprinted 60 AM. L. REV. 312 (1926); Ailshie, "Limits of Uniformity in State Laws," 13 A.B.A.J. 633 at 635 (1927); Moore, "The Passion for Uniformity," 62 UNIV. PA. L. REV. 525 at 539 (1914); Kenner, "The Function of Uniform State Laws," 1 IND. L. J. 127 at 129 (1926); Lapp, "Uniform State Legislation," 4 AM. POL. SCI. REV. 576 at 580 (1910).

widely adopted.[45] In so far as those laws deal with subjects which require diverse regulation by the states, enactment by Congress would be unwise even though Congress had the power.[46] It is submitted, however, that the subject matter of a statute such as the Uniform Judicial Notice Act is adapted to uniform treatment and does not affect local policy. It cannot be said that there are inherent differences in the court procedure of the various states which necessitate differing practices with respect to proof of sister state law. Although state procedure has been regarded traditionally as local in nature, the enforcement of sister state laws involves relationships between states and should be considered as of federal concern. In 1790 and 1801, Congress adopted procedural laws regulating the manner of proving in state courts the statutes and the judicial and nonjudicial records of other states,[47] yet no objection has been made to that legislation on the ground that it intruded upon fields of local concern. Nor should the argument prevail against a judicial notice statute which establishes the method of ascertaining sister state law.

Assuming that judicial notice is suited to uniform legislation, a federal statute on the subject might nevertheless be unwise if it flooded the federal courts with litigation which might better be determined by the state courts. In that event the advantage of a unified law might be outweighed by the disadvantage of an overworked federal judiciary.[48] If, for example, the federal judicial notice statute were construed as giving litigants the right of appeal to the United States Supreme Court from the state supreme court whenever it claimed that the state court erroneously decided the law of another state, serious objections might be made to the act.[49] To remove any question about this, the statute

[45] Young, "Address of President," 51 A.B.A. REP. 651 at 657-658 (1926); Kenner, "The Function of Uniform State Laws," 1 IND. L. J. 127 at 134 (1926).

[46] MacChesney, "Uniform State Laws," 48 CHICAGO LEGAL NEWS 353 at 356 (1916).

[47] Rev. Stat. (1878), §§ 905, 906, 28 U. S. C. (1934), §§ 687, 688.

[48] Many proponents of uniform laws are opposed to achieving uniformity through federal action. The uniform laws movement has been, in part, a states' rights movement. See Crook, "Uniform State Laws," 4 TEX. L. REV. 316 (1926); Hart, "Uniformity of Legislation," 21 COLO. B. A. REP. 96 at 116 (1918); MacChesney, "Uniform State Laws," 48 CHICAGO LEGAL NEWS 353 at 358 (1916).

The administrative feasibility of federal as contrasted with state control may be one of the limitations on Congress' power under the full faith and credit clause. This test has been suggested as a guide to Congressional discretion under both the due process clause of the Fourteenth Amendment and the interstate commerce clause. See 29 COL. L. REV. 321 (1929); 33 COL. L. REV. 854 at 864 (1933).

[49] This interpretation should not be made, however. Sec. 3 of the Uniform Act provides that "the determination of" the law of another jurisdiction "shall be made

might provide that the determination of such law shall be reviewable only in the state courts. An appeal as of right could be taken to the United States Supreme Court only in the situation where the state court held the act invalid.[50] All other questions involving the construction and application of the act would be reviewable exclusively on certiorari from the highest state court to the United States Supreme Court, under the existing federal statutes.[51] Since the writ of certiorari is discretionary with the Supreme Court there is no danger that it would be burdened with cases involving questions of this nature.

B. *Constitutionality*

The constitutional authority for a federal judicial notice statute, if such exists, must be derived primarily from the full faith and credit clause, which provides: "Full Faith and Credit shall be given in each State to the Public Acts, Records and judicial Proceedings of every

by the court and not by the jury, *and shall be reviewable.*" If this provision is carried into a federal judicial notice statute, it should not be interpreted as modifying the appellate procedure established by 28 U. S. C. (1934), § 344(a) and (b), for the review of state supreme court action in the United States Supreme Court, since the provision merely describes the procedural consequence *in state courts* of the requirement that the judge shall decide the foreign law and not the jury. See note 37, supra.

Under present practice review is by certiorari in accordance with § 344b when it is claimed that the state supreme court denied faith and credit to a statute of another state. See Dodd, "The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws," 39 HARV. L. REV. 533 at 560-561 (1926). And no reviewable question is presented for the U. S. Supreme Court when it is contended that the state supreme court erroneously interpreted a sister state statute. Lloyd v. Matthews, 155 U. S. 222, 15 S. Ct. 70 (1894); Glenn v. Garth, 147 U. S. 360, 13 S. Ct. 350 (1893); Banholzer v. New York Life Ins. Co., 178 U. S. 402, 20 S. Ct. 972 (1900); Eastern Building & Loan Assn. v. Ebaugh, 185 U. S. 114, 22 S. Ct. 566 (1902); Johnson v. New York Life Ins. Co., 187 U. S. 491, 23 S. Ct. 194 (1903); Allen v. Alleghany Co., 196 U. S. 458, 25 S. Ct. 311 (1905); Smithsonian Institution v. St. John, 214 U. S. 19, 29 S. Ct. 601 (1909); Louisville & Nashville R. R. v. Melton, 218 U. S. 36, 30 S. Ct. 676 (1910); Texas & New Orleans Ry. v. Miller, 221 U. S. 408, 31 S. Ct. 534 (1911); Hartford Life Ins. Co. v. Johnson, 249 U. S. 490, 39 S. Ct. 336 (1919). Cf. Finney v. Guy, 189 U. S. 335, 23 S. Ct. 558 (1903); Eastern Building & Loan Assn. v. Williamson, 189 U. S. 122, 23 S. Ct. 527 (1903); Converse v. Hamilton, 224 U. S. 243, 32 S. Ct. 415 (1912); Modern Woodmen of America v. Mixer, 267 U. S. 544, 45 S. Ct. 389 (1925); John Hancock Mutual Life Ins. Co. v. Yates, 299 U. S. 178, 57 S. Ct. 129 (1936).

[50] 28 U. S. C. (1934), § 344 (a). See Rubin and Willner, "Obligatory Jurisdiction of the Supreme Court: Appeals from State Courts under Section 237 (a) of the Judicial Code," 37 MICH. L. REV. 540 (1939).

[51] 28 U. S. C. (1934), § 344(b). See Longest v. Langford, 274 U. S. 499, 47 S. Ct. 668 (1927); 5 HUGHES, FEDERAL PRACTICE, § 3348 (1931).

other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." [52] The scope and meaning of this constitutional provision can be ascertained best in the light of the circumstances which preceded and surrounded its adoption.

1. *Origin of the Full Faith and Credit Clause*

The full faith and credit clause of the Federal Constitution was derived from the more limited full faith and credit clause in the Articles of Confederation.[53] Although this provision of the Articles of Confederation was an innovation in many respects, there already existed in 1778 several colonial statutes which expressed the idea of full faith and credit in embryonic form.[54] The origin of the idea is found in these statutes.[55]

The English colonies in America were regarded at common law as foreign to each other for some purposes and a colonial judgment had the legal effect of a foreign judgment in that it was merely prima facie evidence of the debt.[56] It followed that the merits of the original claim could be relitigated in an action in another colony upon such a judgment.[57] This rule encouraged judgment debtors, especially those living near the boundaries of the colonies, to remove with their effects to a neighboring colony, making it necessary for creditors to sue them again

[52] U. S. Constitution, Art. IV, § 1.

[53] Art. IV: "Full faith and credit shall be given in each of these states to the records, acts, and judicial proceedings, of the courts and magistrates of every other state."

[54] Acts and Resolves of the Province of Massachusetts Bay, sess. of 1773-74, c. 16; Ga. Colonial Laws (Reprint), p. 7 (Act of Feb. 8, 1757); Del. Laws (1769), c. 196; Md. Laws (1729), c. 20, reprinted in DORSEY, PUBLIC LAWS OF MARYLAND (1840).

[55] For an excellent discussion of the origin of the full faith and credit clause, see: Ross, "'Full Faith and Credit' in a Federal System," 20 MINN. L. REV. 140 (1936). See also: Abel, "Administrative Determinations and Full Faith and Credit," 22 IOWA L. REV. 461 (1937); Corwin, "The 'Full Faith and Credit' Clause," 81 UNIV. PA. L. REV. 371 (1933); Cook, "The Powers of Congress under the Full Faith and Credit Clause," 28 YALE L. J. 421 (1919); Costigan, "The History of the Adoption of Section 1 of Article IV of the United States Constitution," 4 COL. L. REV. 470 (1904); Smith, "The Constitution and the Conflict of Laws," 27 GEO. L. J. 536 at 536-543 (1939).

[56] 2 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 5th ed., § 1306 (1891), citing Bissell v. Briggs, 9 Mass. 462 at 465 (1813), and Commonwealth v. Green, 17 Mass. 515 at 543 (1822). See: Hilton v. Guyot, 159 U. S. 113 at 180-181, 16 S. Ct. 139 (1895).

[57] 2 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 5th ed., § 1307 (1891). See also: 2 STORY, CONFLICT OF LAWS, 8th ed., §§ 603-608 (1883).

in the colony to which they had removed, with the result that a judgment creditor sometimes lost the second suit, even though his claim was meritorious, because witnesses had died or were otherwise unavailable.[58]

This practice of judgment debtors was also encouraged by the fact that the judgment creditor could not conveniently prove his judgment in the second action under the existing rules of evidence.[59] According to the common law a colonial judgment could be proved in an English court or in the court of another colony only by a copy exemplified under seal or sworn under oath to have been examined with the original.[60] The judgment could not be proved by a copy certified by the officer of the court who was the custodian of the records, since the authority to certify public records would not be implied from the nature of his office as custodian.[61] Apparently no good reason existed for refusing to receive certified copies, although they were more convenient and less expensive than "sworn" or exemplified copies. Wigmore intimates that the policy may be attributed to the selfishness of the practitioner who was satisfied with a rule of proof which retained copying fees and witness fees chiefly in the hands of the lawyer's clerks, as well as to the favor shown by the Chancery to exemplified copies.[62]

In 1774, Massachusetts remedied the situation by adopting a statute which provided that judgments of other colonies could be proved by a copy certified by the clerk of the court where rendered, and that such judgments were conclusive of the merits like domestic judgments.[63]

[58] Story stated that this is one of the reasons why sister state judgments should be conclusive under the Constitution. STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES, § 215 (1840).

[59] The preamble to Acts and Resolves of the Province of Massachusetts Bay, sess. of 1773-74, c. 16: "Whereas it frequently happens that persons against whom final judgments of court are recovered in the neighboring governments remove with their effects into this province, without having paid or satisfied such judgment, and upon actions of debt upon such judgments brought in the executive courts in this province, *the record of such judgments cannot be removed into said courts in this province, and it has been made a doubt whether by law such judgments can be admitted as sufficient evidence of such judgments*, whereby honest creditors are often defrauded. . . ." (Italics supplied.)

[60] 1 STARKIE, EVIDENCE, 5th Am. ed., 162-166 (1834); 2 STORY, CONFLICT OF LAWS, 8th ed., § 635c (1883). See: Appleton v. Lord Braybrook, 6 M. & S. 34, 105 Eng. Rep. 1155 (1817); Black v. Lord Braybrook, 6 M. & S. 39, 105 Eng. Rep. 1157 (1817).

[61] 1 GILBERT, EVIDENCE, Lofft ed., 24 (1795); BULLER, TRIALS AT NISI PRIUS, 4th ed., 229 (1785). The rule was applied in Appleton v. Lord Braybrook, 6 M. & S. 34, 105 Eng. Rep. 1155 (1817), where the English court rejected the copy of a Jamaica judgment not under seal, which was certified by the clerk of court.

[62] 5 WIGMORE, EVIDENCE, 3d ed., § 1677 (1940).

[63] Acts and Resolves of the Province of Massachusetts Bay, sess. of 1773-74, c. 16.

This statute is the only one known which designated both the manner of proving such judgments and their legal effect. Other colonies, however, had statutes which prescribed the method of proving foreign public records and judicial proceedings. These were undoubtedly enacted to provide for more expeditious methods of proof and to clarify the common-law rules of evidence, particularly those relating to the admissibility of copies of public records. Thus, in 1729, Maryland enacted a statute which provided that the exemplification of a debt of record under seal of the foreign court where the judgment was given, should be "good evidence" to prove the same.[64] In 1769, Delaware adopted a similar law with reference to wills probated in English courts or in the courts of other colonies.[65] The act provided that a copy of the record of a foreign probate proceeding bearing the seal of the court or of the colony or kingdom where the same was had, should be "good evidence" in any Delaware court to prove the devise or bequest.[66] Georgia adopted a law in 1757 which provided that the execution of powers of attorney in another of His Majesty's provinces could be proved in a Georgia court by the affidavit of a witness or solemn affirmation in writing before any governor, certified by the governor under the seal of the province where the power of attorney was executed.[67]

These statutes were undoubtedly the precursors of full faith and credit. The Massachusetts statute in particular resembled the full

[64] Md. Laws (1729), c. 20.

[65] Del. Laws (1769), c. 196. The difficulties which gave rise to this statute are recited in the preamble: "Whereas many persons residing out of this government have been seised or possessed of lands, tenements and hereditaments within this government, and having disposed thereof by their last wills, have died, but *by reason of the said wills being lodged in some office out of this government, persons claiming under the same cannot produce them in any court of law or equity within this government, to the great injury of the persons so claiming. . . .*" (Italics supplied.)

[66] Under the English common law the purporting seal of no court of a foreign state (except a court of admiralty) was presumed genuine, hence an exemplified copy of a foreign judicial record or proceeding was inadmissible unless a witness was called to prove the genuineness of the seal. See 5 WIGMORE, EVIDENCE, 3d. ed., 1681 (1940); 7 id., § 2164. No cases have been found interpreting the Maryland and Delaware statutes, but their purpose may have been to eliminate the necessity for proving the validity of the seal in this situation.

[67] Ga. Colonial Laws (Reprint), p. 7 (Act of Feb. 8, 1757). The purpose of this statute was to protect owners of Georgia land who had purchased from foreign owners acting through agents. The preamble states: "Whereas divers persons living out of this province, are and have been owners of lands within the same, which persons have usually appointed attornies to sell and dispose of such lands, to the end therefore that those who have so purchased may from henceforth be secured in their titles and estates. . . ."

faith and credit clause in that it declared both the method of proving the judgments of other colonies and their legal effect when proved. Thus, it would appear that *the idea of full faith and credit grew out of the need for legislation modifying the common-law rule regarding the evidentiary effect to be given colonial judgments and the common-law rules as to the admission in evidence of copies of foreign public records.*[68]

Because there had been a lack of uniformity in these matters, the framers of the Articles of Confederation apparently thought that a uniform rule should be adopted. Accordingly, the Continental Congress approved the full faith and credit clause, which provided: "That Full Faith and Credit shall be given in each of these States to the Records, Acts, and Judicial Proceedings of the Courts and Magistrates of every other State."[69] But uniformity was not achieved. The courts disagreed as to the meaning of this provision. Some decisions indicated that sister state judgments were conclusive of the merits;[70] some that the common law was unchanged and that such judgments were merely prima facie evidence.[71]

Story said that it was the failure of the Articles of Confederation to accomplish uniformity in this respect which led the Federal Convention to give Congress legislative power under the full faith and credit clause.[72] This is entirely probable. Undoubtedly the drafters of the Constitution were concerned about the effect of sister state judgments, but the proceedings of the Convention reveal that this was considered to be only part of a much larger question, the uniform recognition and enforcement of public acts, records and judicial proceedings; and that the power of Congress was intended to encompass this broader area of action.

[68] Professor Corwin states that the historical background of the full faith and credit clause is furnished by that branch of the law known as conflict of laws. Corwin, "The 'Full Faith and Credit' Clause," 81 UNIV. PA. L. REV. 371 (1933). It would seem, rather, that the origin of the clause can be traced to the necessity for modifying certain rules of evidence and procedure, particularly those affecting the enforcement of foreign judgments.

[69] Articles of Confederation, Art. IV. Text reprinted in American History Leaflets No. 20 and stated to have been copied directly from the original manuscript.

[70] Jenkins v. Putnam, 1 Bay (S. C.) 8 (1784); Kibbe v. Kibbe, Kirby (Conn.) 119 (1786).

[71] James v. Allen, 1 Dall. (1 U. S.) 188 (1786); Phelps v. Holker, 1 Dall. (1 U. S.) 261 (1788) (both decided by the courts of Pennsylvania). See discussion of cases under Articles of Confederation in Hitchcock v. Aicken, 1 Caines (N. Y.) 460 (1803).

[72] 2 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 5th ed., § 1307 (1891).

The first draft of the full faith and credit clause appeared in the report of the committee of detail which was submitted to the Convention, August 6, 1787.[73] It provided that full faith and credit should be given legislative acts as well as judicial records and proceedings, but there was no provision for conferring legislative powers upon Congress. When this draft was discussed on August 29, Madison suggested that Congress be given the power to provide for the execution of judgments in other states under such regulations as might be expedient.[74] Morris made a broader proposal. He moved that Congress be empowered to determine the proof and effect of the public acts, records and judicial proceedings of the states.[75] It seems, however, that Madison's suggestion was adopted by the committee to which the clause had been committed, as appears from the draft reported to the Convention on September 1:

> "Full faith and credit ought to be given in each State to the public Acts, Records and Judicial proceedings of every other State, and the Legislature shall by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect which judgments obtained in one State shall have in another."[76]

Morris thereupon moved to amend the committee report by striking out the words "judgments obtained in one State shall have in another" and inserting the word "thereof" after the word "effect."[77] The following discussion ensued:

> "Col. Mason favored the motion, particularly if the 'effect' was to be restrained to judgments & Judicial proceedings.
>
> "Mr. Wilson remarked, that if the Legislature were not allowed to *declare the effect* the provision would amount to nothing more than what now takes place among all Independent Nations.
>
> "Docr. Johnson thought the amendment as worded would authorize the Genl. Legislature to declare the effect of Legislative acts of one State, in another State.
>
> "Mr. Randolph considered it as strengthening the general objection agst. the plan, that its definition of the powers of the Government was so loose as to give it opportunities of usurping

[73] 2 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, p. 188 (1911).

[74] 2 id. 448.

[75] 2 id. 448.

[76] 2 id. 483-484.

[77] 2 id. 488.

all the State powers. He was for not going farther than the Report, which enables the Legislature to provide for the effect of *Judgments*."[78]

The Morris amendment was adopted despite the criticism of Randolph that the powers conferred upon Congress "were so loose as to give it opportunities of usurping all the State powers."[79] Undoubtedly the Federal Convention fully appreciated that Congress would have broad powers under its authority to declare the effect of legislative acts and judicial proceedings as well as judgments.

Upon Madison's motion "ought to" was struck out of the clause reported by the committee, and "shall" was inserted between "credit" and "given"; "shall" between "Legislature" and "by general laws" was struck out and "may" inserted.[80] No discussion of this motion was reported, but it would seem that by deliberately substituting "may" for "shall" the Convention intended that Congress' power to legislate in this field was not to be exclusive, but was to be concurrent with that of the states.

2. *Scope of Full Faith and Credit Clause*

(a) *Interpretation by Congress and the Courts*

The clause, as finally adopted, provides:

> "Full Faith and Credit shall be given in each State to the Public Acts, Records and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."[81]

Pursuant to the authority thus conferred, Congress enacted statutes in 1790 and 1801, which are embraced in sections 905 and 906 of the

[78] 2 id. 488-489.

[79] 2 id. 488-489. Madison, however, did not believe that the clause would have a far-reaching effect. He made the following comment in THE FEDERALIST, No. 42 [Ford ed., p. 279 (1878)]: "The power of prescribing by general laws the manner in which the public acts, records, and judicial proceedings of each State shall be proved and the effect they shall have in other States, is an evident and valuable improvement on the clause relating to this subject in the articles of Confederation. The meaning of the latter is extremely indeterminate, and can be of little importance under any interpretation which it will bear. The power here established may be rendered a very convenient instrument of justice, and be particularly beneficial on the borders of contiguous States, where the effects liable to justice may be suddenly and secretly translated, in any stage of the process, within a foreign jurisdiction."

[80] 2 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, p. 489 (1937).

[81] U. S. Constitution, Art. IV, § 1.

Revised Statutes.[82] Section 905 prescribes the manner of authenticating the statutes and the judicial records and proceedings of the states and territories and countries subject to the jurisdiction of the United States. It then provides that "the records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken." Section 906 has similar provisions with respect to nonjudicial public records.

Certain generalizations may be made from an examination of these statutes: (1) The power to prescribe "the manner" in which public acts, records and judicial proceedings "shall be proved" was construed by these Congressional enactments to mean the power to declare the method of authentication required for the admission of statutes and records in evidence.

The main result in the field of evidence and procedure has been to give the states uniform rules for proving the public records and statutes of sister states whenever they are relevant evidence in a case. However, many states have enacted statutes which prescribe methods of authentication differing from those designated by Congress, and it has been held that sister state records and statutes are admissible in evidence if authenticated in compliance with either the federal requirements or those of the forum.[83]

(2) The power to prescribe "the effect" of public acts, records and

[82] Rev. Stat. (1878), §§ 905, 906, 28 U. S. C. (1934), §§ 687, 688.

[83] Goodwyn v. Goodwyn, 25 Ga. 203 (1858); People ex rel. Johnson v. Miller, 195 Ill. 621, 63 N. E. 504 (1902); Petty v. Hayden, 115 Iowa 212, 88 N. W. 339 (1901); Sullivan v. Kenney, 148 Iowa 361, 126 N. W. 349 (1910); Tomlin v. Woods, 125 Iowa 367, 101 N. W. 135 (1904); Reed v. Stevens, 120 Me. 290, 113 A. 712 (1921); Kingman v. Cowles, 103 Mass. 283 (1869); Portland Maine Pub. Co. v. Eastern Tractors Co., 289 Mass. 13, 193 N. E. 888 (1935); Willock v. Wilson, 178 Mass. 68, 59 N. E. 757 (1901); In re Ellis' Estate, 55 Minn. 401, 56 N. W. 1056 (1893); Gribble v. Pioneer Press Co., (C. C. Minn. 1883) 15 F. 689; Logansport Gas Light & Coke Co. v. Knowles, (C. C. Minn. 1871) 15 F. Cas. No. 8466; Mobile & O. R. R. v. Swain, 164 Miss. 825, 145 So. 627 (1933); Barlow v. Steel, 65 Mo. 611 (1887); Duvall v. Ellis, 13 Mo. 203 (1850); Etz v. Wheeler, 23 Mo. App. 449 (1886); Karr v. Jackson, 28 Mo. 316 (1859); State v. Hendrix, 331 Mo. 658, 56 S. W. (2d) 76 (1932); Hewit v. Bank of Indian Territory, 64 Neb. 463, 90 N. W. 250, 92 N. W. 741 (1902); Title Guaranty & Trust Co. v. Trenton Potteries Co., 56 N. J. Eq. 441, 38 A. 422 (1897); United States Vinegar Corp. v. Foehrenbach, 148 N. Y. 58, 42 N. E. 403 (1893); Wells, Fargo & Co. v. Davis, 105 N. Y. 670, 12 N. E. 42 (1887); Block v. Shafer, 62 Okla. 114, 162 P. 456 (1917); Otto v. Trump, 115 Pa. 425, 8 A. 786 (1887); Campbell v. Home Ins. Co., 1 Rich. (1 S. C.) 158 (1869); Tourtelot v. Booker, (Tex. Civ. App. 1913) 160 S. W. 293; Wolf v. King, 49 Tex. Civ. App. 41, 107 S. W. 617 (1908); Ritchie v. Carpenter, 2 Wash. 512, 28 P. 380 (1891); Ordway v. Conroe, 4 Wis. 59 (1854). See also: Tarlton v. Broscoe, 8 Ky. 67 (1817); Barbour v. Watts, 9 Ky. 290 (1820); A.

judicial proceedings was interpreted by Congress to mean the power to determine their effect when authenticated.[84] The "faith and credit" which is given the records and judicial proceedings of sister states at common law is superseded by the statutes which provide that such records and proceedings shall have the faith and credit which they are given by law or usage in the state from which they are taken. No such provision was made, however, with respect to legislative acts. The effect to be given them when properly authenticated was not determined.

Lehmann & Co. v. Rivers, 110 La. 1079, 35 So. 296 (1903); Hope v. Hurt, 59 Miss. 174 (1881). (The federal statute provides the exclusive method of proof in the absence of a state statute on the subject.)

Caperton v. Ballard, 14 Wall. (81 U. S.) 238 (1872), holds that no federal question is presented under the full faith and credit clause unless the record of a sister state is authenticated in the manner prescribed by Congress, since the states are obligated to give full faith and credit, under the federal statutes, only where the method of authentication set out in the federal statutes is followed. This seems to have been overlooked in many cases.

[84] Although the federal statutes require that the legal effect of records and judicial proceedings be determined by the law or usage of the state of origin, Congress did not designate the procedure for ascertaining such law or usage. This was left to the states. Hanley v. Donoghue, 116 U. S. 1, 6 S. Ct. 242 (1885); Adam v. Saenger, 303 U. S. 59, 58 S. Ct. 454 (1938); Springs v. James, (C. C. Ga. 1909) 172 F. 626. Accordingly, when the law of a sister state is material in a case for the purpose of determining the "faith and credit" which is given in that state to a record or proceeding, most courts have held that such law is a fact which must be proved. It will not be judicially noticed. When there is a failure of proof the courts indulge in presumptions as to the sister state law. Hanley v. Donoghue, 116 U. S. 1 at 5, 6 S. Ct. 242 (1885); Chicago & Alton R. R. v. Wiggins Ferry Co., 119 U. S. 615 at 622, 7 S. Ct. 398 (1887); Eastern B. & L. Assn. v. Williamson, 189 U. S. 122 at 125, 23 S. Ct. 527 (1903); Finney v. Guy, 189 U. S. 335 at 340, 343, 23 S. Ct. 558 (1903); Allen v. Alleghany Co., 196 U. S. 458 at 464, 25 S. Ct. 311 (1905); Adam v. Saenger, 303 U. S. 59 at 63, 58 S. Ct. 454 (1938); Sammis v. Wightman, 31 Fla. 10, 12 So. 526 (1893); Leathe v. Thomas, 218 Ill. 246, 75 N. E. 810 (1905); Baltimore & O. S. W. R. R. v. McDonald, 112 Ill. App. 391 (1903); Taylor, Shipton & Co. v. Runyan & Brown, 9 Iowa 522 (1859); Crafts v. Clark, 31 Iowa 77 (1870); Robinson v. Chicago, R. I. & P. Ry., 96 Kan. 137, 150 P. 636 (1915), affd. 96 Kan. 654, 153 P. 494 (1915); Alexander v. Gray, (La. App. 1938) 181 So. 639; Norman v. Pennsylvania Fire Ins. Co., 237 Mo. 576, 141 S. W. 618 (1911); In re Bruhns' Estate, 58 Mont. 526, 193 P. 1115 (1920); Field v. Cain, 9 N. M. 283, 50 P. 327 (1897); Pelton v. Platner, 13 Ohio 209 (1844); Gill v. Everman, 94 Tex. 209, 59 S. W. 531 (1900); Tourtelot v. Booker, (Tex. Civ. App. 1913) 160 S. W. 293; Home Brewing Co. v. American Chemical & Ozokerite Co., 58 Utah 219, 198 P. 170 (1921); Hunt v. Monroe, 32 Utah 428, 91 P. 269 (1907); Ellis v. Gordon, 202 Wis. 134, 231 N. W. 585 (1930) (judicial notice statute not cited); Osborn v. Blackburn, 78 Wis. 209, 47 N. W. 175 (1890); Rape v. Heaton, 9 Wis. 301 (1859).

A minority of courts hold that they have a duty to take judicial notice in this situation. State of Ohio v. Hinchman, 27 Pa. St. 479 (1856); Paine v. Schenectady Ins. Co., 11 R. I. 411 (1876).

The principal result in the conflict of laws field has been to leave the enforcement of causes of action, where the operative facts occur in a sister state, at the mercy of the adverse policy of the forum, except in two situations: Where the cause of action arises on a judgment,[85] or under a statute in certain cases.[86] Thus, where suit is brought in State Y upon a judgment obtained in State X the merits of the claim upon which the judgment is founded may not be litigated. The Congressional statutes provide that such a judgment shall have the "faith and credit" which it has in the state of origin and since it is conclusive of the merits there it is conclusive evidence in the forum. Where suit is brought in State Y upon a cause of action involving a statute in State X, the forum is obligated to apply the statute of State X in those cases where State X has a "governmental interest" in the cause of action,[86a] even though the public policy of the forum is opposed to its enforcement. The "governmental interest" test has not been fully defined, but it seems that a statute is entitled to full faith and credit if the subject matter thereof falls peculiarly within the regulatory power of the enacting state. Since Congress did not declare what "faith and credit" should be given legislative acts of sister states, the Supreme Court has accomplished this result by holding that the clause is self-executing to a limited extent. In other words the first sentence of the clause, which provides that full faith and credit shall be given in each state to the acts, records, and proceedings of every other state, is interpreted as placing a direct duty upon state courts to apply the statutes of sister states in certain cases involving choice of law even though the policy of the forum is opposed to such statutes.[87]

[85] Corwin, "The 'Full Faith and Credit' Clause," 81 UNIV. PA. L. REV. 371 (1933).

[86] The cases are fully discussed in: Hilpert and Cooley, "The Federal Constitution and the Choice of Law," 25 WASH. UNIV. L. Q. 27 (1939); Ross, "'Full Faith and Credit' in a Federal System," 20 MINN. L. REV. 140 (1936); Ross, "Has Conflict of Laws Become a Branch of Constitutional Law?" 15 Minn. L. Rev. 161 (1931); Langmaid, "The Full Faith and Credit Required for Public Acts," 24 ILL. L. REV. 383 (1929); Field, "Judicial Notice of Public Acts under the Full Faith and Credit Clause," 12 MINN. L. REV. 439 (1928); 45 YALE L. J. 339 (1935).

[86a] See discussions cited note 86, supra.

[87] The cases frequently assert in dictum that the full faith and credit clause declares a rule of evidence only. Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U. S. 111 at 134, 32 S. Ct. 641 (1912); Anglo-American Provision Co. v. Davis Provision Co. No. 1, 191 U. S. 373 at 374, 24 S. Ct. 92 (1903); Andrews v. Andrews, 188 U. S. 14 at 36, 23 S. Ct. 237 (1903); Cole v. Cunningham, 133 U. S. 107 at 112, 10 S. Ct. 269 (1890); Wisconsin v. Pelican Ins. Co., 127 U. S. 265 at 291-292, 8 S. Ct. 1370 (1888); Thompson v. Whitman, 18 Wall. (85 U. S.)

Obviously, Congress did not attempt to execute all of the powers conferred upon it by the full faith and credit clause. In the words of Professor Cook, Congress "has attempted to prescribe the effect of records and judicial proceedings only, and as to those has contented itself with repeating the language of the constitution about 'full faith and credit'—language the meaning of which we are still litigating at the end of one hundred and thirty years." [88] Undoubtedly Congress has immense powers, not yet fully defined by the Supreme Court, to declare rules for the enforcement and recognition in each state of sister state public acts, records, and judicial proceedings; and it is clear that such powers exceed the limits which have been described by the Supreme Court in giving the clause a self-executing effect. Thus, Justice Stone has said:

> "The mandatory force of the full faith and credit clause as defined by this Court may be, in some degree not yet fully defined, expanded or contracted by Congress. Much of the confusion and procedural deficiencies which the constitutional provision alone has not avoided may be remedied by legislation. . . . The constitutional provision giving Congress power to prescribe the effect to be given to acts, records and proceedings would have been quite unnecessary had it not been intended that Congress should have a latitude broader than that given the courts by the full faith and credit clause alone." [89]

457 at 461-463 (1874); United States Fidelity & Guarantee Co. v. Lawson, (D. C. Ga. 1936) 15 F. Supp. 116 at 120; In re C. A. Taylor Logging & Lumber Co., (D. C. Wash. 1928) 28 F. (2d) 526 at 529; Israel v. Israel, (C. C. Pa. 1904) 130 F. 237 at 238-239; Clifford v. Williams, (C. C. Wash. 1904) 131 F. 100 at 105. The dictum in these cases was derived from the following statement of Story: "The constitution did not mean to confer any new power upon the states, but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their territory. It did not make the judgments of other states domestic judgments to all intents and purposes, but only gave a general validity, faith and credit to them as evidence." STORY, CONFLICT OF LAWS, 8th ed., § 609 (1883). This view is erroneous. The proceedings of the Constitutional Convention intimate that the clause was to have a wider meaning. See pp. 190-191, supra. And the decisions of the Supreme Court which hold that certain choice of law questions are governed by the Constitution also expose the fallacy of this dictum. See 1 ILL. L. REV. 256 at 258-259 (1906).

[88] Cook, "The Powers of Congress under the Full Faith and Credit Clause," 28 YALE L. J. 421 at 426 (1919).

[89] Yarbrough v. Yarbrough, 290 U. S. 202 at 215, note 2, 54 S. Ct. 181 (1933), dissenting opinion. See also: Pacific Employers Ins. Co. v. Industrial Accident Commission, 306 U. S. 493 at 502, 59 S. Ct. 629 (1939); Bank of the State of Alabama v. Dalton, 9 How. (50 U. S.) 522 at 527 (1850).

(b) *Potential Power of Congress*

What, then, is the possible scope of Congress' power under the full faith and credit clause?

The first sentence of the clause states its purposes and describes the full extent of the duties which it imposes: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." The second sentence confers upon Congress the power to declare in greater detail the ends expressed in the first sentence and the means by which they may be attained: "And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." The limits of Congressional power are to be found in the first sentence as well as in the second, since a statute of Congress could not validly embrace objects not stated in both. It would seem, however, that the two sentences are equally extensive. Undoubtedly, "full faith and credit" refers to the recognition and enforcement[90] which states[91] shall accord to acts, records, and proceedings of other states, and Congress is empowered by the second sentence to enact all substantive and procedural rules reasonably necessary to accomplish the recognition and enforcement to which "full faith and credit" refers.[92] This power has

[90] An analytical distinction between recognition and enforcement is intended, which is analogous to the difference between substance and procedure. See Yntema, "The Enforcement of Foreign Judgments in Anglo-American Law," 33 MICH. L. REV. 1129 at 1132 (1935). Admittedly, the distinction between substance and procedure varies according to the purpose for which it is made, and in the conflicts field it determines the extent to which the foreign law is applied in a particular case. See Cook, " 'Substance' and 'Procedure' in the Conflicts of Laws," 42 YALE L. J. 332 (1933). Nevertheless, the phrasing of the full faith and credit clause suggests this terminology since the clause is concerned not only with the procedural means of giving effect to public acts, records and judicial proceedings, but also with the substantive effect which should be given to them.

[91] The clause provides that full faith and credit shall be given "*in* each state" and not "*by* each state," which raises a question whether the duty may be imposed upon other than state agencies. This is not important here, however, because the duty at least rests upon those agencies and most certainly upon the state courts. See: Minnesota v. Northern Securities Co., 194 U. S. 48 at 72, 24 S. Ct. 598 (1904). Rev. Stat. (1878), § 905, 28 U. S. C. (1934), § 687 places the duty to accord faith and credit upon "every court within the United States" whereas Rev. Stat. (1878), § 906, 28 U. S. C. (1934), § 688 imposes the duty upon "every court and office within the United States."

[92] The second sentence provides that Congress "may" enact general laws. The proceedings of the Federal Convention reveal that "may" was substituted for "shall" in an earlier draft, but the reason for the change does not appear. See supra at note 80. Undoubtedly, it was intended that Congress could execute its powers if it chose but that matters involving full faith and credit should be left to state regulation in the absence of any Congressional legislation.

two aspects which are analytically distinguishable: Congress is not only authorized to prescribe the procedural method of enforcing acts, records and proceedings, but it may also declare their substantive effect in the forum.

What is meant by "*full* faith and credit"? Does it mean that acts, records, and proceedings shall be given the *same* faith and credit (i.e., the same recognition and enforcement) in the forum which is given them by the state of origin?[93] *Less* faith and credit? *More* faith and credit? Or *all* of the faith and credit which a state reasonably can be compelled to give? Since the clause provides that *full* faith and credit shall be given, it would appear that Congress may require a state to give the acts, records and proceedings of sister states *all* of the recognition and enforcement which is reasonable, subject to limitations imposed by other clauses of the Constitution.[94]

It has been urged that the purpose of the full faith and credit clause is to achieve uniformity, simplicity, and certainty in the recognition and enforcement of the legal standards of each state throughout the union in cases of national concern, and that the words "public acts, records and judicial proceedings" are sufficiently comprehensive to include all legal standards officially established by a state, whether they are established by judicial acts or by legislative acts. Consequently the Constitution enjoins the states to give full faith and credit to both com-

[93] Some cases have stated that the Constitution obliges the forum to give judgments and decrees the effect to which they are entitled in the state where rendered. Haddock v. Haddock, 201 U. S. 562 at 567, 26 S. Ct. 525 (1905); Harding v. Harding, 198 U.S. 317 at 341, 25 S. Ct. 679 (1905). These statements are dicta, however, since the question presented was the meaning of the acts of Congress, and the cases decide merely that Congress has declared that judicial proceedings shall have some of the effects which they have in the state of origin. See criticism in 1 ILL. L. REV. 256 (1906). In those cases where the Constitution directly operates upon the states and requires that full faith and credit be given statutes of other states, it has been said that such statutes must be given the effect which they have in the enacting state. This is not true in all cases, however. Thus, statutory causes of action are entitled under the Constitution to enforcement in other states although the statutes creating such causes of action limit suits thereunder to courts of the enacting state. Atchison, T. & S. F. Ry. v. Sowers, 213 U. S. 55, 29 S. Ct. 397 (1909); Tennessee Coal, Iron & R. Co. v. George, 233 U. S. 354, 34 S. Ct. 587 (1914); Kenney v. Supreme Lodge, 252 U. S. 411, 40 S. Ct. 371 (1920). See also: Milwaukee County v. M. E. White Co., 296 U. S. 268 at 274-275, 56 S. Ct. 229 (1935).

[94] For example, Congress probably could not provide that judgments rendered without jurisdiction are entitled to enforcement in other states because this would violate due process. Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U. S. 111 at 134, 32 S. Ct. 641 (1912); Old Wayne Mutual Life Assn. v. McDonough, 204 U. S. 8 at 15, 27 S. Ct. 236 (1907); Garland Co. v. Filmer, (D. C. Cal. 1932) 1 F. Supp. 8 at 12.

mon law and statutes; and no state court may refuse to apply the law of a sister state in a case involving a foreign element where the sister state has an interest in the outcome of the suit which outweighs the interest of the forum.[95]

If this is the purpose of the clause it would seem that Congress has full competence to enact choice of law rules. Moreover, it would appear that Congress has power to enact procedural laws (such as a judicial notice law) which uniformly expedite the application of foreign law, since complete uniformity and certainty can be achieved only by the establishment of uniform procedure.

It is doubtful, however, whether Congress may regulate all choice of law questions.[96] Whatever the powers of Congress may be in this respect, it is unnecessary to discuss them at length because the authority to prescribe rules for the enforcement of sister state public acts, records and judicial proceedings is governed by different considerations. For example, a crucial constitutional question in the choice of law field is the scope of Congress' power to require the forum to decide a case according to the foreign law when, under its conflicts rule, the forum would deny the action because its enforcement would be contrary to

[95] See Smith, "The Constitution and the Conflict of Laws," 27 GEO. L. J. 536 at 555-558 (1939).

[96] See: Yntema, "The Hornbook Method and the Conflict of Laws," 37 YALE L. J. 468 at 481-482 (1928); Dodd, "The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws," 39 HARV. L. REV. 533 (1926).

It has been assumed that the clause does not compel a state court to apply the common law of a sister state in a suit upon a cause of action arising in that state which has not been reduced to judgment. Wiggins' Ferry Co. v. Chicago & Alton Ry., (C. C. Mo. 1882) 11 F. 381 at 384, affirmed 108 U. S. 18, 1 S. Ct. 614 (1883); In re Patterson's Estate, 64 Cal. App. 643, 222 P. 374 (1923), writ of error dismissed sub nom. Patterson v. Patterson, 266 U. S. 594, 45 S. Ct. 225 (1924); Esmar v. Haeussler, 341 Mo. 33, 106 S. W. (2d) 412 (1937). See Cook, "The Powers of Congress under the Full Faith and Credit Clause," 28 YALE L. J. 421 at 434 (1919). But see: Commonwealth Fuel Co. v. McNeil, 103 Conn. 390, 130 A. 794 (1925); 13 ILL. L. REV. 43 at 57 (1918); 40 YALE L. J. 291 at 295 (1930). The acts of Congress require that judgments be given the effect they have by "law or usage" in the state of origin if that law is proven, and the Supreme Court will review a decision of the forum which allegedly applied that law incorrectly. To this extent the clause undoubtedly compels recognition of the common law as well as statutes. Titus v. Wallick, 306 U. S. 282 at 287-288, 59 S. Ct. 557 (1939); Adam v. Saenger, 303 U. S. 59 at 64, 58 S. Ct. 454 (1938). The common law has been adopted in most states by statute or constitutional provision and to the extent that it has a statutory basis it might be considered a "public act" within the meaning of the Constitution. See: RADIN, ANGLO-AMERICAN LEGAL HISTORY, § 194 (1936); WALSH, A HISTORY OF ANGLO-AMERICAN LAW, 2d ed., § 47 (1932); Pope, "The English Common Law in the United States," 24 HARV. L. REV. 6 at 20-23 (1910); Frierson, "A Revolutionary Decision—Erie v. Tompkins," 8 GEO. WASH. L. REV. 1221 at 1225 (1940).

public policy. Whether Congress may require that the public policy of one state shall be subordinated to the public policy of another when they are in conflict involves a determination of the "governmental interest" of the states concerned in the final disposition of the suit. But this question is not presented where Congress designates the procedure which state courts must observe in enforcing the acts, records and proceedings of other states.[97] Here the criterion of Congressional power, as we shall see, is whether the federal statute establishes an expeditious remedy.[98]

The two areas of Congressional power overlap but are not coextensive. The power to command the forum to apply the substantive law of another state in certain cases undoubtedly includes the power to impose procedural rules which facilitate the application of that law. But the authority to adopt procedural laws is not restricted to those cases only. Congress may prescribe the procedure for ascertaining the law of a sister state even though the forum is not obligated by the Constitution or by acts of Congress to apply that law in a particular case, but does so under its choice of law rule. This is demonstrated by the fact that Congress has prescribed the method of proving the statutory law of a sister state, which is applicable whenever the forum applies that law, either because of constitutional mandate or by virtue of the forum's common-law conflicts rule.[99] Federal authority in this respect has never been doubted, since statutes are "public acts," and Congress has the power to prescribe the "manner" in which "public acts" shall be

[97] We are not concerned here with the power of Congress to require the forum to apply the procedural law of a sister state. The criteria which would determine the validity of such a statute would be similar to those governing Congress' power to require the application of foreign substantive law. See: Atchison, T. & S. F. Ry. v. Sowers, 213 U. S. 55, 29 S. Ct. 397 (1909); Tennessee, C., I. & R. Co. v. George, 233 U. S. 354, 34 S. Ct. 587 (1914); John Hancock Mutual Life Ins. Co. v. Yates, 299 U. S. 178, 57 S. Ct. 129 (1936); Pacific Employers Ins. Co. v. Industrial Accident Commission, 306 U. S. 493, 59 S. Ct. 629 (1939).

Nor are we concerned with the power of Congress to regulate the jurisdiction of state courts in cases involving foreign judgments and statutory causes of action to which full faith and credit must be given. A federal judicial notice statute would not interfere with the jurisdiction of state courts. See: Anglo-American Provision Co. v. Davis Provision Co. No. 1, 191 U. S. 373, 24 S. Ct. 92 (1903); Weidman v. Weidman, 274 Mass. 118, 174 N. E. 206 (1931); 1 WILLOUGHBY, CONSTITUTION OF THE UNITED STATES, 2d. ed., § 151 (1929); Smith, "The Constitution and the Conflict of Laws," 27 GEO. L. J. 536 at 571-572 (1939); Abel, "Administrative Determinations and Full Faith and Credit," 22 IOWA L. REV. 461 at 514 (1937).

[98] See infra, pp. 202-203.

[99] Baggett v. Davis, 124 Fla. 701, 169 So. 372 (1936); New York, C. & St. L. Ry. v. Lind, 180 Ind. 38, 102 N. E. 449 (1913); Burge v. Broussard, (Tex. Civ. App. 1924) 258 S. W. 502. See 4 JONES, EVIDENCE, 2d ed., § 1721 (1926).

"proved" in every case in which they are relevant evidence.[100] Furthermore it is apparent that Congress has authority to enact many procedural laws which strictly speaking have no bearing on choice of law questions. Illustrative of this is the power to prescribe the manner of authenticating nonjudicial public records which Congress exercised in enacting section 906 of the Revised Statutes.[101]

Because the present federal statutes have a restricted operation, the cases do not furnish definite clues concerning the potentialities of federal action in the procedural field. In the absence of more extensive legislation it has been assumed that the states may determine the remedy in cases involving a foreign element,[102] and the question has been whether the full faith and credit clause and the enabling statutes place any restrictions upon the states in this respect.

Christmas v. Russell[103] was the first case in which the Supreme Court invalidated a state statute because of an implied prohibition in the full faith and credit clause and statutes of Congress. Plaintiff brought suit in Mississippi upon a judgment which was rendered in Kentucky against a Mississippi resident when the cause of action would have been barred if suit had been brought in Mississippi. A Mississippi statute expressly barred actions upon judgments obtained in those circumstances. Although in form a limitation law, in effect the statute denied the right to sue upon a valid judgment of another state. In declaring the statute void, the United States Supreme Court announced that the test for determining the constitutionality of remedial statutes was their reasonableness. The Court said:

> ". . . Reasons of sound policy have led to the adoption of limitation laws, both by Congress and the States, and, if not unreasonable in their terms, their validity cannot be questioned. ... Cases, however, may arise where the provisions of the statute on that subject may be so stringent and unreasonable as to amount to a denial of the right and in that event a different rule would prevail as it could no longer be said that the remedy only was affected by the new legislation."[104]

[100] The federal statute prescribing the method of authenticating state statutes was in existence more than 70 years before the Supreme Court discovered that the full faith and credit clause had any application to choice of law questions.

[101] See supra at note 82.

[102] McElmoyle v. Cohen, 13 Pet. (38 U. S.) 312 (1839); Bank of the State of Alabama v. Dalton, 9 How. (50 U. S.) 522 (1850).

[103] 5 Wall. (72 U. S.) 290 (1866).

[104] Id. at 300. Accord: Keyser v. Lowell, (C. C. A. 8th, 1902) 117 F. 400.

Although the statute entirely denied enforcement of the judgment, it seems clear that the Court would have achieved the same result if the statute had provided an unreasonably short time to sue. Accordingly, the decision forecast the holding of the circuit court of appeals in *Lamb v. Powder River Live Stock Co.*[105] In that case a Colorado statute provided that actions upon judgments obtained in other states against Colorado residents were barred six years after the judgments were rendered, provided that no action could be maintained upon a judgment three months after rendition if six years had elapsed since the accrual of the cause of action upon which the judgment was founded. Plaintiff recovered a judgment upon a contract in Nebraska and sued upon the judgment in a federal court in Colorado more than six years after the contract cause of action accrued and more than three months after the judgment was recovered. The court held that the Colorado statute was invalid because the three months limitation did not afford judgment creditors of other states reasonable opportunity to enforce their judgments in Colorado courts. The decision was based upon the full faith and credit clause and the clause prohibiting the impairment of the obligation of contracts.

In *Broderick v. Rosner*[106] the underlying principle of the foregoing cases was affirmed and extended to a different kind of remedial statute, although the Supreme Court did not frame its decision in terms of reasonableness. In that case an action at law was brought in New Jersey by the New York superintendent of banks to recover unpaid assessments levied upon the New Jersey stockholders of a New York bank. A New Jersey statute provided that no law action might be maintained in this situation, but that the proper remedy was a bill in equity for an accounting to which the corporation and all of the creditors and stockholders were necessary parties. Only a few of the 20,843 stockholders and 400,000 depositors and creditors resided in New Jersey, and it was therefore, impossible to serve all of them personally. Moreover, even though jurisdiction over all of the nonresidents could have been obtained by service by publication, the fees and expenses of such service would have exceeded the aggregate amount due from the New Jersey stockholders. This made it practically impossible to secure jurisdiction over all. The Court held that suit could be maintained nevertheless; to sustain the asserted bar of the statute would violate the full faith and credit clause.

It may be concluded that a state is prohibited from enacting a

[105] (C. C. A. 8th, 1904) 132 F. 434.
[106] 294 U. S. 629, 55 S. Ct. 589 (1935).

statute which in terms or practical operation bars the enforcement of judgments or statutory causes of action entitled to constitutional protection, or which denies reasonable opportunity to bring such suits in state courts having general jurisdiction over the subject matter and parties.[107] A further deduction is that Congress may prohibit the states from adopting unreasonable remedies in this situation. For instance, Congress probably would have the power to interdict all state statutes which barred action upon sister state judgments after three months. But may Congress affirmatively specify the period of limitations in such suits? What is the extent of Congress' authority to enact procedural laws? These questions are not fully answered by the cases, and for this reason it is necessary to sketch the limits of Congress' power in the light of the clause's objectives.

Having in mind the historical background of the clause,[108] we submit that Congress has complete power to enact uniform procedural laws which establish certain, prompt, inexpensive and effective means of enforcing throughout the Union the acts, records and judicial proceedings of the states in order to expedite the uniform recognition of substantive rights and duties in transactions or suits involving those acts, records and proceedings.[109] The power to prescribe the manner of proving acts records and proceedings and their effect is literally broad enough to sustain the enactment of any laws in this regard. However the statement of the clause's purpose in these terms suggests a line between those powers which belong to Congress and those which belong to the states under the Tenth Amendment, for it would seem that if a particular procedural law does not facilitate the recognition of substantive rights and duties it falls outside the scope of Congress' power. Thus, cases may arise where the federal statute may be justified by a literal interpretation of the Constitution but where the exercise of power is invalid because it does not pertain to full faith and credit. Suppose, for instance, Congress designated the venue in suits upon

[107] The problem is analogous in some respects to the question which has arisen when a legislature has changed the remedy with respect to existing contracts and the Court has held that unreasonable changes were invalid because they impaired the obligations of those contracts. In Christmas v. Russell, 5 Wall. (72 U. S.) 290 (1866), the Court relied on Bronson v. Kinzie, 1 How. (42 U. S.) 311 (1843), an impairment of contracts case. See similar analogies cited in Lamb v. Powder River Live Stock Co., (C. C. A. 8th, 1904) 132 F. 434 at 441. In the future the Court will probably rely upon these analogies in developing the doctrine of reasonableness in the full faith and credit field.

[108] See supra, pp. 189-191.

[109] See Yntema, "The Enforcement of Foreign Judgments in Anglo-American Law," 33 MICH. L. REV. 1129 at 1164 (1935).

judgments of sister states. Literally, this might be the "manner" of "proving" judgments and their "effect" in other states, yet it is doubtful whether the statute could be sustained because Congressional designation of the place of trial would not expedite the extrastate enforcement of judgments in the usual case. On the other hand, a federal statute providing for the direct enforcement of state judgments in other states by execution without requiring a second suit would provide an expeditious method of enforcement and therefore would probably be within the power of Congress.[110] It is impossible to foresee, of course, where the line will be drawn in all cases, but it would seem that the question whether a particular remedy facilitates the recognition of substantive rights is one of reasonableness. Since the Supreme Court's approach to the question would be analogous to that taken in the police power cases under the due process clause, a federal statute under the full faith and credit clause would not be invalidated unless it was clearly unreasonable.

The reasonableness standard may not only delineate the powers delegated to Congress, but it may also be a limitation imposed by the due process clause of the Fifth Amendment.[111] Conceivably, the remedies enacted by Congress must be reasonable in the sense that they must be administratively feasible; they must not burden the state courts with a procedural rule which is not workable. To illustrate, the federal statute which prescribes the manner of authenticating nonjudicial public records has been interpreted to provide for the admission in evidence of fingerprint records properly certified by the warden of a prison in a sister state.[112] Yet it is questionable whether Congress could compel state courts to take judicial notice of fingerprint records in other states, even though the purpose of the statute was to expedite proof, because judicial notice would not be feasible in that case. In other words, the due process clause may limit the exercise of power under the full faith and credit clause to those remedies which are practicable under the circumstances; or the limitation may be implied in the full faith and credit clause itself. However, the Supreme Court probably would not invalidate a statute for this reason unless a strong case of inconvenience was shown.

[110] See Cook, "The Powers of Congress under the Full Faith and Credit Clause," 28 YALE L. J. 421 (1919).

[111] The due process clause may impose other limitations as well. See supra, note 94.

[112] State v. Johnson, 194 Wash. 438, 78 P. (2d) 561 (1938). See also: People v. Reese, 232 App. Div. 624, 250 N. Y. S. 392 (1931).

(c) *Power of Congress to Adopt Judicial Notice Act*

In view of these considerations it is believed that Congress has the power to adopt an act of the type of the Uniform Act. The effect of the act would be twofold: (1) By requiring the judge to notice the foreign law it would expedite proof by dispensing with the necessity of producing formal evidence of that law. In this respect the statute would merely prescribe a rule as to the burden of going ahead with the evidence: the party relying on the foreign law would have the ultimate burden of proof, the "risk of nonpersuasion," on that issue.[113] (2) By providing that the judge and not the jury shall determine the foreign law the act would assign to the judge the function of deciding what is to be proved. In either aspect the statute could be said to declare the "manner" in which the law of sister states shall be "proved" and "the effect thereof" in the constitutional sense. Its objectives would coincide with those of the full faith and credit clause since it would simplify proof of sister state law, directly facilitating the application of that law. It would abolish the presumption method of determining the foreign law, which sometimes has resulted in the application of the "wrong" substantive rule and would establish procedure for applying the "correct" rule in every case. Congressional adoption of such an act, therefore, would fall within a specifically delegated federal power, and would not be an invalid encroachment upon the powers of the states under the Tenth Amendment.

Furthermore, the act would be administratively feasible. We have already pointed out that a state court can notice the law of other states as easily as the domestic law and that the early reasons of expediency for refusing to take judicial notice no longer obtain.[114] We have also noted that the judge is better qualified than the jury to decide questions of foreign law.[115] The requirements of the statute, therefore, would be reasonable.

The remaining question is whether the statutes and decisions of sister states are embraced within the "public acts, records and judicial proceedings," which Congress may require to be judicially noticed.

As we have seen, the framers of the Constitution intended to confer power to accomplish uniformity, certainty and simplicity in the enforcement of public acts, records and judicial proceedings through

[113] See Shapleigh v. Mier, 299 U. S. 468, 57 S. Ct. 261 (1937).

[114] See supra, p.177.

[115] See supra, p. 179.

procedural reforms.[116] Pursuant to that objective Congress did effect reforms by providing for the authentication of statutes and official records which are "public acts" and "records." Congress, then, has undoubted authority to prescribe the manner of authenticating official statutes and official reports of decisions,[117] and it follows that Congress may designate judicial notice as the method of proof, since this is merely an alternative means of enforcing "public acts" and "records." Undoubtedly, in taking judicial notice the judge would consult commonly-used private publications of decisions and statutes as well as official publications. But it would be unrealistic to suggest that Congress may not require judicial notice because such private publications are not "public acts" and "records." Private reports of judicial opinions are customarily relied upon in arguments of law as correctly representing the opinion rendered and the facts upon which the decision was based.[118] This practice has long been sanctioned by the judges as a means of establishing the tenor of precedents and it was undoubtedly known to members of the Constitutional Convention.[119] Moreover, privately printed statute books are now frequently accepted as authoritative evidence of the law of a sister state when they are commonly admitted and used in the courts of that state.[120] The necessity for this practice exists because many of the

[116] See supra, pp. 189-191.

[117] Rev. Stat. (1878), § 905, 28 U. S. C. (1934), § 687, provides that state statutes shall be authenticated by having the seal of the state affixed thereto. Statutes so authenticated are admissible in evidence. This statute and Rev. Stat. (1878), § 906, 28 U. S. C. (1934), § 688, designate the manner of authenticating judicial records and nonjudicial public records. Reports of judicial decisions, however, are not ordinarily proved under these statutes which provide for certified copies of official records, but under state statutes which state in the alternative two conditions of admissibility: (1) the report must purport to be printed by authority of the sister state, or (2) it must be proved to be commonly used in that state as evidence of the law. 6 WIGMORE, EVIDENCE, 3d ed., § 1703 (1940); 5 id., § 1684. See: Whited v. Johnson, (Tex. Civ. App. 1914) 167 S. W. 812, where the court said that the unpublished opinion of a court is admissible in evidence as a "record and judicial proceeding," when authenticated as provided by Congress. There is little doubt that Congress has authority to provide that officially printed statute books and reports are admissible in evidence. See suggestion in 5 WIGMORE, EVIDENCE, 3d ed., § 1684, note 13 (1940), that Congress has the power to enact the Uniform Proof of Statutes Act.

[118] 6 WIGMORE, EVIDENCE, 3d ed., § 1703, note 1 (1940); 13 ILL. L. REV. 43 at 57 (1918).

[119] 6 WIGMORE, EVIDENCE, 3d ed., § 1703 (1940).

[120] This practice obtains under statutes in many states. 5 WIGMORE, EVIDENCE, 3d ed., § 1684, note 15 (1940); 4 JONES, EVIDENCE, 2d ed., § 1724 (1926). In the absence of such legislation, unofficial volumes purporting to contain the statutes of foreign states are generally held to be inadmissible. 4 id., § 1723.

compilations of state laws now in current use are privately printed.[121] For these reasons "public acts, records and judicial proceedings" should be construed to mean both official and private reports of decisions and statutes. Since the act would provide that counsel may assist the judge and would permit the parties to introduce countervailing evidence,[122] there is assurance that the courts in taking judicial notice would consult those books which are customarily regarded as the most trustworthy evidence of the law.

[121] See Field, "Judicial Notice of Public Acts under the Full Faith and Credit Clause," 12 MINN. L. REV. 439 at 459-460 (1928).

[122] See supra, at note 33, and secs. 2 and 4 of the act, quoted in note 1, supra.