CONSTITUTIONAL LIMITS ON FREE CHOICE OF LAW

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INTRODUCTION

Between thirty and forty years ago, and especially in the early 1930's, it seemed that the law of conflict of laws might be about to become a branch of constitutional law.[1] The United States Supreme Court was using the due process of law clause of the fourteenth amendment, and to a lesser extent the full faith and credit clause, to prescribe for state courts in choice-of-law cases, as well as in jurisdiction to tax and judicial jurisdiction cases, the one permissibly governing law by which the facts could constitutionally be controlled.[2] Since the early 1940's, however, the Supreme Court has backed away from this "single proper law" approach, and has in choice of law, taxation, and judicial jurisdiction cases held that constitutional requirements are satisfied by a widening variety of factual contacts with the state whose law is chosen as governing.[3] Typically, the Court today says:

> Where more than one state has a sufficiently substantial contact with the activity in question, the forum state, by analysis of the interests possessed by the states involved, could constitutionally apply to the decision of the case the law of one or another state having such an interest in the multi-state activity.[4]

Politically, it is fair to say that the Court today embraces a "states' rights" theory in the law of conflict of laws.

Due process approval of modern "long-arm statutes" which permit state courts to exercise judicial jurisdiction under the "fair play and substantial justice" test[5]

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[1] Dodd, *The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws*, 39 HARV. L. REV. 533 (1926); Ross, *Has the Conflict of Laws Become a Branch of Constitutional Law?*, 15 MINN. L. REV. 161 (1931). *Cf.* Schofield, *The Supreme Court of the United States and the Enforcement of State Law by State Courts*, 3 ILL. L. REV. 195 (1908).

[2] Among choice-of-law cases, Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 292 U.S. 143 (1934), marked the extreme of this series. It corresponded in this respect with First National Bank of Boston v. State of Maine, 284 U.S. 312 (1932), which held the only state that could collect a death tax on a decedent's intangible property (corporate stock) was the state where he was domiciled at death.

[3] See State Tax Commissioner of Utah v. Aldrich, 316 U.S. 174 (1942), which overruled First National Bank of Boston v. State of Maine, *supra* note 2, and left the state free to levy death taxes at the debtor's domicile and at the place where the specialty instrument, if any, was kept, as well as at the owner-creditor's domicile. The theory is that any state whose law affords substantial benefit or protection to the property may tax it.

[4] Richards v. United States, 369 U.S. 1, 15 (1962).

[5] International Shoe Co. v. Washington, 326 U.S. 310 (1945). Contrast Western Union Telegraph Co. v. Pennsylvania, 368 U.S. 71 (1961) (jurisdiction to escheat choses in action, as against non-party claimants).

on bases which would have been unthinkable in the days of *Pennoyer v. Neff*[6] runs parallel to the current approval of similar choice-of-law freedom. Contacts sufficient to satisfy "fair play and substantial justice" for judicial jurisdiction under the due process clause will often satisfy whatever test (perhaps the same test) the same constitutional clause prescribes for legislative jurisdiction. It cannot be concluded, however, that identical *facts* automatically mark the outer limits of "fair play and substantial justice" for *both* constitutional purposes. The "fairness" and "justice" which the due process clause requires depend upon the purposes and functions of the law's operation in each specific separated context. Fairness and justice are relative things, not absolutes. The related questions of what law may govern and what court may act are similar though not the same. The lines that delineate the answers to the questions seem to be converging but they have not merged.[7]

I

THE CONSTITUTIONAL FRAMEWORK

The due process clause is the part of the Constitution which has been relied upon for most purposes of federal control over the broad field of conflict of laws. It is the only clause that has been relied upon substantially in the judicial jurisdiction cases. Along with the commerce clause, plus occasionally the equal protection and privileges and immunities clauses, it prescribes territorial limitations upon all kinds of state taxation. Divorce jurisdiction is governed by a due process concept, though the scope of faith and credit to divorce decrees appears to have more practical significance than does the constitutional limitation on jurisdiction, and the two concepts have not been combined into one in the divorce and other domestic status cases. In the criminal cases, as in divorce cases, there has been no separation of the question of judicial jurisdiction from the question of what substantive law is governing; in both areas it is assumed that a state which has judicial jurisdiction will also apply its own relevant law to the merits of the case. Criminal jurisdiction decisions in the states are usually controlled by state constitutional provisions, such as those requiring trial in "the vicinage of the offense," but the federal essence of these is found in or through the fourteenth amendment's due process clause. That clause, by its catch-all requirement of what is generally termed "fair play and substantial justice," serves better than any other to bar hog-wild misapplications of any kind of irrelevant law to a set of extrastate facts.

On choice-of-law questions in civil cases, the tendency has been to treat all relevant federal constitutional clauses as the combined sources of whatever territorial limits there are on state power. The due process clause and the full faith and credit clause

[6] 95 U.S. 714 (1878). See Ehrenzweig, *Pennoyer Is Dead, Long Live Pennoyer*, 30 ROCKY MT. L. REV. 285 (1958); Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts—From Pennoyer to Denckla: A Review*, 25 U. CHI. L. REV. 569 (1958); Reese and Galston, *Doing an Act or Causing Consequences as Bases of Judicial Jurisdiction*, 44 IOWA L. REV. 249 (1959); Cleary, *The Length of the Long Arm*, 9 J. PUB. L. 293 (1960).

[7] See Leflar, *The Converging Limits of State Jurisdictional Powers*, 9 J. PUB. L. 282, 292 (1960). Compare Briggs, *Jurisdiction by Statute*, 24 OHIO ST. L.J. 223 (1963).

are the ones most often employed, usually not in the same case but sometimes on almost indistinguishable problems. The equal protection and privileges and immunities clauses are used infrequently and the commerce clause almost not at all.

There are some sets of facts to which one clause or another, alone, has to be applied, either because the special fact situation so limits it, or for historical reasons. Thus, in *Home Insurance Co. v. Dick*,[8] the full faith and credit clause could not be used because the claim sued on in Texas arose in no sister state but rather in Mexico, so that the due process clause was the only constitutional provision that fitted the facts. Choice-of-law problems that inhere in suits on sister state judgments are all handled under the full faith and credit clause because that clause was deliberately framed to govern those cases. As an original matter, and still today as a matter of logic and even of good sense, it could be urged that choice-of-law questions ought all to be put under the due process clause, thus permitting a state court to apply to the facts before it any law which does not violate "fair play and substantial justice" as defined under that clause, leaving the full faith and credit clause to deal altogether with denials of access to a local forum's courts and remedies for the enforcement of sister state claims and obligations whose substantive existence was independently assured. That would have made for an easier outline of the sources and limits of power. But that is not the way the Supreme Court has developed the cases. It has run them together.[9]

The equal protection[10] and privileges and immunities[11] clauses have not been much used for controlling state choice of law. They are by their terms designed to guard against discriminations directed toward "persons" and "citizens" (which surely includes residents) of sister states, and extrastate factors such as domicile or geographical origin of rights claimed may be involved in these prohibited discriminations. Thus, rules basing choice of law upon unreasonably discriminatory

[8] 281 U.S. 397 (1930).

[9] Most of the commentators have found it necessary to treat the two clauses together, when dealing with federal control over state choice of law, though they usually assign different functions to the clauses. See Dodd, *The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws*, 39 HARV. L. REV. 533, 538, 548 (1926) (derives assistance for some cases also from the contracts clause); Hilpert & Cooley, *The Federal Constitution and the Choice of Law*, 25 WASH. U.L.Q. 25, 39 (1939); Cheatham, *Federal Control of Conflict of Laws*, 6 VAND. L. REV. 581, 584 (1953); Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 13, 83 (1958); Weintraub, *Due Process and Full Faith and Credit Limitations on a State's Choice of Law*, 44 IOWA L. REV. 449, 490 (1959): "The full faith and credit clause places a further limitation on a state's choice of law than is imposed by the due process clause if the interest of the state, which gives it the reasonable contact under due process, is outweighed by the need for national uniformity in the solution of the particular issue being litigated"; Note, 35 COLUM. L. REV. 751, 758-59 (1935): "Apparently the 'governmental interest' is to be ascertained for purposes of full faith and credit by the same considerations which validate the statute under the due process clause." As an illustration of the correlation of the two clauses, see John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178, 182 (1936), where Brandeis, J., cited Home Ins. Co. v. Dick, *supra* note 8, a pure due process decision, as supporting a result which he grounded on the full faith and credit clause.

[10] See Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Equal Protection*, 28 U. CHI. L. REV. 1 (1960).

[11] See Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, 69 YALE L.J. 1323 (1960).

distinctions between different "persons within the jurisdiction," or classes of such persons, or between local citizens and citizens of sister states, might well be held to violate one or the other of these clauses. It is the personal or class discrimination that the clauses are directed against, however, and not the wrong choice of law as such.

Similarly, the "law of the land" clause, embracing not only federal statutes but also "treaties" with other nations, fixes very definite limits upon state choice of law. Treaties may permissibly cover as yet undetermined but certainly tremendous areas of foreign and international transactions, and in so far as they prescribe governing law for these transactions they supersede local choice-of-law rules.[12] By the same token, cases which fall within areas taken over by the Congress under the commerce,[13] bankruptcy,[14] or other clauses that confer implementing power upon it are outside the control of all contrary state law including state law on choice of law, and the same is true of cases which fall within the *Clearfield*[15] rule of "federal common law" governing nonstatutory matters of peculiarly federal concern.[16] These matters that are controlled directly by federal treaties, statutes, and common law present, however, a problem that does not come under the head of federal control over state choice of law. They present situations in which no state choice-of-law rule whatever is applicable, because they cannot be controlled by state law. They need not be mentioned again in this study.

The "public acts" part of the full faith and credit clause is what causes it to overlap the due process clause. The two quoted words, ignored until recent years,[17] are not yet defined, though the process of definition is now going on. That state

[12] Kolovrat v. Oregon, 366 U.S. 187 (1961) (treaty with Yugoslavia controlled descent of Oregon property on alien owner's death). See Bayitch, *Conflict of Law in United States Treaties*, 8 MIAMI L.Q. 501 (1954).

[13] *E.g.*, Western Union Tel. Co. v. Boegli, 251 U.S. 315 (1920) (Hepburn Act superseded application of state law to tort claims for mental anguish in connection with interstate telegrams); O'Brien v. Western Union Tel. Co., 113 F.2d 539 (1st Cir. 1940) (similar result for defamation cases).

[14] *E.g.*, Vanston Bondholders' Protective Committee v. Green, 329 U.S. 146 (1946).

[15] Clearfield Trust Co. v. United States, 318 U.S. 363 (1943).

[16] D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447 (1942) (question whether federal agency is holder in due course of promissory notes pledged to it as security held governed by "federal common law" rather than by law of any state having contact with the transaction); American Pipe & Steel Corp. v. Firestone Tire & Rubber Co., 292 F.2d 640 (9th Cir. 1961) (construction of subcontract under federal defense contract).

[17] The history of the full faith and credit clause was itself largely ignored until this century, though it has lately excited considerable interest. The best study of it is Nadelmann, *Full Faith and Credit to Judgments and Public Acts: A Historical Analytical Appraisal*, 56 MICH. L. REV. 33 (1957). Also see Costigan, *History of the Adoption of the Full Faith and Credit Clause*, 4 COLUM. L. REV. 470 (1904); Corwin, *The "Full Faith and Credit" Clause*, 81 U. PA. L. REV. 371 (1933); Radin, *The Authenticated Full Faith and Credit Clause: Its History*, 39 ILL. L. REV. 1 (1944); Page, *Full Faith and Credit: The Discarded Constitutional Provision*, 1948 WIS. L. REV. 265; Sumner, *The Full-Faith-and-Credit Clause: Its History and Purpose*, 34 ORE. L. REV. 224 (1955). On the function and potentialities of the clause generally, see Jackson, *Full Faith and Credit: The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1 (1945). Compare Waite, C. J., in Chicago & Alton R.R. v. Wiggins Ferry Co., 119 U.S. 615, 622 (1887): "Without doubt... [the full faith and credit clause] implies that the public acts of every state shall be given the same effect by the courts of another state that they have by law and usage at home."

statutes are "public acts" seems established,[18] which means that full faith and credit, or at least some faith and credit,[19] must be given in each state to private rights and defenses conferred by state statutes, or at least to those conferred by some statutes. Just as with the "judicial proceedings" part of the clause, the process of giving faith and credit is unlikely to be called for unless some person asserts in court a claim or defense based upon what he describes as a "public act" of a sister state.

Apart from statutes as such, what manifestations of governmental authority constitute "public acts"? The pronouncement of a judgment by a competent court is certainly a "public act" in the official sense, but it is covered by the "judicial proceedings" part of the constitutional clause. The same is true of the determinations of an administrative agency exercising judicial or quasi-judicial functions.[20] The scope of faith and credit required for these has been somewhat clarified.

What about an appellate court's opinion which not only sets out the court's judgment but serves in its *ratio decidendi* as a precedent for the determination of future cases, thus constituting a promulgation of law in very nearly the same sense as a legislatively promulgated statute? In other words, are claims based on the common law of State *X* entitled to faith and credit in State *F*? It has been suggested that if the common law of *X* goes back to a reception statute which formally adopted the English common law, as is true in most of the American states,[21] this suffices to give the state's common law the overall statutory status that the term "public act" traditionally applies to.[22] A difficulty with this is that the reception statutes invariably adopt the English law as of some stated time—the fourth year of James I (1607), or 1620, or 1776—and a judicial precedent announced in State *X* in 1960 was simply no part of the law of England at any of these dates. The very setting of fixed dates by the reception statutes is a declaration that judge-made law differs from date to date. On the other hand, it may be urged that the reception statutes really adopted the common law *system*, not just a given set of rules and precedents that existed in England at some named date, so that even the current decisions of the *X* court come within the legal system which the statute put into effect. Regardless of formalistic analysis, there seems to be as much merit in giving faith and credit to private claims and defenses based on judge-made law as to those based on legislatively enacted law. The official character of the law's promulgation is as real in one case as in the other; in each case the rule of law derives from the official act of a public agency. Unless the United States Supreme Court declares otherwise, we had better

[18] Langmaid, *The Full Faith and Credit Required for Public Acts*, 24 ILL. L. REV. 383 (1929), was one of the early studies reaching this conclusion. And see Field, *Judicial Notice of Public Acts Under the Full Faith and Credit Clause*, 12 MINN. L. REV. 439 (1928).

[19] See *infra* notes 31-33, 35.

[20] See Broderick v. Rosner, 294 U.S. 629 (1935); Industrial Comm'n of Wisconsin v. McCartin, 330 U.S. 622 (1947).

[21] See Hall, *The Common Law: An Account of Its Reception in the United States*, 4 VAND. L. REV. 791 (1951).

[22] Hilpert & Cooley, *The Federal Constitution and the Choice of Law*, 25 WASH. U. L.Q. 27, 34 (1939); Cheatham, *Federal Control of Conflict of Laws*, 6 VAND. L. REV. 581, 603 (1953).

assume that a state's common law is entitled to the same faith and credit as are its statutes.[23]

On their respective faces, the due process clause is negative, telling the states what they must not do, and the full faith and credit clause is affirmative, telling the states that they must do certain things. As the two clauses stand today, however, in the substantial absence of congressional implementation of either of them, they both operate in essentially the same fashion, each setting minimum limits on what the states are free to do.

The due process clause does not require states to create any rights or obligations. It rather puts an outer limit on the extent to which a state may "deprive" persons of rights, including defenses, (involving life, liberty and property) which are already and independently existent under local law, or under some other state's or nation's law, or under the "law of the land."[24] The due process clause does not tell us which state's law must be applied to determine the legal rights and duties that grow out of a given set of facts; it only tells us which state's, or states', law must *not* be applied. True, an inference may follow that *some* state's law must be applied if to apply *no law* would operate to deprive a person of the sort of rights that may not constitutionally be taken away from him. But the clause has not been deemed to create any such affirmative requirement as to claims based on extrastate facts. It merely has that incidental effect, sometimes.

The required recognition and enforcement of extrastate claims, in so far as they depend upon the laws of sister states,[25] would rather seem to be the function of the full faith and credit clause. Yet that clause, except as to judgments, has done little to assure enforcement throughout the nation of claims based on extrastate law. Up to now, in cases not involving judgments, the clause has been for the most part effectual only to do the same sort of thing that the due process clause does, which is, to prevent a forum state from applying some wrong law to control claims and defenses asserted under extrastate facts, thereby incidentally inducing the forum to apply what is regarded as the proper law, or *a* proper law. It thus like the due process clause has prescribed a minimum of propriety, a choice-of-law rule setting outer limits as to what may be done, not generally but in a few special situations only.

The few cases in which the full faith and credit clause has been employed to assure enforcement of unadjudicated extrastate claims afford no clear picture of

[23] See Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 436 (1943): "...the full faith and credit... to which local common and statutory law is entitled under the Constitution and laws of the United States" (dictum by Stone, C.J.); Jackson, *Full Faith and Credit: The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 12 (1945): "...the Court has so acted and talked that we may deal with this part of our subject on the assumption that what is entitled in proper cases to credit is the law of a state by whatever source declared"; Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 13 (1958). Generally, see Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210 (1946).

[24] As to "natural law" rights, it is assumed that they either are discoverable under the law of one of these political entities or else do not exist for purposes of due process protection.

[25] The "act of state" doctrine, tentative and incomplete though it be, is beginning to serve the purposes of a full faith and credit rule between nations. See Zander, *The Act of State Doctrine*, 53 AM. J. INT'L L. 826 (1959); Note, 75 HARV. L. REV. 1607 (1962); Note, 35 N.Y.U.L. REV. 234 (1960).

what access to courts the clause requires. One thing that is clear is that the matter is not now as urgent as it seemed at one time. The development of "long-arm service" statutes[26] is making it normally possible to secure first judgments in the state where the cause of action arose, regardless of a defendant's persistent absence therefrom, which judgments will in turn be entitled to faith and credit in the state where the defendant or his property are located. Thus ultimate sister state enforcement of valid claims is becoming reasonably effective without the compulsion of full faith and credit to "public acts" as such. Despite this, no one can doubt that ready extrastate enforcement of unadjudicated transitory causes of action makes for a better economic life among people living in a federal nation.

One area in which states have been required to entertain suits on sister state claims is that in which all the stockholders of an insolvent corporation have been ordered by a court or administrative agency at the corporate domicile to pay an assessment to a regularly appointed statutory liquidator, and action is then brought by the liquidator in another state against particular stockholders to collect the assessment. Most of these cases can be explained under the "full faith and credit to judicial proceedings" head.[27] Though the assessment order in the first state is based upon a statute, or "public act," the proceeding fixing the assessment is normally judicial in character. It may have been held before an administrative tribunal rather than a court, and it had to be a class action, but it was in any event an adjudication of the legal propriety of the assessment upon the stockholders. In that character it is as clearly entitled to sister state faith and credit[28] as is a judgment rendered by a court as such, and for the same reasons. One important case, however, requires further explanation. In *Broderick v. Rosner*,[29] a New York administrative assessment had evidential status only and apparently lacked judicial character, yet was nevertheless held entitled to full faith and credit in New Jersey on the idea that the statute and the possibly non-judicial administrative order in combination were "public acts" entitled to constitutional protection. New Jersey was required to entertain the liquidator's action against local stockholders of the New York corporation. A closely related situation is that in which a law of the first state, normally administered in some kind of judicial or quasi-judicial proceeding, puts property titles into some person such as a statutory liquidator or an attaching creditor. Here again the full faith and credit clause requires other states to respect the titles thus created,[30]

[26] *Supra* notes 5, 6.

[27] Bernheimer v. Converse, 206 U.S. 516 (1907); Converse v. Hamilton, 224 U.S. 243 (1912); Chandler v. Peketz, 297 U.S. 609 (1936); Hood v. Guaranty Trust Co., 270 N.Y. 17, 200 N.E. 55 (1936). But see Christopher v. Brusselback, 302 U.S. 500 (1938) (such judgment not effective in second state unless statute at place of incorporation provided for representation of stockholders' interests by corporation in action there).

[28] See note 20 *supra*.

[29] 294 U.S. 629 (1935).

[30] Relfe v. Rundle, 103 U.S. 222 (1880) (statutory liquidator); Clark v. Williard, 292 U.S. 112 (1934) (statutory liquidator); Green v. Van Buskirk, 72 U.S. (5 Wall.) 307 (1866), 74 U.S. (7 Wall.) 139 (1868) (attaching creditor). This of course assumes that the first state, as *situs* or on some other

by entertaining actions based upon them. In these cases the "public acts" and the "judicial proceedings" parts of the full faith and credit clause have been inexactly combined to create the compulsion for sister state enforcement.

The case that sets a pattern for such compulsion based altogether on the "public acts" part of the clause is *Hughes v. Fetter*.[31] It required Wisconsin to entertain suit upon a cause of action for wrongful death conferred by an Illinois "public act," that state's wrongful death act. The decision might suggest that the clause confers as clear a constitutional right to sister state enforcement of private claims based upon "public acts" as it does to enforcement of those based upon "judicial proceedings," save for one thing. This is the express proviso that if the forum state has a genuinely strong local public policy against the type of claim sued upon, it need not entertain the suit,[32] a rule which one outstanding scholar has vigorously attacked[33] and which is exactly opposite the requirement that sister state judgments be en-

adequate basis, had legal power to create the property title in question. A first state which lacks such power, or possesses it incompletely, may be denied faith and credit by another state whose superior power over the *res* enables it to fix the title more authoritatively. *E.g.*, see Mieyr v. Federal Surety Co., 97 Mont. 503, 34 P.2d 982 (1934), sustained in Clark v. Williard, 294 U.S. 211 (1935), which completely defeated the faith and credit requirement prescribed by the earlier *Clark v. Williard* decision, *supra*, for the same set of facts. Generally, see Note, 48 HARV. L. REV. 835 (1935).

[31] 341 U.S. 609 (1951). Accord: First National Bank of Chicago v. United Air Lines, 342 U.S. 396 (1952) (full faith and credit clause requires Illinois to entertain action based on Utah wrongful death act). These decisions practically nullify Chambers v. Baltimore & Ohio R.R., 207 U.S. 142 (1907), which held that the privileges and immunities clause did not require Ohio to entertain a sister state cause of action for wrongful death. The 1951 and 1952 decisions also assume that the causes of action for wrongful death necessarily arose under the death acts of Illinois and Utah respectively. On the possible incorrectness of that assumption see Currie, *The Constitution and the "Transitory" Cause of Action*, 73 HARV. L. REV. 268 (1959); Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Equal Protection*, 28 U. CHI. L. REV. 1 (1960). Certainly, the clause does not compel each forum state to enforce claims arising under the law of any and every other state whose law might permissibly be applied to the facts. "A rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own." Alaska Packers Ass'n v. Industrial Accident Comm'n of Calif., 294 U.S. 532, 547 (1935).

[32] "We have recognized ... that full faith and credit does not automatically compel a forum state to subordinate its own statutory policy to a conflicting public act of another state; rather it is for this Court to choose in each case between the competing public policies involved." Hughes v. Fetter, 341 U.S. 609, 611 (1951). The Court concluded that Wisconsin actually had no strong local public policy against extrastate statutory claims for wrongful death.

[33] Currie, *The Constitution and the Choice of Law*, 26 U. CHI. L. REV. 9, 28, 47 (1958); Currie, *Conflict, Crisis and Confusion in New York*, 1963 DUKE L.J. 1, 25-28. Also see Seidelson, *Full Faith and Credit: A Modest Proposal ... or Two*, 31 GEO. WASH. L. REV. 462, 463 (1963). Professor Currie identifies the proviso as "the Brandeis fallacy," because of language used by Brandeis, J., in Bradford Electric Light Co. v. Clapper, 286 U.S. 145, 160 (1932): "A State may, on occasion, decline to enforce a foreign cause of action. In so doing, it merely denies a remedy, leaving unimpaired the plaintiff's substantive right, so that he is free to enforce it elsewhere." It seems a bit unfair to attach the name of Brandeis to the "fallacy," if it is a fallacy, since he was merely repeating what scores of other judges and writers had said before him, a supposed rule which until Currie's time had not been questioned. Actually, not many cases can be found in which a forum's local public policy was the real reason for denying access to a local court for enforcement of a recognizedly valid sister state claim. See Paulsen & Sovern, *"Public Policy" in the Conflict of Laws*, 56 COLUM. L. REV. 968, 972, 1010 (1956). Yet there are *some* cases, and many dicta. Union Trust Co. v. Grossman, 245 U.S. 412 (1918), is typical. It is impossible to know with certainty whether that case applied Texas rather than Illinois law on the merits, thus determining that the plaintiff had no cause of action, or only held that the Illinois cause of action would not be enforced in a court sitting in Texas, for reasons of strong Texas public policy.

forced regardless of the forum's local policies.[34] The two parts of the clause do operate differently in respect to the compulsion they, as now implemented, exert upon the states to open the doors of their courts to extrastate causes of action.

It is possible, of course, and expectable, that the full faith and credit clause will in future be implemented by general laws enacted by the Congress under the authority of its second sentence, and that this implementation[35] will to some extent, and perhaps greatly, broaden the areas of compulsory "effect" exerted by the clause. This broadening may be either in respect to access to courts or in respect to the determination of what law governs the creation of substantive causes of action and defenses (choice-of-law questions as such), or both. It is impossible to predict now what form congressional implementation will take, nor how far it will go. Probably it can go quite far. Regardless of that, the present study is concerned primarily with what the situation is today, under the meager implementation which Congress has so far provided for the clause, and with the limits on free choice of law which this and other constitutional clauses impose upon state courts.

II

SPECIFIC AREAS OF LIMITATION ON STATE CHOICE OF LAW

The undifferentiated application of the due process and full faith and credit clauses to choice-of-law questions calls for a blanket description of their effect. The limits which the Constitution imposes on free choice of law by the states are limits imposed by the relevant constitutional clauses as a group. Original analysis by a Brainerd Currie[36] can show how the courts should differentiate between the clauses and should assign completely separate effects to each, as the framers presumably intended. Perhaps some day that will be done. The courts have not done it yet. The only choice-of-law question for which the cases decided under the constitutional clauses today furnish any real guidance is—what does "the Constitution" permit, or require, the states to do? The immediately useful practical question is in terms of the several federal constitutional clauses as the combined sources of the limits on state power.

The specific areas within which the United States Supreme Court has undertaken

[34] Fauntleroy v. Lum, 210 U.S. 230 (1908). The permissible application of the forum's own procedural rules, including its statutes of limitation, remains ostensibly the same for actions brought under either part of the full faith and credit clause. Wells v. Simonds Abrasive Co., 345 U.S. 514 (1953) (Pennsylvania one-year limitation rule bars action there for Alabama wrongful death though action not barred in Alabama); McElmoyle v. Cohen, 38 U.S. (13 Pet.) 312 (1839) (Georgia five-year limitation for actions on judgments bars action there on South Carolina judgment though action not barred in South Carolina).

[35] It is assumed that the 1948 addition of the words "such acts" to the general implementing statute, 28 U.S.C. § 1738 (1958), referring to "public acts," did not achieve any important extension of full faith and credit, both because of the vague generality of the 1948 addition and because of its apparently accidental character. See Goodrich, *Yielding Place to New: Rest Versus Motion in the Conflict of Laws*, 50 COLUM. L. REV. 881, 891 (1950); Note, 30 N.Y.U.L. REV. 984 (1955). Compare Dean, *The Conflict of Conflict of Laws*, 3 STAN. L. REV. 388 (1951), advocating elaborate implementation.

[36] *E.g.*, Currie, *The Constitution and the Transitory Cause of Action* (2 pts.), 73 HARV. L. REV. 36 and 268 (1959).

to impose limits on state choice of law are few. Frankfurter, J., in a 1955 dissenting opinion[37] undertook to summarize in terms of factual areas the cases in which the full faith and credit clause was relied upon by the Court, either alone or along with the due process clause, in imposing or refusing to impose such limits. He could have added the cases such as *Home Insurance Co. v. Dick*[38] in which the due process clause alone was relied upon, without changing anything except his statistical totals. He identified three factual groups of cases, involving (a) commercial law, (b) insurance, and (c) workmen's compensation. Under (a) commercial law, he listed the decisions enforcing statutory assessments against out-of-state shareholders under the laws of the state of incorporation of an insolvent corporation[39] and simple contract cases[40] in which "less need for uniformity" was found. Under (b) insurance he noted the fraternal benefit society cases[41] in which an "indivisible unity" among the members is deemed to create "a resultant need for uniform construction of rights and duties in the common fund," so that the law of the corporate society's home state must prevail, and ordinary insurance contracts[42] as to which "the forum has had a much wider scope" if (applying its own law) it has "more than a casual interest" in the transaction. Then under (c) workmen's compensation cases[43] he pointed out that "the Court has likewise adopted an interest-weighing approach."

A. Insurance

The "indivisible unity" among members of fraternal insurance societies may as a fact be arguable, but the theory of it is clear enough. It is the same theory that subjects all the stockholders of an insolvent corporation to the law of the state of incorporation.[44] The theory can reasonably be extended to a conclusion that all the basic rights and duties of all the stockholders (or members) of any artificial legal entity, between themselves and toward the entity, ought to be governed by the same law, which would have to be the law of the (or a) place[45] in which the corporate existence was created and is centered. To allow the rights and obligations of stockholders or members to be governed by the laws of their several domiciles or by the laws of the places where they acquired membership would create such a non-uniformity of stockholder interests as to cripple the corporate device. This overwhelming need for unity of treatment applies to such matters as the shareholders' rights to dividends, their right to participate in the management of the corporation

[37] Carroll v. Lanza, 349 U.S. 408, 414, 416 (1955).

[38] 281 U.S. 397 (1930).

[39] *Supra* note 27. The element of faith and credit to "judicial proceedings" present in these cases has already been noted.

[40] No cases compelling application of extrastate law were cited under this subhead.

[41] See *infra* note 47.

[42] See *infra* notes 48, 51-59.

[43] See *infra* notes 60-62.

[44] *Supra* note 27.

[45] A difficulty exists as to corporations formally organized in one state, perhaps Delaware, but having their principal place of business and all their major activities centered elsewhere. Probably as to these the state of "commercial domicile" rather than that of incorporation should be looked to. See Latty, *Pseudo-Foreign Corporations*, 65 YALE L.J. 137 (1955). *Cf.* State *ex rel.* Weede v. Bechtel, 239 Iowa 1298, 31 N.W.2d 853 (1948).

by voting at stockholders' meetings or otherwise, their liability on unpaid subscriptions, their subjection to assessments or double liability, the existence and nature of pre-emptive rights in other stock or property of the corporation, and other relational rights and duties.[46] As to most or all of these, competing interests of third persons or of other states will seldom be involved. If no such outside interests are affected, the members of the corporate body ought all to have identical rights and duties, and a constitutional requirement that one law and one law only govern them is understandable.

Interestingly, however, the group of cases in which this constitutional requirement has been most often applied, the fraternal benefit society insurance ones, presents sets of facts to which the theory's application is doubtful. The latest case in the series, *Order of United Commercial Travelers v. Wolfe*,[47] is typical. The defendant, an Ohio fraternal insurance society, had in its constitution a prohibition against bringing any action on a death claim more than six months after disallowance of the claim by the Supreme Executive Committee of the society. This provision was valid under Ohio law. The defendant had qualified to engage in business in South Dakota, and the insured, now deceased, applied in South Dakota for membership and was a citizen of South Dakota throughout the period of his membership, up to his death. The policy was payable to a South Dakota beneficiary, though she had assigned her rights under it to an Ohio citizen who was plaintiff in the South Dakota action brought on the policy. The South Dakota court applied South Dakota law, which regards such time limitations on suit as void, and allowed recovery. The United States Supreme Court reversed, holding that South Dakota must give full faith and credit to the Ohio public acts under which the defendant society was incorporated since the common interests of the scattered members require unity of governing law as to their interrelationship with the society and with each other.

The real difficulty with this case and its companions is their assumption that a genuine difference exists between fraternal insurance contracts and ordinary insurance contracts because of the "membership" feature that accompanies the fraternal contract. Whatever may have been the sociology of life insurance in its early days, it is today not in any realistic sense a fraternal or societal matter, even when the policy is written by a fraternal benefit society. It is a business carried on through a very special type of contract written with reference to experience tables which may vary from one social group to another in respect to life expectancies but which

[46] This is so generally regarded as the correct choice-of-law rule that state courts have regularly reached the result stated, so that the United States Supreme Court has had no occasion to announce it as one based on constitutional compulsion. *Cf.* Fourth Nat'l Bank v. Francklyn, 120 U.S. 747 (1887). Generally, see Reese & Kaufman, *The Law Governing Corporate Affairs: Choice of Law and the Impact of Full Faith and Credit*, 58 COLUM. L. REV. 1118 (1958).

[47] 331 U.S. 586 (1947). On this case, see Harper, *The Supreme Court and the Conflict of Laws*, 47 COLUM. L. REV. 883, 895 (1947). Earlier cases in the series were Royal Arcanum v. Green, 237 U.S. 531 (1915); Modern Woodmen v. Mixer, 267 U.S. 544 (1925); and Sovereign Camp v. Bolin, 305 U.S. 66 (1938). The cases employed somewhat varying logical techniques in arriving at their conclusions, and there were vigorous dissents on varying grounds also, but all reached the same result.

are otherwise substantially similar. Insured persons today "buy" insurance as they buy many other commodities, tangible and intangible. The policy or written contract is a sort of embodiment of what is purchased, but everyone understands that the insurer's promise to pay in the specified amount and manner on the insured's death (or other named disability) is what is bargained for. The insurance purchased is regarded as of one general character regardless of the internal corporate form of the insurer. There is no practical difference in the public eye today between fraternal insurance societies and other insurers, as far as their insurance contracts are concerned. The insurance coverage issued by the fraternal society is not merely an incident of membership as such, but rather a separable promise having independent economic value and involving economic hazards and risks as to which well-established standards of police power regulation by state law have developed. There is substantially the same social justification for the application of this state law, under the same principles of choice of law, to fraternal society insurance contracts as to insurance contracts of other corporations. The analogy to the common interest of members, such as shareholders, in an artificial legal entity which they control and dominate, does not stand up. A more reasonable analogy is to choice-of-law rules applicable to insurance contracts generally.

The rules for choice of law in contracts cases are about as unsettled as any in the whole law of conflict of laws. That indicates that as far as the constitutionality of contracts-conflicts rules and decisions under them is concerned, almost anything goes. *Almost,* but not quite. The Supreme Court has set some limits. It held in *Home Insurance Co. v. Dick*[48] that the due process clause will not permit Texas as forum to invalidate a limitation-on-time-for-suit clause, valid in a Mexican insurance contract under Mexican law, under the pretense that limitations on time for bringing suit are always a procedural matter. The contract was altogether a Mexican one, without any significant Texas contacts, and no trick of characterization would permit Texas to defeat the insurance company's valid defense under it.

No one suggests that the *Dick* case is wrong or is likely to be overruled. The outer limit on constitutionality that it suggests is that no state may create (or destroy) substantive claims by determining them under the law of a state[49] which has no substantial connection with the transaction in litigation.

The United States Supreme Court has never held, however, that this is a conclusive formulation of the outer limit which the Constitution prescribes. The early cases edged back and forth uncertainly, searching understandably for a sound but as yet incompletely formulated rule. *Allgeyer v. Louisiana,*[50] not itself a contracts-

[48] 281 U.S. 397 (1930).

[49] "A state may deprive a party of due process of law by applying the law of a state having no interest in the matter, whether the law applied is that of the forum or of another state. Usually the question is raised by the court's application of the law of the forum. There is every reason, however, why the principle should apply equally to the unwarranted application of foreign law...." Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function,* 26 U. CHI. L. REV. 9, 16 (1958).

[50] 165 U.S. 578 (1897). For a somewhat similar decision see St. Louis Cotton Compress Co. v. Arkansas, 260 U.S. 346 (1922).

conflicts case, was for practical purposes the starting point. It held that Louisiana could not under the due process clause punish an owner of Louisiana cotton for insuring it with a foreign insurance company not qualified to do business in the state, when all that the owner did, after taking out in another state a blanket policy covering, upon notification, all his cotton thereafter shipped by common carrier, was to notify the insurer by letter mailed in Louisiana that the local cotton was being so shipped. The Louisiana contacts were held to be insufficient to justify application of that state's police power regulation to the transaction. *New York Insurance Co. v. Cravens*[51] then held that fine print stipulations in an insurance contract could not prevent the state where the contract was centered from applying its law to the contract. The next major case, *New York Life Insurance Co. v. Head*,[52] came fourteen years later. It is essentially similar to *Home Insurance Co. v. Dick*. In *Head* the original life insurance contract was assumed to have been made in Missouri, on a New Mexico life, and a New Mexico beneficiary was later designated. The beneficiary then in New Mexico and New York arranged for a loan on the policy, the new contract specifying that it was governed by New York law. The loan was not repaid and, in accordance with New York law, the policy's accumulated reserve was applied to discharge the loan, and the life policy was reduced to a small paid-up amount. The insured then died, and a Missouri recovery of the original policy amount was sought on the theory that Missouri law was effective to keep the policy in force for that amount. The holding was that the Constitution does not permit the Missouri law to preclude parties to Missouri contracts, and their privies, from later making new contracts elsewhere concerning the same subject matter. The fact that a subject matter was first contracted about in Missouri was not enough to enable Missouri to apply its law to later independent contracts or transactions with which Missouri had no substantial connection.

After *Head* came a pair of cases which appear contradictory. The first was *New York Life Insurance Co. v. Dodge*,[53] which followed *Head* so blindly that it went considerably beyond that case. In *Dodge* the original contract was made in Missouri on a Missouri life in favor of a Missouri beneficiary, and a subsequent loan on the policy as security was applied for in Missouri in keeping with procedures prescribed in the policy, though the loan was completed in New York with new papers which expressly declared that they constituted a new contract governed by New York law. The loan was not repaid. In action on the policy after death of the insured, the Missouri court applied its law to prevent a forfeiture, and the United States Supreme Court reversed, again holding that the loan contract was separate, an independent New York contract to which Missouri's law could not be constitutionally applied. The Court completely disregarded Missouri's substantial connection with the new contract as well as the continuing Missouri connection (absent in the *Head* case) with the old contract out of which the new contract

[51] 178 U.S. 389 (1900).
[52] 234 U.S. 149 (1914).
[53] 246 U.S. 357 (1918).

developed. The second case in the pair was *Mutual Life Insurance Co. v. Liebing*[54] which on almost indistinguishable facts permitted Missouri to apply its law to keep the original insurance policy alive despite nonpayment of the intervening loan. The distinction made by Holmes, J., in *Liebing* was that "the policy now sued upon contained a positive promise to make the loan if asked, whereas, in [*Dodge*] ... it might be held that some discretion was reserved to the company."[55] It was permissible for Missouri to apply Missouri law because the intervening loan was itself provided for by the original Missouri contract.

Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.[56] went as far as did the *Dodge* case beyond the "outer limits" rule derived from *Home Insurance Co. v. Dick*. The action was brought in Mississippi on an employee defalcation insurance contract made in Tennessee with the defendant Connecticut insurance company, covering the Mississippi corporate plaintiff's employees in Tennessee, Mississippi, and other states. The particular loss sued upon was a defalcation by a Mississippi employee. A contract clause limited to a short period the time within which a claim for loss could be filed after the insurance policy was terminated, and this claim was not filed within that time because the defalcation was not sooner discovered. The clause was valid by Tennessee but not by Mississippi law, and the Mississippi court sustained the action, applying its own law. The United States Supreme Court reversed, saying that Mississippi had taken the insurer's property without due process of law when it disregarded the defense given by the Tennessee contract which was "lawful where made." As in *Dodge*, the Court put its emphasis solely on the place where the contract was made, to the exclusion of another place which had a substantial connection with the total transaction since the insured's domicile plus a large part of the risk insured, including the part of the risk on which the loss occurred, were there located.

A 1936 case, *John Hancock Mutual Life Insurance Co. v. Yates*,[57] fits in with the "outer limits" rule ascribed to *Home Insurance Co. v. Dick*. The insurance contract was made in New York on a New York life and with a New York beneficiary. Material false representations which induced issuance of the policy made it void by New York law. Action was brought by the beneficiary in Georgia where she had acquired residence after the death of the insured, her husband. Georgia applied its rule requiring jury determination of all fact issues, which it characterized as "procedural," to bypass the policy's clear invalidity under undisputed facts by New York law. The "procedural" characterization, like that in *Home Insurance Co. v. Dick*, was no more than a trick to create a pretense of traditional ground for application of the forum's law. The problem was one of what law governed the substantive defense asserted under the contract, and Georgia could not

[54] 259 U.S. 209 (1922).

[55] *Id.* at 213. Aetna Life Ins. Co. v. Dunken, 266 U.S. 389 (1924), used conversely an analysis quite similar to that in the *Liebing* case, holding that subsequent transactions in Texas were referable back to an original Tennessee contract and must be governed by Tennessee rather than Texas law.

[56] 292 U.S. 143 (1934).

[57] 299 U.S. 178 (1936).

constitutionally apply its law because it had no substantial connection of any sort with the substantive transaction sued on.

One later insurance contract case does much to bring order into the field. This is *Watson v. Employers Liability Insurance Corporation*.[58] An insurance contract negotiated and delivered in Massachusetts and/or Illinois covered products liability claims against the insured anywhere in the United States. The contract included a clause, valid under Massachusetts and Illinois law, prohibiting direct actions against the insurer until after final determination of the insured's tort liability. The plaintiff was injured in Louisiana by use of the insured's product and there brought a direct action against the insurer, as permitted by a Louisiana statute. The United States Supreme Court held that the Louisiana direct action was constitutionally permissible despite the contract. Louisiana was the place of the tort and as such had substantial connection with the claim sued on.[59] This was held to be enough to satisfy the requirements of both the due process and the full faith and credit clauses.

B. Workmen's Compensation

The *Dick, Yates,* and *Watson* cases, taken together, suggest a constitutional rule that is fairly simple even though difficult to apply in practice. A frequent statement of it is that a state may apply its own (or any other state's) substantive law to govern a particular transaction if, but only if, significant factual elements in the transaction are connected with the state whose law is applied. The forum state is free in any event to apply its own procedural rules in trying the case, but it may not under the guise of procedural characterization apply its own law so as to deprive parties of claims or defenses which cannot otherwise be attributed to the forum's law. The permissible scope of procedural characterization is thus limited to rules which genuinely relate to the manner in which judicial business is conducted, plus a few others such as statutes of limitation, statutes of frauds, and measures of damages—rules which have sometimes or always been traditionally characterized as procedural for conflict of laws purposes.

The workmen's compensation cases fit in with that analysis. That would not be true if the authority of *Bradford Electric Light Co. v. Clapper*,[60] decided in 1932,

[58] 348 U.S. 66 (1954). Another case, Sun Insurance Office, Ltd. v. Clay, 363 U.S. 207 (1960), might have called for a review of Home Insurance Co. v. Dick, 281 U.S. 397 (1930), had not the Court found a different ground on which to dispose of it, at least temporarily. But see Sun Insurance Office, Ltd. v. Clay, 319 F.2d 505 (5th Cir 1963), which if taken to the United States Supreme Court may yet compel the re-examination of principles that was avoided in 1960.

[59] "Persons injured or killed in Louisiana are most likely to be Louisiana residents, and even if not, Louisiana may have to care for them. Serious injuries may require treatment in Louisiana homes or hospitals by Louisiana doctors. The injured may be destitute. They may be compelled to call upon friends, relatives, or the public for help. Louisiana has manifested its natural interest in the injured by providing remedies for recovery of damages. It has a similar interest in policies of insurance which are designed to assure ultimate payment of such damages. Moreover, Louisiana courts in most instances provide the most convenient forum for trial of these cases." Black, J., in Watson v. Employers Liability Insurance Corp., 348 U.S. 66, 72 (1954). *Cf.* Speidel, *Extraterritorial Assertion of the Direct Action Statute,* 53 NW. U.L. REV. 179 (1958).

[60] 286 U.S. 145 (1932).

were not substantially destroyed today. The *Clapper* case held that, when the compensation act of the state where the employment contract was made and partly performable (Vermont) barred tort recovery completely, the state where injury was suffered in the course of the employment (New Hampshire) could not constitutionally apply its own law to permit an optional tort recovery against the negligent employer. The holding was that New Hampshire by applying its own law was denying full faith and credit to the Vermont "public [workmen's compensation] act." The prospective eclipse of *Clapper* became evident when the *Pacific Employers*[61] case held in 1939 that California as place of injury could allow compensation recovery under its own act for injuries suffered in the course of temporary employment there even though the compensation act of Massachusetts, the place where the contract was made and the injured man's employment was centered, purported to be exclusive. The fact that *Clapper* was a torts case and *Pacific Employers* involved a compensation recovery did not sensibly distinguish the cases. The effect of the latter decision was that the full faith and credit clause does not require a state which has such substantial contacts with the relevant facts as California had to defer on workmen's compensation matters to the law of a state situated as was Massachusetts. Then *Carroll v. Lanza*[62] in 1955 made the eclipse of *Clapper* almost a total one. It held that Arkansas, the place of injury in the course of employment, could constitutionally give a tort recovery under Arkansas law despite an explicit ban on such recovery in the compensation law of Missouri where the contract of employment was made between Missouri parties. This did not imply the opposite of *Clapper*, that the state of injury is the only one whose law may be applied, but rather that either state may apply its law, provided it has substantial and significant connection with the facts to which its law is applied. *Clapper* seemed to say that the full faith and credit clause picked out one major factual contact in each set of facts, and required all states to give conclusive effect to the "public act" of the state where that major factual contact was located. The later cases tell us that, for workmen's compensation at least, the clause no longer makes that choice between factual contacts, but leaves each forum free to make the choice for itself, so long as the law chosen is supported by substantial factual contacts.

III

A GENERAL TEST: FAIR PLAY AND SUBSTANTIAL JUSTICE

The commercial law, insurance, and workmen's compensation areas of constitutional control just discussed are merely representative, and whatever general conclusions are drawn from them may be assumed to be broadly applicable to choice of law in torts, property, and other private law fields as well. Determination of property claims by a law which has no substantial connection with the facts would

[61] Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493 (1939).

[62] 349 U.S. 408 (1955). See Stone, *The Forum's Policy and the Defense of Faith and Credit to Workmen's Compensation Acts*, 41 IOWA L. REV. 558 (1956).

pretty clearly be unconstitutional.[63] Although there is more room for argument about tort claims, the same conclusion must be reached as to them[64] and as to any other type of substantive private claim (or defense) that anyone might assert. Furthermore, these standard private law problems cannot be isolated from other less private choice of law areas, not so frequently discussed under the conflict of laws heading, such as criminal law,[65] state taxation,[66] divorce,[67] and domestic relations law generally. And there is the obvious correlation between the constitutional limits on choice of law in these "legislative jurisdiction" areas and those imposed by the due process clause under the head of "judicial jurisdiction."[68]

The *Clapper* case is not the only early United States Supreme Court decision that will be dropped by the wayside if this analysis of the more recent cases is sound. *Hartford Accident and Indemnity Co. v. Delta and Pine Land Co.*[69] is another, and there are more, though some of them can probably be ignored rather than overruled.[70] In *Hartford,* a Mississippi court was prevented from applying its own substantive law to defeat a time limitation clause in a Tennessee contract insuring against Mississippi losses from Mississippi risks covered by the policy. The Mississippi factual contacts with the cause of action were certainly substantial. They were more substantial than the California contacts in *McGee v. International Life Ins. Co.,*[71] where judicial jurisdiction was sustained on comparable facts, and just as substantial as in *Watson v. Employers Liability Insurance Corp.,*[72] the Louisiana direct action case, and *Carroll v. Lanza,*[73] the Arkansas tort-workmen's compensation case which finally obliterated *Clapper.* If place of making the contract is not to be automatically regarded as the controlling factor, Mississippi's factual contacts with the case were at least as substantial as Tennessee's. The current "states' rights in choice of law" attitude of the Court would surely permit Mississippi to apply its time limitation

[63] As to land, see Selover, Bates & Co. v. Walsh, 226 U.S. 112 (1912), and Kryger v. Wilson, 242 U.S. 171 (1916); Goodrich, *Two States and Real Estate,* 89 U. PA. L. REV. 417 (1941). As to tangible movables, see Leflar, *Constitutional Jurisdiction Over Tangible Chattels,* 2 Mo. L. REV. 171 (1937), an analysis which went too far in suggesting constitutional limits but which nevertheless has some soundness in it. *Cf. In re* Thornton's Estate, 1 Cal.2d 1, 33 P.2d 1 (1934).

[64] *Cf.* Young v. Masci, 289 U.S. 283 (1933); Scheer v. Rockne Motors Corp., 68 F.2d 942 (2d Cir. 1934).

[65] See WILLIAM L. CLARK & W. L. MARSHALL, A TREATISE ON THE LAW OF CRIMES 118 (6th ed. 1958); Berge, *Criminal Jurisdiction and the Territorial Principle,* 30 MICH. L. REV. 238 (1931); Note, 15 U. MIAMI L. REV. 428 (1961).

[66] *Cf.* Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194 (1905); State Tax Comm'r of Utah v. Aldrich, 316 U.S. 174 (1942); Braniff Airways v. Nebraska, 347 U.S. 590 (1954). See Bittker, *The Taxation of Out-of-State Tangible Property,* 56 YALE L.J. 640 (1947).

[67] See Alton v. Alton, 207 F.2d 667 (3d Cir. 1953), *vacated as moot,* 347 U.S. 610 (1954). Compare Wheat v. Wheat, 229 Ark. 842, 318 S.W.2d 793 (1958).

[68] *Supra* notes 5, 6, 7.

[69] 292 U.S. 143 (1934). The facts are stated *supra* note 56.

[70] *E.g.,* Allgeyer v. Louisiana, *supra* note 50, and New York Life Ins. Co. v. Dodge, *supra* note 53. But see State Board of Insurance v. Todd Shipyards Corp., 370 U.S. 451 (1962) (interpretation of congressional intent, under exercise of commerce power, to retain *Allgeyer* rule). It may be necessary, however, for the fraternal benefit society cases, *supra* note 47, to be overruled explicitly if that line of authority is to be eliminatd.

[71] 355 U.S. 220 (1957).

[72] 348 U.S. 66 (1954).

[73] 349 U.S. 408 (1955).

rules to a set of facts in which such numerous and significant local concerns are evident.

But in a more doubtful case, how much of local concerns must be evident before a court is free to apply its own substantive law to a case? It is easy to say that the local contacts must be "substantial" or "significant," but these are inexact words. They are vague and difficult to apply to specific facts. A number of attempts have been made to formulate a clearer test. The word "reasonableness," or some corollary, is central to most of the attempts.

Professor Weintraub devised a test of reasonableness based on "unfair surprise." Sufficiency of local contacts to make it reasonable for the state's law to be used in adjudicating the particular controversy, coupled with the condition that if the state's contact was acquired so late in the series of events (as in *Home Insurance Co. v. Dick*) that "to apply its law would result in a serious disregard of the justifiable expectations of one of the parties" and "inject an element of unfair surprise" is the test proposed.[74] This seems to be an acceptable restatement of the concept of "fair play and substantial justice," with added concreteness afforded by the words "unfair surprise," but it too is difficult to apply to specific facts. Professor Overton's earlier test of "an arbitrary and capricious application of laws that have no fair or decent connection with the transaction"[75] is similarly helpful but similarly indefinite as well.

A. "Governmental Interest" and "Weighing"

For many years the courts, both in the common law cases and in those presenting constitutional questions, have accompanied their references to factual contacts in a state with references to the local concerns or interests which grew out of these contacts. Thus in *Watson* the Court spoke of Louisiana's "legitimate interest in safeguarding the rights of persons injured there,"[76] and in an earlier insurance case the Supreme Court pointed out that "a state may have substantial interest in the... insurance of its people or property... measured by highly realistic considerations such as the protection of the citizen insured or the protection of the state from the incidents of loss."[77] Comparable language undertaking to identify social, political, economic, and even cultural interests attributable to a state because of the incidence of local factors in a litigated case has been employed hundreds of times.

It was from this background that Professor Brainerd Currie developed his "governmental interests" theory[78] to the effect that, if a forum state's connection with the facts in dispute gives it a "legitimate interest" in having its law applied

[74] Weintraub, *Due Process and Full Faith and Credit Limitations on a State's Choice of Law*, 44 IOWA L. REV. 449, 455-57 (1959). And see Weintraub, *A Method for Solving Conflict Problems—Torts*, 48 CORNELL L.Q. 215, 239 (1963).

[75] Overton, *State Decisions in Conflict of Laws and Review by the United States Supreme Court Under the Due Process Clause*, 22 ORE. L. REV. 109, 170 (1943).

[76] 348 U.S. 66, 73 (1954). And see *supra* note 59.

[77] Hoopeston Canning Co. v. Cullen, 318 U.S. 313, 316 (1942). This was connected with an implied rejection of "conceptualistic discussion of theories of the place of contracting or of performance."

[78] Currie's position is set out in numerous papers, but is most completely presented in Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9 (1958).

to the facts, it is not only permissible under the Constitution but generally desirable that the forum's law be applied almost automatically. The fact that this automatic application of interest-connected forum law would avoid all "weighing" of competing interests of other states and would eliminate all choices of law based on such selected facts as the place of making a contract or the place of injury in a tort case is regarded as a choice-of-law advantage independent of constitutional considerations. By avoiding the weighing of competing state interests, the approach would preclude judicial reliance upon public policy factors in making choices of governing law, and would accordingly take what Currie identifies as "political questions" away from the courts. Currie feels strongly that these political questions are, at both the common law and the constitutional level, legislative rather than judicial in character. At the constitutional level, this means that the due process, full faith and credit, and other relevant constitutional clauses are self-executing to the extent of limiting application of any state's law to interest-connected situations, but that limitations beyond that simple one should await congressional legislation under the implementing powers conferred by the several clauses.

It is evident that neither the state courts nor the United States Supreme Court have in years gone by restrained themselves, as Currie now proposes, from weighing competing state interests or considering policy factors, either in deciding common law choice-of-law problems or in determining constitutional limitations on state choice-of-law rules. In *Clapper* there was an implication that New Hampshire might not have been required to give faith and credit to Vermont's public act had it been shown that the act was truly "obnoxious to New Hampshire's public policy," and this proviso on compelled faith and credit has been repeated more clearly by the Court nearly a dozen times since then. In the fraternal benefit society cases the choice of law which is affirmatively compelled has consistently been put on "evaluated public policy" of the affected states, as in *Wolfe*:[79]

> ...the weight of public policy behind the general statute of South Dakota, which seeks to avoid certain provisions in ordinary contracts, does not equal that which makes necessary the recognition of the same terms of membership for members of fraternal benefit societies wherever their beneficiaries may be.

However much one may disagree with the conclusion that the claims of fraternal benefit society members must all be determined by one law, it remains true that there are some situations (corporate stockholder relations appear to be one) in which a comparison of the interests and policies of different states having factual contacts with the transaction will point clearly to only one state as the one whose law should govern.

B. Policy Evaluation

It may be said that in these cases the chosen law is that of the only state having a real governmental interest in the transaction, that other states' contacts were insufficient to give them a governmental interest. That conclusion is itself one of

[79] Order of United Commercial Travelers v. Wolfe, 331 U.S. 586, 624 (1947). See *supra* note 47.

policy, necessarily. The evaluation of any contact, to determine whether it gives rise to a "*legitimate* governmental interest" in the state, *i.e.*, whether it substantially concerns the state to which it relates, is a policy evaluation. When *Watson* and *Carroll v. Lanza* held that occurrence of an injury plus a few surrounding facts in a particular state was enough to permit that state's law to govern, they reached a policy conclusion. When Professor Currie suggests[80] that the occurrence of an auto accident in Ontario, on the essentially New York facts of *Babcock v. Jackson*,[81] might well be deemed insufficient to give Ontario a genuine governmental interest that would support application of its law to the case, he too is making a judgment which includes a comparison of values inherent in asserted interests. In the same sense he is determining a "political question." It is impossible to deal with "governmental interests," either by discovering their existence, by denying their existence, or by deliberately comparing them, without making policy judgments concerning them and the grounds on which they are deemed substantial or insubstantial.

Furthermore, not all "governmental interests," especially in a federal nation, are state interests. In the United States there are national interests that transcend state interests. Some of them arise out of national responsibility in international affairs, some out of the nature of the federal union. If a choice of law case involves matters of serious international concern, the United States Supreme Court is certainly able to require from a forum court a choice of law that will respect the national interest. By the same token, if there be some important internal national interest, perhaps in assuring uniformity of result or rule in a particular legal area, or even in assuring a socioeconomic, political, or other practical convenience that in the national view far outweighs local concerns, the Court will equally be justified in exercising its power to control the choice of law. This is true despite congressional power to make the choice, especially for problems as to which it will not do to wait for Congress to act because Congress is so preoccupied with other issues that it is in no hurry to act.

The society and the economy of the United States today transcend state lines, and the governmental interests which relate to them are in many respects interstate and international in their legal identification. They are often not confined by the state lines around which the Amercian law of conflict of laws has developed, nor by the "states' rights" tradition of American political oratory. These governmental interests are larger matters such as human rights, the security of transactions, the protection of property, and assurance of relief against harms unjustifiably inflicted. They include "the just result in the individual case," but only as one among several considerations. Some of the larger concepts of governmental interest inhere in

[80] Currie, *Conflict, Crisis and Confusion in New York*, 1963 DUKE L.J. 1, 38.

[81] 17 App.Div.2d 694, 230 N.Y.S.2d 114 (1962). The holding, severely criticized by Currie, was that Ontario's guest statute barred recovery because the auto accident happened there, even though the auto host and guest, and the auto, were all from New York and were only making a weekend trip into Ontario. The decision was reversed by the court of appeals in 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), on a "center of gravity" analysis which involved a frank weighing against each other of the governmental interests arising from the respective sets of contacts.

"the law" (the decision as precedent), and some in social and economic policy which transcend the individual case just as they transcend state boundaries. These larger interests can and sometimes should override the interests that inhere in this or that local law even to the extent that the local rule of law indicated by the local interest ought not to be allowed to govern. Congress could take care of this, but the congressional attitude has been that this is the sort of problem that is best left to the courts. If the courts in turn abdicate absolutely to Congress, nothing at all will happen. That is all right for the mass of private litigation. As to this mass, completely free choice of law by the states produces results that are at least adequate, perhaps almost ideal. But there are scattered situations, and as the years pass there are likely to be more of them, in which official national interest, or some socio-economic interest that is national in its scope and operation, demands a more enlightened choice-of-law rule. If the Congress enacts one, well and good. But if the Congress does not, it is part of the courts' traditional function to meet the need. Not only do cases have to be decided; they are supposed to be decided in accordance with "fair play and substantial justice."

C. Restrictions on Characterization

The classic tradition in the law of conflict of laws has been to use the characterization device as the key to identification of significant territorial contacts and, if governmental interests are to be taken into account, to identify these in turn as tied to the contacts which were deemed significant under the characterization employed. In the course of time, characterization came to be recognized as a flexible legal tool which does not itself produce results inexorably, but often only affords logical justification for results independently arrived at. So recognized, characterization cannot today be regarded as an essential part of the process of defining constitutional limits on local choice of law. The significance of factual contacts ought to be determined with reference to the total situation in a given case, not just by reference to the technical characterization that has been fastened onto the case by the plaintiff's attorney or even by the judge. That is what is being done increasingly nowadays.[82] Despite this, characterization cannot be ignored in connection with the constitutional problem. If a cause of action is deemed to sound in tort, the common law has for a century or more associated it with the place of injury. If it sounds in contract a similar association with the place where the contract was made is equally shrouded in time, though this contact has more often been bypassed. These traditionally controlling contacts have been employed in choice-of-law cases time and again without regard to the comparative insignificance of the governmental interests they may give rise to. The contact has been deemed sufficient without measurement

[82] Along this line, see Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657 (1959). "No wonder the Supreme Court is now disentangling itself therefrom after some unhappy efforts to elevate choice-of-law rules to constitutional rank. It does not follow, however, that Congress either would or should enact choice-of-law rules post-haste, or even that it should ever enact them wholesale. As we now finish one long servitude to categorical imperatives, we should be on guard against another." *Id.* at 675.

of the interest. And the minimal requirements prescribed by the due process clause have been held, perhaps unfortunately, to be met by rules and procedures which satisfy tradition without satisfying common sense,[83] as well as by newer ones which make good sense regardless of tradition. Contacts which have been traditionally sufficient for choice of law purposes must be deemed still to satisfy the Constitution. The characterization device still has some substantive effect in determining the outer limits which the Constitution sets.

An interesting but not particularly difficult variation of the characterization problem appears when a court grounds its choice of governing law on a characterization which may be inadequate to support the constitutionality of the choice made but where there is available under the facts another characterization which would support the choice of law. Other ways of describing such a case would be that the facts have a sufficiently substantial connection with the state whose law is chosen, or that the governmental interests arising from the facts in that state are sufficiently significant, to justify application of its law, though some other reason for applying that law was given in the court's opinion. Or it might be said that, regardless of reasons given, application of the chosen state's law would not be utterly unreasonable, and would not involve such "serious disregard of the justifiable expectations" of a party as to "inject an element of unfair surprise" against him, nor constitute "an arbitrary and capricious application of laws that have no fair or decent connection with the transaction." This would be equivalent to a conclusion that "fair play and substantial justice" were not denied by what was done.

The now-famous *Kilberg*[84] case and its companion *Pearson*[85] illustrate the point. The *Kilberg* holding was that the law of the New York forum governed measure of damages for a Massachusetts wrongful death, though existence of the cause of action was deemed to be governed by Massachusetts law. Measure of damages was for New York public policy reasons characterized as a procedural matter, so that New York's forum law governed it. This is a doubtful characterization.[86] But the decedent was a New York domiciliary killed while on an airlines flight from New York under a passenger ticket purchased (contract made) in New York. New York had enough significant contacts with the transaction to sustain application of its own substantive law as governing the whole case. The *Pearson* decision in the second circuit concluded that the result in *Kilberg* was not unconstitutional. The minimum contacts essential to constitutionality in choice of law are to be discovered from the facts in the case, not merely from the state court's possibly mistaken reasoning and language.[87]

[83] *E.g.*, see Ownbey v. Morgan, 256 U.S. 94 (1921), sustaining against constitutional attack a Delaware "foreign attachment," which, though extremely unfair, followed the late medieval Custom of London as it had been imported into the American colonies. *Cf.* Midrich v. Lauenstein, 232 U.S. 236 (1914) (sheriff's false return of service).

[84] Kilberg v. Northeast Airlines, 9 N.Y.2d 34, 211 N.Y.S.2d 133, 172 N.E.2d 526 (1961).

[85] Pearson v. Northeast Airlines, 309 F.2d 553 (2d Cir. 1962), *cert. denied*, 372 U.S. 912 (1963).

[86] New York itself partially backed away from the characterization a year later in Davenport v. Webb, 11 N.Y.2d 392, 183 N.E.2d 902, 230 N.Y.S.2d 17 (1962).

[87] "...surely a state court does not violate the Constitution when it reaches a perfectly sound result

The "divided characterization" technique used in *Kilberg* may also give rise to some trouble. Assuming that each characterization employed is separately permissible, not hog-wild, does the mere fact of choosing two laws rather than one, so that part of the case is governed by one state's law and another part by the law of a different state, raise a constitutional question? If one of the characterizations is that an issue is procedural so that forum law governs it, and the procedural characterization is clearly a permissible one, there is of course no difficulty. But if the procedural characterization is a doubtful one, as with measure of damages in *Kilberg*, or if different substantive characterizations are used for different elements in the facts, the problem is present. Thus in *Order of United Commercial Travelers v. Wolfe,* Burton, J., speaking of fraternal benefit society membership, said:[88]

> It is of the essence of the full faith and credit clause that, if a state gives *some* faith and credit to the public acts of another state... then it must give *full* faith and credit to those public acts....

And Friendly, J., dissenting in *Pearson,* thought that, though New York was not required by the Constitution to apply Massachusetts law to a set of facts with so many New York facets, once New York chose to determine the right by Massachusetts law it should not under the full faith and credit clause be free to "take what is liked and reject what is disliked" from the sister state's public act.[89]

The answer to this constitutional doubt appears to lie in the "reasonable" severability of issues, "reasonableness" in this context having the same meaning that it has in the "fair play and substantial justice" concept that fixes constitutional limits for other choice-of-law problems. Such a severance of issues is reasonable and sensible when the interests relevant to each are centered at different places, as where the question concerns liabilities between family members domiciled in one state for a tort committed in another state,[90] or the effect of an automobile guest statute on a tort committed in one state when all the parties and the car come from another state.[91] These are different from "rules of the road." So, when an issue relates primarily to the method of trial, as when jury trial is prescribed by one state's law and judge trial without a jury by another's, or relates to pleadings or evidence, it is

but uses language that gives offense to doctrinal purists." Currie, *Conflict, Crisis and Confusion in New York,* 1963 DUKE L.J. 1, 28, in turn quoting Black, J., in Eli Lilly & Co. v. Sav-on-Drugs, Inc., 366 U.S. 276, 284 (1961): "So even if the state court had rested its conclusions on an improper ground, this Court could not, in view of the undisputed facts establishing its validity, declare a solemn act of the state of New Jersey unconstitutional."

[88] 331 U.S. 586, 625 (1947). The case is discussed *supra* note 47. Compare Currie, *The Constitution and the Choice of Law,* 26 U. CHI. L. REV. 9, 63 (1958): "[the Court] ... ought also to understand that a transaction may be governed, in some or all of its aspects, by the laws of two or more states, as their interests may appear."

[89] 309 F.2d 553, 566 (2d Cir. 1962).

[90] Emery v. Emery, 45 Cal.2d 421, 289 P.2d 218 (1955); Haumschild v. Continental Cas. Co., 7 Wis.2d 130, 95 N.W.2d 814 (1959); Haynie v. Hanson, 16 Wis.2d 299, 114 N.W.2d 443 (1962).

[91] Babcock v. Jackson, *supra* note 81. Another illustration of separable issues is as between the commission of a tort by an alleged servant at one place and existence of a relationship justifying vicarious liability on another person by reference to the law of some other place where the asserted relationship was centered. Garrison v. Ryno, 328 S.W.2d 577 (Mo. 1959). Compare Venuto v. Robinson, 118 F.2d 679 (3d Cir. 1941).

reasonable to characterize the particular issue as a procedural one to be governed by forum law. The conduct of litigation centers at the place where the litigation is conducted. But that leads on to the hard questions, when some issue that may be outcome-determinative in the case, or which like measure of damages determines the size of the right, or like a statute of limitations determines whether any action may be brought, is classified as procedural. *Home Insurance Co. v. Dick*[92] and *John Hancock Mutual Life Insurance Co. v. Yates*[93] warn us that the procedural characterization can go too far. It goes too far not because of any technical rule of characterization, but for the same "fair play and substantial justice" reasons that make it unconstitutional when any court deprives any person of his life, liberty, or property by applying a law which has so little of substantial connection with his case as to make the application an unreasonable one.

CONCLUSION

But what is unreasonable? As a constitutional concept, the word has no exact definition now, never has had, and probably never will have. It is a fluctuating amalgam of considerations, traditions, attitudes, and reactions.

When the word is tied down to some particular factual or legal context, it seems more definite. This is true when it is in its choice-of-law context. Here, it is clear that the outcome-determinative effect of a given rule does not bar its being classified as procedural. Almost any procedural rule can sometimes affect the outcome of litigation, and the *Erie* outcome-determinative test[94] classifies as substantive many rules which have traditionally been characterized as procedural for choice-of-law purposes. Tradition in conflicts law plays an important part in determining what is to be deemed unreasonable. The content of the procedural classification is largely a matter of tradition. If damages rules and statutes of limitations had not in the past been matters for forum law it is doubtful that they would as an original question be so regarded today. Tradition can be abandoned, but it is apt to be abandoned slowly, gradually, and only in the face of urgent demands that "fair play and substantial justice" be more completely achieved. As to damages and limitations, the traditionally permissible applicability of forum rules is more apt to be nibbled away from the edges than to be eliminated suddenly. These rules have not yet come to be regarded as terribly bad.

Considerations of the general public interest, including the national interest in international and federal relationships and our ever-broadening American interest in socioeconomic and human values that transcend state lines, are increasingly a part of our constitutional concept of what is unreasonable, whether in choice of law or other areas. Respect for the interests of the states, even for asserted state interests that may be difficult to identify or accept, is a major element in the constitutional

[92] 281 U.S. 397 (1930).
[93] 299 U.S. 178 (1936).
[94] See Sedler, *The Erie Outcome Test as a Guide to Substance and Procedure in the Conflict of Laws*, 37 N.Y.U.L. REV. 813, 877 (1962).

concept, perhaps the most important single element in the whole concept as it operates in the choice-of-law area. In a federal nation the governmental interests of the states which comprise it vary according to the allocations of power in the federal structure, but in the United States the reservoir of power is in the states. State governmental interests are to be respected, along with the policies they represent, and so are national ones. Both enter into the amalgam of definition which marks the outer limits of what is reasonable.

There is nothing in the reasonableness concept of "fair play and substantial justice" that would necessarily bar choice of law in terms of general rules of law rather than in terms of the law of particular territorial states. The conflict of laws cases still speak almost unanimously a language of "choice of jurisdictions," so that the law of one state or another must be selected as governing, but they might instead speak in terms of an actual "choice of rules of law" regardless of political territories.[95] Thus, if two or more interest-connected states have identical or compatible rules of law, and the law of a third connected state is different, it would be possible to choose as governing the laws of the two states as an undifferentiated but coordinated unit, as against the law of the third state. It would even be possible to choose deliberately the rule of law which would best serve the needs of the parties and the purposes of their transaction, in keeping with state policy.[96] The constitutional permissibility of this would be difficult to attack.

The defining of constitutional unreasonableness is a weighing of values, a weighing in which a great preponderance of values, but not absolutely all of them, must be on one side before it will be decided that a choice-of-law decision the other way is unconstitutional. There is no mathematical formula to tell us when the necessary preponderance exists. The identification of governmental interests, both national and state, is essential to the process, since that identifies what is to be weighed. But a set of scales with some kind of markers on it is also essential. The scales are of course in the constitutional clauses themselves, in their "fair play and substantial justice" requirement which as time goes on will presumably be given further definition, but which of a certainty will be marked to preclude what is unreasonable: any "arbitrary and capricious application of laws that have no fair or decent connection with the transaction" in litigation; laws which involve such "serious disregard of the justifiable expectations" of a party as to "inject an element of unfair surprise

[95] *Cf.* Frank, J., in Walton v. Arabian-American Oil Co., 233 F.2d 541, 545 n.14a (2d Cir. 1956): "As the tort rules, pertinent here, of New York, Delaware, and Arkansas are doubtless substantially similar, there would be no need to choose one or the other." The "choice of rules of law" suggestion was introduced in Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 183, 201 (1933), and is elaborated slightly in Cavers, *Restating the Conflict of Laws: The Chapter on Contracts*, in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW (LEGAL ESSAYS IN HONOR OF HESSEL E. YNTEMA) 349, 350 (1961). The Contracts chapter in the *Restatement Second* of Conflict of Laws takes a timid step in this direction by proposing that if the relevant rules in two or more states which have contacts with the contract are the same, "the case will be treated ... as if these contacts were grouped in a single state." RESTATEMENT (SECOND), CONFLICT OF LAWS § 332(b), comment *c* (Tent. Draft No. 6, 1960).

[96] Compare Seeman v. Philadelphia Warehouse Co., 274 U.S. 403 (1927).

against him"; and laws that would defeat governmental interests which have truly outstanding national significance.

What is the area left for congressional implementation? The answer suggests itself. It is the area within which, in the absence of congressional implementation, the states have been and are free to do as they please. Beyond that lies the area of unreasonableness in which application of a given law violates "fair play and substantial justice." Congress is as completely bound not to violate that outer limit on choice of law which the self-executing part of the Constitution prescribes as are the states and their courts. The Supreme Court of the United States may from time to time change its determinations as to what choices of law go beyond the outer limits, and it may be hoped that some of them will be changed soon; but whatever those limits are, they are binding. On the safe side of those limits, however, congressional power under the implementing clauses is vast. The power would probably comprehend enactment of a complete code on choice of law. Another hope, that this will be somewhat further delayed, may also be expressed.