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MARRIED WOMEN'S CONTRACTS: A STUDY IN CONFLICT-OF-LAWS METHOD

BRAINERD CURRIE*

I

THE PROBLEM of *Milliken v. Pratt*¹ has been a featured subject of analysis in two of the most provocative writings in modern times on the conflict of laws.² This fact alone, to say nothing of other studies of the same problem, nor of the fact that the casebooks have made the decision familiar to the point of triteness, makes it seem almost presumptuous to offer further discussion. The practical importance of the specific problem is no doubt approaching the vanishing point as a result of the progressive removal of restrictions on the capacity of married women to contract. A number of factors, however, have nurtured the temerity necessary to prompt further comment in such circumstances. In the first place, Cook and Cavers, after all, did not advance solutions of the problem in the papers cited,³ but only methods of approach to a solution. Cook has been severely criticized for the "destructive" character of his analysis,⁴ and Cavers seems to have resigned himself to disillusionment.⁵

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¹ 125 Mass. 374 (1878).

² Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 Yale L. J. 457 (1924), reprinted in Cook, *The Logical and Legal Bases of the Conflict of Laws*, c. I (1942), and in Association of American Law Schools, *Selected Readings on Conflict of Laws* 71 (1956); Cavers, *A Critique of the Choice-of-Law Problem*, 47 Harv. L. Rev. 173 (1933), reprinted in Association of American Law Schools, *Selected Readings on Conflict of Laws* 101 (1956). Hereafter, the Association's collection will be cited "AALS Readings."

³ At a later time, Cook suggested that a somewhat flexible version of the rule referring to domicile would be preferable to the place-of-making rule. Cook, *The Logical and Legal Bases of the Conflict of Laws*, c. XVI (1942).

⁴ Yntema, *The Historic Bases of Private International Law*, 2 Am. J. Comp. L. 297, 314 (1953) (AALS Readings, at 30, 43).

⁵ Cavers, *Review of Cook, The Logical and Legal Bases of the Conflict of Laws*, 56 Harv. L. Rev. 1170, 1173 (1943). More recently Cavers has returned to the attack with a vigor which considerably discounts the pessimism he expressed in 1943. Cavers, *The Two "Local Law" Theories*, 63 Harv. L. Rev. 822 (1950) (AALS Readings, at 124).

In the second place, those of us who teach the subject have to treat the case anew each year, no matter how trite or how limited in current "practical" importance it may be; and one harbors a sense of guilt at not having committed one's treatment of it to paper, and hence, perhaps, not having thought it through. As for the diminishing practical importance of the specific problem, that is a circumstance which should not discourage inquiry, at least so long as there is any possibility that the results may have a somewhat broader application. Indeed, I am inclined to think that the fact that a problem is familiar, is limited in scope, and can be viewed in detachment from live controversy over the values involved in the conflicting laws, actually commends the problem for selection as the focus of a study of the methods of conflict of laws.

No further apology is needed for restating the problem, since each year brings another contingent of law students who are unfamiliar with it:

In 1870 Mrs. Pratt, at her home in Massachusetts, executed a guaranty of her husband's credit in favor of a partnership doing business in Portland, Maine. She delivered the instrument to her husband, who mailed it to the firm in Maine. In reliance on the guaranty, and in response to orders placed by Mr. Pratt, the partnership delivered goods to Mr. Pratt, either in person or by common carrier "for him," Mr. Pratt paying the shipping charges. Upon default, the partners sued Mrs. Pratt in Massachusetts on the guaranty. According to a Maine statute enacted in 1866, a married woman was competent to bind herself by contract as if she were unmarried. According to the law of Massachusetts at the time of the transaction, a married woman could not bind herself by contract as surety or for the accommodation of her husband or of any third person.

Reversing a judgment for the defendant, Mr. Justice Gray, for the Supreme Judicial Court of Massachusetts, announced that "[t]he general rule is that the validity of a contract is to be determined by the law of the state in which it is made. . . ." Treating the instrument executed by Mrs. Pratt as an offer for a unilateral contract, and concluding that the offer was accepted when and where the offeree delivered goods to the buyer or to a carrier for him, which was in Maine, the court concluded that Maine law governed and gave the contract validity. The court specifically rejected, on pragmatic grounds, the suggestion that such a question of capacity to contract should be decided in accordance with the law of the domicile. Finally, having determined that the contract was valid according to the applicable foreign law, it declined to take advantage of a second line of defense for Mrs. Pratt, which was available in the doctrine of local public policy. In this it was fortified by the fact that, after the transaction but before the action had been filed, Massachusetts law had been changed so as to remove the incapacity of married women.

Cook's initial interest in the case was limited; he analyzed it only to support his local law theory.⁶ Noting that the Massachusetts court applied the rule

⁶ Cook, *op. cit.*, *supra* note 2, at 470 et seq. (AALS Readings, at 82 et seq.). For Cook's later view, see note 3 *supra*.

which Maine would have applied to a purely domestic case, and did not inquire into the conflicts rules which would have indicated how Maine would have decided this particular case, with its mixed factors, he dealt a heavy blow to the theories according to which courts in conflicts cases are said to apply foreign law and to enforce foreign-created rights. ". . . [I]t follows that we must say that [the Massachusetts court] neither applied Maine 'law' nor 'recognized and enforced a Maine-created right,' as such, and that what it did do was to apply to the case before it the Massachusetts law and so to enforce a Massachusetts-created right."⁷

Cavers did not refer to *Milliken v. Pratt* specifically, but he constructed a hypothetical case which presented the same problem. His analysis, too, was advanced in support of a thesis—which, oversimplified, was "that considerations of justice and social expediency should be . . . the dominant determinants of problems in this field."⁸ His principal points in connection with the *Pratt* problem were: (1) that traditional conflicts method wrongly ignores the content of the competing rules of law; (2) that a rule referring to the source of the applicable law without regard to the content of that law will produce anomalous results when the patterns of content are reversed; (3) that the traditional "contacts" which courts seek out in order to relate the case to one state or another are too meager, and too mechanically applied, and that a much wider range of facts should be taken into account; and (4) that the place where the contract is made, determined in accordance with rules of contract law for determining *when* the contract is made, is irrelevant to the selection of the rule which should govern.

This is not, of course, a full statement of the Cavers thesis. It is simply a résumé of the points developed in discussion of the *Pratt* problem, to be woven into the thesis—which, to oversimplify again, was that "[t]he choice of . . . law [sh]ould not be the result of the automatic operation of a rule or principle of selection but of a search for a just decision in the principal case."⁹

Before we begin our discussion of *Milliken v. Pratt*, I should like to change one of the facts. It is evident from the opinion of the court, and the fact has been duly noted,¹⁰ that the change in the Massachusetts law between the time of the transaction and the filing of the suit had a material influence on the decision. But for that fact, it is possible that the Massachusetts court might have held that the applicable law was that of the married woman's domicile,¹¹ although that seems doubtful in view of Mr. Justice Gray's clear appreciation of the practical inconvenience of such a rule. More likely, the court, while professing adherence to the principle that the law of the place of making governs,

⁷ Cook, op. cit. supra note 2, at 473 (AALS Readings, at 84-85).

⁸ Cavers, op. cit. supra note 2, at 178 (AALS Readings, at 105).

⁹ Id., at 193 (AALS Readings, at 114).

¹⁰ Cook, op. cit. supra note 2, at 473 n. 49 (AALS Readings, at 84 n. 49). See also *Union Trust Co. v. Grosman*, 245 U.S. 412, 417 (1918).

¹¹ Cook, op. cit. supra note 2.

would have invoked local public policy as its justification for not applying the "applicable" law. At any rate, the change in the domestic law of Massachusetts destroyed any conflict of interest between Massachusetts and Maine, and so any real problem of conflict of laws.¹² If we are to proceed with this discussion we must have a problem. I therefore suggest that we delete from our consideration the fact that the Massachusetts law was changed. Indeed, I suggest that we go one step farther. We are not a great deal better off if all we know about the position of Massachusetts is that it retained a rule disabling married women to assume the obligations of suretyship. One of the reasons why we can tolerate a mechanical, deductive system of conflict of laws and the anomalies it produces is that frequently—and this is especially true of common-law rules—the purpose and policy of the rule is obscured by the mists of antiquity, or is obsolete, or simply inconsequential. There still may be no discernible conflict of interest. I should therefore like to assume that, shortly prior to 1870, a bill was introduced in the Massachusetts General Assembly for the enactment of a law similar to that enacted in Maine in 1866, removing the contractual disabilities of married women; that the issue was fully debated; that the proposal was defeated by a decisive though by no means overwhelming majority; and that the explicit reason for its defeat was the only one even remotely intelligible in modern times: that (in the judgment of the majority of the General Assembly) married women as a class are a peculiarly susceptible lot, prone to make improvident promises, especially under the influence of their husbands. We thus assume that by its negative action the General Assembly in effect gave deliberate approval to the existing rule: that no contract whereby any married woman might undertake to assume liability as a surety should subject her to judgment in any court.

II

Lawgivers, legislative and judicial, are accustomed to speak in terms of unqualified generality. Apart from the imperatives, the words most inevitably found in rules of law are words like "all," "every," "no," "any," and "whoever." In part, perhaps, this propensity is traceable to the fact that there lurks in all of us some vestige of the superstition that laws have an inherent quality of universality, derived from their association with Justice and Right Reason.¹³ This, however, must not be taken too seriously, because in a great many cases

¹² Cf. Cavers, *The Two "Local Law" Theories*, 63 *Harv. L. Rev.* 822, 828 (1950) (AALS Readings, at 128). It is interesting to note that, when the rationale is in terms of "local public policy," the outcome of a case can legitimately be affected by a change of law or of circumstances occurring *after* the event. Would such a result become objectionable if the conflict-of-laws rules themselves were stated in terms of policy? Cf. *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 433-35 (1957) (dissenting opinion); *Yarborough v. Yarborough*, 290 U.S. 202, 213 (1933) (dissenting opinion).

¹³ Possibly this kind of thinking is responsible for such preposterous decisions as that in *Ulman, &c. Woolen Co. v. Magill*, 155 Ga. 555, 117 S.E. 657 (1923).

it is quite obvious that the lawgivers do not mean all that they say. Suppose, for example, that we could buttonhole in the statehouse corridor the personification of the Massachusetts General Assembly and ask, "Now, really, do you mean to say that, if a married woman living in Maine should execute in Maine a guaranty of her husband's obligation to a Maine creditor, a Maine court could not or should not enter judgment on the guaranty against her?" There is no doubt at all what the startled, condescending reply would be: "Certainly not. What Maine courts do in actions between Maine parties arising out of Maine transactions is no affair of mine. Massachusetts problems are more than enough to keep me busy, thank you."

The important reason why lawgivers speak in such extravagantly general terms is that they ordinarily give no thought to the phenomena which would suggest the need for qualification. When the Massachusetts legislature addresses itself to the problem of married women as sureties, the undeveloped image in its mind is that of Massachusetts married women, husbands, creditors, transactions, courts, and judgments. In the history of Anglo-American law the domestic case has been normal, the conflict-of-laws case marginal. Probably this is still true, despite the much-publicized mobility of modern society. At least it is true in the thinking of lawyers. Nor is this a circumstance to be altogether deplored; presumptions of normality spare us, personally and professionally, a good deal of unnecessary worry and trouble.

Marginal or not, however, the conflict-of-laws case must be dealt with when it arises, if not before; and between the wholly domestic case visualized by the Massachusetts legislature and the wholly foreign case posed by our impertinent question lies an unimagined range of mixed configurations, each of them, however rare in actual occurrence, a conflict-of-laws case by definition. It may be interesting and even instructive to enumerate these cases in detail, if only because that is rarely, if ever, done. The enumeration will suggest something of the scope and difficulty of the conflict-of-laws problem which the legislature has left to the courts, and may prove an aid to analysis. Within reasonable limits, such an enumeration is possible. At first thought it may seem that, given a multiplicity of possibly significant factors and possibly interested states, the number of possible conflicts cases might verge on the astronomical. By being only a little arbitrary, however, we can keep the problem of enumeration within manageable limits.

Let us stipulate, therefore, that in a case like *Milliken v. Pratt* there are just four factors which may be significant for our purposes:

1. The domicile, or nationality, or residence, or place of business of the creditor;
2. The domicile, or nationality, or residence of the married woman;
3. The place of the transaction, i.e., the place where the contract is made, or possibly the place where it is to be performed;

4. The place where the action is brought.¹⁴

It is by no means a matter of indifference which of the alternative concepts mentioned in the first three factors is ultimately settled upon as the significant one; but for our immediate purposes it is not necessary to make this choice, and, for the sake of simplicity, we may assume that the facts would satisfy any of the alternatives, and lump each set of alternative concepts together.

There are two additional conditions to be observed: (a) For the time being, we are not interested in the content of the foreign rule (the content of the domestic [Massachusetts] rule is, of course, known); and (b) for present purposes we shall assume that only one foreign state is involved.

In such a case as *Milliken v. Pratt*, then, there are four factors of possible significance for the conflict of laws, each of which may be either domestic or foreign (to Massachusetts).¹⁵ There are therefore sixteen possible combinations—sixteen different cases which may arise. One of these is the purely domestic case, and one is purely foreign. That leaves fourteen conflict-of-laws cases. By oversimplifying the problem and making certain rather arbitrary assumptions we have been able to reduce the possibilities to this relatively small range. Even so, the fourteen different conflict-of-laws cases are difficult to visualize. It may be useful to present the whole array (Table 1).

If we were to place this array before our personification of the Massachusetts General Assembly, asking that he point out just which of the fourteen mixed cases the Massachusetts rule is intended to govern, and why, we should almost certainly meet with impatience and rebuff. Most likely, the reply would be that such questions belong to the realm of conflict of laws, and are for the courts to determine.¹⁶ This does not mean that legislatures, when they are disposed to

¹⁴ Cf. Savigny, *Private International Law, A Treatise on the Conflict of Laws and the Limits of Their Operation in Respect of Place and Time* 140 (2d Eng. ed., 1880); see Yntema, *op. cit. supra* note 4, at 310 (AALS Readings, at 40). I am not unmindful of Cavers' admonition that "[t]he problem of defining in a phrase the fact situations presenting conflict-of-laws problems is insuperable, since what the operative facts are depend on the rules for choice of law adopted. Until these rules are definitely ascertained, who can be sure that a given case is wholly 'domestic'?" Cavers, *op. cit. supra* note 2, at 176 n. 10 (AALS Readings, at 103 n. 10). But one cannot very well begin a chess game with a stalemate. In the end we may find a way out of this dilemma. If we can state conflict-of-laws rules in terms of the factors which bring the policy of a state into play, the "operative facts" are not dependent upon the rules. The dilemma is presented only if we conceive of conflict-of-laws rules as being necessarily universal choice-of-law rules of the traditional type.

¹⁵ The experimentally minded reader may wish to stop at this point and make the enumeration for himself. Unless he is a bit of a mathematician, he is likely to find the process unexpectedly difficult (as I did). Such an experience helps one to understand why legislatures ordinarily do not undertake to specify how laws shall apply to mixed cases.

¹⁶ Cf. Cheatham, *Sources of Rules for Conflict of Laws*, 89 U. of Pa. L. Rev. 430, 449-50 (1941) (AALS Readings, at 133, 140): "Most statutes are formulated with regard to only the ordinary or internal situations and on the problems of Conflict of Laws they are silent. Their sphere of application or use is to be determined through the principles of Conflict of Laws." See also Cook, "Contracts" and the Conflict of Laws: "Intention" of the Parties, 32 Ill. L. Rev. 899, 908 (1938) (AALS Readings, at 639, 648).

specify how their laws shall apply to cases involving foreign factors, refrain from doing so out of deference to the courts. It simply means, in this case, that the legislature has not thought about the matter, and does not want to think about it.

Left thus to our own devices, we may inquire what policy can reasonably be attributed to the legislature, and how it can best be effectuated by the courts in their handling of mixed cases. At the outset, it is well to recognize that the legislature can effectively control the result of litigation only in its own courts, so that strictly speaking we might concern ourselves here with only half of the

TABLE 1

CASE NUMBER	FACTORS*					
	1	2	3	4		
	R C	R M W	K	F		
1.....	D	D	D	D	All factors domestic	(1)
2.....	F	D	D	D	One foreign factor	(4)
3.....	D	F	D	D		
4.....	D	D	F	D		
5.....	D	D	D	F		
6.....	F	F	D	D		
7.....	D	F	F	D	Two foreign factors	(6)
8.....	D	D	F	F		
9.....	F	D	D	F		
10.....	F	D	F	D		
11.....	D	F	D	F		
12.....	F	F	F	D	Three foreign factors	(4)
13.....	F	F	D	F		
14.....	F	D	F	F		
15.....	D	F	F	F		
16.....	F	F	F	F	All factors foreign	(1)

- * 1. Residence of the creditor.
 2. Residence of the married woman.
 3. Place of contracting.
 4. Forum.

cases. We shall not so confine ourselves, however, because the legislature may desire to control the event of litigation in foreign courts, and the foreign court may, for one reason or another, defer to that desire.

It is surely not a difficult matter to formulate the legislative policy in this case. We have in effect already done so in the act of artificial respiration performed on the moribund body of the law concerning the contractual capacity of married women. Massachusetts, in common with all other American states and many foreign countries, believes in freedom of contract, in the security of commercial transactions, in vindicating the reasonable expectations of promisees. It also believes, however, that married women constitute a class requiring special protection. It has therefore subordinated its policy of security of transactions to its policy of protecting married women. More specifically, it has subordinated the interests of creditors to the interests of this particular, favored

class of debtors. It has felt the influence of pressure groups—banking and commercial interests, feminists, liberals, traditionalists, conservatives. It has weighed competing considerations. Many of the legislators have been persuaded that there should be a change. Yet, although the decision runs counter to the interests of powerful constituents, the legislature decides in favor of protecting married women.

What married women? Why, those with whose welfare Massachusetts is concerned, of course—*i.e.*, Massachusetts married women. In 1866 Maine emancipated (its) married women. Is Massachusetts declaring that decision erroneous, attempting to alter its effect? Certainly not. Given a slightly different configuration of the little causes that determine the outcome of the legislative process, Massachusetts might have decided the same way. Who can say that Maine, or Massachusetts for that matter,¹⁷ was wrong? All that happened was that in each state the legislature weighed competing considerations, with different results. Well, each to his own. Let Maine go feminist and modern; as for Massachusetts, it will stick to the old ways—for Massachusetts women. Never mind, for the time being, exactly what we mean by “Massachusetts” married women—whether citizens, domiciliaries, residents. For the sake of convenience, until we must decide that question, let us say that it is *residence* in Massachusetts which defines the ambit of the state’s protective policy.

The margin, narrow or substantial, by which the proposed change in Massachusetts law failed of enactment will soon be forgotten; when legislation is passed (or not passed) the vote, being immaterial, is not reported in the statute books. The result stands in all its emphatic generality, the word of the legislature, unweakened by expressions of dissent. This is The Law, this is the Just Rule—this, it is all too easy to infer, is Right Reason, all else being error, all else being rejected. But any such inference is a far cry from the realities of the legislative process. The legislature knew very well that it was not discovering the “true” rule, rejecting error. The legislature was not abnegating the principle of security of commercial transactions. Massachusetts had, and still has, *two* interests: security of transactions, and protection of Massachusetts married women. The first has been subordinated; it has not been destroyed. Perhaps the converse is not quite true for Maine. True, for many years prior to 1866 that state had subordinated its interest in the security of transactions to a policy of protecting its married women, and the change in the law may even have come about through a very close vote. Yet it seems far-fetched to say that Maine retains a subordinate interest in the protection of its married women. Security of transactions is, for both states, the basic policy, and the incapacitation of classes

¹⁷ Of course, from the vantage point of 1958, we can make an objective and pragmatic judgment in favor of Maine’s policy. The point, however, is that such questions are for legislatures to determine in the light of their advices at the time, and that no higher principles of reason were violated by the legislature of either state. There was no inconsistency in the two laws since, at least in the purely domestic context, each had its impact on a different group of married women.

of persons the exception. It seems more realistic to say that Maine has completely abandoned the policy of treating married women as a favored—or disfavored—class; and that its interest in protecting the weak and susceptible is implemented, with respect to married women, just as it is with respect to other persons generally—*i.e.*, through the more discriminating defenses of duress, fraud, mistake, want of mental capacity, and so on.

So far, nothing that we have said provides any basis for a suggestion that the place where the contract is made has anything whatever to do with the policy of the Massachusetts legislature. Yet Mr. Justice Gray tells us that “[t]he general rule is that the validity of a contract is to be determined by the law of the state in which it is made. . . .” Unless we have been very much mistaken in the foregoing formulation of the Massachusetts policy, the legislature was concerned with *people*—primarily Massachusetts married women—and the effects of their being induced to sign certain documents. What possible difference can it make where the document is signed? What effect will such a general rule have upon the Massachusetts policy?¹⁸

Before we examine that effect in detail, some preliminary observations are important. First of all, it would be remarkable if a rule, developed in the domestic law of contracts to determine *when* a contract is made, should prove serviceable in determining *where* a contract is made—assuming that the place of making has any relevance at all to such questions in the conflict of laws.¹⁹ For all the conceptual language that went into its development, that rule is best understood and evaluated as an allocation, between parties negotiating by correspondence, of the risks of uncertainty, delay, non-delivery, and so on. The more the rule is shaped consciously to this practical end, the more apparent becomes its irrelevance to the problems of conflict of laws. This is easily demonstrated by the familiar classroom parade of hypothetical cases. If Deering, Milliken & Co. had delivered the goods to Mr. Pratt in Massachusetts using their own wagons, the contract would have been “made in Massachusetts,” and Mrs. Pratt presumably would have escaped liability—though the mode of conveyance would seem to be totally irrelevant to any discernible Massachusetts policy.²⁰ The bilateral contract emerging from a long series of counter-offers, the contract made by telephone, the bargain concluded on board an airplane, all lend themselves to the same demonstration.

Secondly, there is no reason whatever to suppose that any alternate rule, even

¹⁸ The analysis in terms of state interests which is employed here has been most explicitly suggested by Freund, Chief Justice Stone and the Conflict of Laws, 59 Harv. L. Rev. 1210, 1216, 1223 (1946). See also Hancock, Choice-of-Law Policies in Multiple Contract Cases, 5 U. of Toronto L. J. 132, 136-37, 142-43 (1943).

¹⁹ It will be recognized that here, as in much of the argument to follow, I am using ideas advanced by Cavers and Cook. The repetition seems desirable in the interest of development of the argument, and there may perhaps be a somewhat different emphasis.

²⁰ Cf. Cheatham, Goodrich, Griswold & Reese, Cases and Materials on Conflict of Laws 488 (4th ed., 1957).

one devised expressly to determine *where* a contract is made for the purposes of conflict of laws, as distinguished from one designed to determine *when* it is made for purposes of allocating risks, would serve any useful purpose. I suppose a case can be stated in which there is no conceivable doubt as to *where* the contract is made—and to be performed. The parties meet in person, accompanied by their counsel, in the center of a stadium. The document is read aloud. With solemn, ceremonial flourish the document is signed, sealed, witnessed, and delivered. The parties shake hands. The document provides that when payment—the only performance called for—is due, the parties will meet again in the same place to make and receive it. To devise a rule which would admit the statement that the contract was made in any other place would challenge the ingenuity of a Lewis Carroll.²¹ If the scene is enacted in Massachusetts, the immanent law of that state, which droppeth as the gentle rain from heaven, pervades the contract, rendering it, if it is the promise of a married woman to answer for the debt of her husband, wet and void.²² If, then, as persons seeking shelter from the rain, the parties move their solemn charade across a state line, and act out their parts in a congenially dry climate, what possible difference can that make in terms of anything that Massachusetts or any other interested state may be trying to accomplish through its laws? We may invent doctrines of local public policy²³ and fraud on the law,²⁴ and resort to other devices to contain the absurdities spawned by sanctification of the place of making; but, as we shall see, they have not been effectively contained. Why not face the fact that the place of making is quite irrelevant; why not summon public policy from the reserves and place it in the front line where it belongs?²⁵

But perhaps we move too fast. The way to judge the rule is to see how it operates. The first thing to notice is that, by adoption of the rule that the law of the place of making governs, Massachusetts renounces any claim that its

²¹ But cf. California Law Revision Commission, Recommendation and Study Relating to Choice of Law Governing Survival of Actions J-18 (1957): "If legislation were enacted providing that the survival of a tort action is to be controlled by the place of the wrong, this would still leave considerable discretion in the court. Where is the place of the wrong? . . . Further assume that the parties were residents of the same state. . . . Could not the state of residence be reasonably considered the state with the primary interests and hence the place of the wrong?"

²² "Those laws pervade all transactions which take place where they prevail, and give them their color and legal effect." Bradley, J., in *The Scotland*, 105 U.S. 24, 29 (1881).

²³ See *Union Trust Co. v. Grosman*, 245 U.S. 412 (1918).

²⁴ See Cheatham, Goodrich, Griswold & Reese, *Cases and Materials on Conflict of Laws* 519-20 (4th ed., 1957).

²⁵ Five articles are generally helpful in this connection: Nussbaum, *Public Policy and the Political Crisis in the Conflict of Laws*, 49 *Yale L. J.* 1027 (1940) (AALS Readings, at 220); Paulsen & Sovern, "Public Policy" in the Conflict of Laws, 56 *Col. L. Rev.* 969 (1956); Katzenbach, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 *Yale L. J.* 1087 (1956); Neuner, *Policy Considerations in the Conflict of Laws*, 20 *Can. Bar Rev.* 479 (1942); Yntema, *The Objectives of Private International Law*, 35 *Can. Bar Rev.* 721 (1957).

law should control the result in exactly half of the mixed cases; for in seven of the possible cases the third factor, the place of making, which is all-important, is foreign. Furthermore, of the seven remaining cases, in which the applicability of Massachusetts law is asserted because the place of making is domestic, Massachusetts can be sure of effecting the result it purports to desire in only three, because Massachusetts can directly control the result only in its own courts, and there are only three cases (Nos. 2, 3, and 6) in which the third and fourth factors (place of making and forum) are both domestic. On the face of it, this is an extraordinarily diffident attitude for a "sovereign" state to assume. This rule, this product of the General Assembly's most careful deliberation, is to govern only seven of the fourteen possible cases? And is to govern four of those seven only by the grace and deference of a foreign court?²⁶

Assume for the moment a different attitude, carried to an extreme. Assume a quite selfish state, concerned only with promoting its own interests; a state, if you please, blind to consequences, and interested only in short-run "gains." Such a state might be expected to apply its law disabling married women, or to desire its application: (1) to every case in which both parties reside in the state (Nos. 4, 5, and 8), since it has decided to subordinate the interests of domestic creditors to the interests of domestic married women; and, a fortiori, (2) to all cases in which the married woman is domestic and the creditor foreign (Nos. 2, 9, 10, and 14)—in short, to all cases in which the married woman is a local resident, regardless of the creditor's residence. Such a state would not be expected to apply its law to any case in which the creditor is a local resident and the married woman a foreigner (Nos. 3, 7, 11, and 15). It would be indifferent, and would cheerfully apply the foreign law, to the cases in which neither party is a local resident (Nos. 6, 12, and 13). The question is not, for the moment, whether such an attitude would be shocking, or unwise, or unjust, or unconstitutional. The question is whether it would be rational; and the answer is that it *would*—in the sense that, in the short run, without considering how other states or higher authority might react, the state would in this manner be doing all it could to maximize its own interests.

It will be understood, I hope, that to recognize the rationality of such an attitude is not necessarily to commend it. But a statement of what a state would do, acting solely in its own interests, may serve as a gauge to measure the extent to which states do not so act, and thus provide a basis for discussing the phenomenon of their failure to do so.

With these considerations in mind, let us examine the cases which Massachusetts, by embracing the rule that the law of the place of making governs, has (1) determined to control, (2) asserted, somewhat wishfully, an interest in controlling, and (3) disclaimed an interest in controlling.

The cases in the first class are shown in Table 2.

²⁶ Possibly, of course, by virtue of the full-faith-and-credit clause of the federal Constitution, Article IV, Section 1. But that is a consideration to be reserved for the time being.

In Case No. 2, application of the domestic law makes good sense. It protects Massachusetts married women, and that without expense to Massachusetts creditors. If the foreign state is Maine, Maine's interest in the security of transactions is defeated. But if one state's policy must yield, should not the court prefer the policy of its own state?

In Case No. 3, despite the fact that three of the four factors are domestic, application of the domestic law makes no sense whatever. In the context with which we are concerned, it is abundantly clear that there is at stake no policy of Massachusetts relating to the administration of her courts. Sometimes such a policy is involved, and legitimately, as when the state believes that certain types of claims consume the time of courts without adequate social justification, or tend to the corruption of judicial processes.²⁷ No such considerations are involved here; no one suggests that the Massachusetts rule as to a married woman's capacity is "procedural." The only policies apparently at stake are

TABLE 2

CASE NUMBER	FACTORS			
	1	2	3	4
	R	R	K	F
	C	M		
		W		
2.....	F	D	D	D
3.....	D	F	D	D
6.....	F	F	D	D

those which have been suggested. And how does the application of the domestic law in Case No. 3 accord with those policies? (1) It does not advance the interest of Massachusetts in protecting Massachusetts married women, for the defendant is not a resident of Massachusetts. (2) It subverts the interest of Massachusetts in the security of transactions, to the detriment of a Massachusetts creditor. This interest, it should be remembered, was not renounced by the legislative action, but only subordinated to another interest, which is not present in this case. Moreover, suppose that at this point we inquire into the identity of the foreign state, and into the content of its law. The foreign state proves to be Maine, which has emancipated its married women. In that event, application of the Massachusetts law (3) does not advance any interest of Maine in protecting married women and (4) conflicts with Maine's general policy of security of transactions, although that policy is not directly involved, since the creditor is a Massachusetts resident. In short, application of the domestic rule advances no interest of either state, and clearly subverts an important interest of Massachusetts itself. That is to say, it advances no interest which has yet become apparent. Whether there are higher interests which warrant such apparently irrational behavior remains to be seen.

²⁷ See N.Y. Civ. Prac. Act § 61-a (1941); N.Y. L. Rev. Comm'n Rep. 243 (1947); *id.*, at 200 (1935); Paulsen & Sovren, *op. cit.* supra note 24, at 1002.

In Case No. 6, application of the domestic law makes no sense either. Both parties are nonresidents. Massachusetts has no interest in the married woman, and no apparent justification for upsetting the creditor's reasonable expectations. Massachusetts is merely meddling. In so doing, it subverts Maine's legitimate interest in the security of transactions where Maine creditors are concerned, without advancing any state's interest in protecting married women.

In short, of the three cases which Massachusetts has determined to control, and which she can effectively control, the application of Massachusetts law makes sense, in terms of Massachusetts policy, in only one. In the other two, the application of that law advances the interests of neither state, and subverts an interest of one state or the other. This is, indeed, peculiar behavior.

The cases in which Massachusetts had said that Massachusetts law ought to apply, but in which a foreign court will make the decision, are shown in Table 3.

In Case No. 5 it is reasonable enough for Massachusetts to express the hope that other states will apply Massachusetts law. That is what Massachusetts

TABLE 3

CASE NUMBER	FACTORS			
	1	2	3	4
	R C	R M W	K	F
5.....	D	D	D	F
9.....	F	D	D	F
11.....	D	F	D	F
13.....	F	F	D	F

would do if the case were in her courts (Case No. 1). No other state appears to have any legitimate interest in the matter.

In Case No. 9, also, it is reasonable for Massachusetts to hope that foreign courts will apply Massachusetts law. This is the foreign creditor against the domestic married woman. If the case were in the Massachusetts courts, Massachusetts would rationally apply domestic law (Case No. 2, discussed above). This may be asking a good deal of the foreign state, since now the power factor is reversed and Maine is in position to give preference to its own policy. But Massachusetts has done what it can.

In Case No. 11, the creditor is a resident of Massachusetts and the married woman is a nonresident. If the foreign state is Maine, it is simply irrational for Massachusetts to express the hope that Massachusetts law will be applied. True, if the case were in a Massachusetts court, Massachusetts would so decide (Case No. 3, discussed above); but that decision would be irrational, and this is so for the same reasons.

In Case No. 13, the Massachusetts hope that the foreign court will apply Massachusetts law is presumptuous and downright laughable. Massachusetts has nothing whatever to do with the case except that the contract was "made" there. If the foreign state is Maine, Massachusetts is asking that state to subvert

its own policy, which gives primacy to the security of transactions, even where Maine interests alone are involved. True, if the case were in a Massachusetts court, Massachusetts would so decide (Case No. 6, discussed above); but if such a result would be indefensible in a Massachusetts court, it would be more painfully so in a court of Maine.

In short, the expression by Massachusetts of hope that foreign courts will apply Massachusetts law makes sense, in terms of Massachusetts interests, in only two of the four cases. In the other two, realization of the hope would advance the policy of neither state, and would defeat the policy of one state or the other.

Of the seven cases which Massachusetts has disclaimed an interest in controlling, four are cases which it has de facto power to control, since they are in Massachusetts courts, as shown in Table 4.

In Case No. 4, the position taken by Massachusetts seems incredibly perverse. No state other than Massachusetts has any interest in the matter. Yet

TABLE 4

CASE NUMBER	FACTORS			
	1	2	3	4
	R C	R M W	K	F
4.....	D	D	F	D
7.....	D	F	F	D
10.....	F	D	F	D
12.....	F	F	F	D

Massachusetts goes to the trouble of ascertaining and applying foreign law. To what end? The result, if the foreign state is Maine, is to defeat Massachusetts' own preferred policy of protecting its married women, without advancing any policy whatever.

In Case No. 7, where the creditor is domestic and the married woman a non-resident, the application of foreign law, if the foreign state is Maine, results in the furtherance of Massachusetts' subsidiary interest in security of transactions for local creditors without impairing any interest of either state in the protection of married women.

In Case No. 10, application of the law of Maine results in furthering Maine's legitimate interest in security of transactions at the expense of Massachusetts' legitimate interest in the protection of its married women. Let us not condemn such a result hastily. Where the interest of the foreign state is substantial and legitimate, as here, there may well be, among civilized states, reasons for relaxing the uncompromising attitude of selfishness and requiring legitimate local policy to yield.²⁸ Inquiry into the possible existence of such reasons is

²⁸ "In saying all this it is not meant to suggest that there are not situations in which a married woman from another state should be held to have the same contractual capacity as married women domiciled in the state in which she acts." Cook, *The Logical and Legal Bases of the Conflict of Laws* 440 (1942).

deferred for the time being. We should note now, however, that Massachusetts' position in this case is quite inconsistent with its position in Case No. 2, discussed above, where, faced with the identical conflict of interests, Massachusetts reached the conclusion that the foreign policy must yield.²⁹ If Massachusetts in Case No. 10 is acting upon altruistic or far-sighted considerations which we have not yet discovered, she does not do so consistently.

In Case No. 12, the result of applying foreign law is eminently satisfactory. Maine alone is concerned. Maine would decide the same way if the case were in a Maine court (Case No. 16). Massachusetts has no reason to desire a different result. Maine policy is furthered without impairment of any policy of Massachusetts.

In short, in these four cases where Massachusetts has disclaimed interest and willingly applied foreign law though it had *de facto* power to do otherwise with less trouble, the result clearly makes sense in terms of Massachusetts' interests in only two cases. In one case Massachusetts' interests are made to yield to

TABLE 5

CASE NUMBER	FACTORS			
	1	2	3	4
	R	R	K	F
	C	M		
		W		
8.....	D	D	F	F
14.....	F	D	F	F
15.....	D	F	F	F

those of the foreign state. In the remaining case, Massachusetts' interests are subverted without advancing any foreign interest.

Finally, Table 5 shows the three cases which Massachusetts has disclaimed an interest in controlling, and which it cannot effectively control since they are in foreign courts.

In Case No. 8, Massachusetts invites Maine to apply Maine law although Maine has no interest in doing so, and although the result is to subvert Massachusetts policy with no advantage to Maine.

In Case No. 14, Massachusetts invites Maine to apply Maine law, preferring the interest of Maine and its creditors to that of Massachusetts and its married women. (Compare Cases Nos. 2 and 10, discussed above.)

In Case No. 15, Massachusetts invites Maine to apply Maine law with the result that Massachusetts' subsidiary interest in security of transactions is advanced without prejudice to any policy for the protection of married women.

In short, the result of the application of foreign law is subversive of Massachusetts' interests in two cases, in neither of which is any interest of the foreign state advanced. In one case the policy of Massachusetts is advanced without detriment to any state's policy.

²⁹ The positions are inconsistent, that is, unless the fact that the place of making differs in the two cases is ground for distinction, which of course it is not.

Summarizing the entire series, we find that application of the law of the place of making has the results shown in Table 6, if we assume (1) that the foreign law is different and (2) that Massachusetts' wishes will be respected by the foreign state.

A startling fact shown by this table is that the *largest* group of cases (group VI) consists of those in which application of the rule subverts domestic interest without advancing any interest of the foreign state. Add to this the group in which foreign interests are subverted with no advancement of domestic policy (group V), and we have a total of six of the fourteen cases in which the operation of the rule seems purely perverse. Against this result, note that application of the rule advances domestic interests in only five cases (groups I and III), and in two of these does so at the expense of foreign interests. Note also that the re-

TABLE 6

I	Domestic interest advanced without detriment to foreign interests.....	Case No. 5 (D D D F) (3) Case No. 7 (D F F D) Case No. 15 (D F F F)
II	Foreign interest advanced without detriment to domestic interests.....	Case No. 12 (F F F D) (1)
III	Domestic interest advanced at expense of foreign interests.....	Case No. 2 (F D D D) (2) Case No. 9 (F D D F)
IV	Foreign interest advanced at expense of domestic interests.....	Case No. 10 (F D F D) (2) Case No. 14 (F D F F)
V	Foreign interest subverted with no advancement of domestic interests.....	Case No. 6 (F F D D) (2) Case No. 13 (F F D F)
VI	Domestic interest subverted without advancement of foreign interests.....	Case No. 3 (D F D D) (4) Case No. 11 (D F D F) Case No. 4 (D D F D) Case No. 8 (D D F F)

sult in the two cases last mentioned is exactly counterbalanced by the fact that in two cases, apparently indistinguishable (group IV), domestic interests are subordinated to foreign. The deference to foreign interests appears to have a certain rhythm, but is without rhyme or reason.

From the point of view of Maine (*i.e.*, of a state which has emancipated its married women), the array of possible cases is, of course, a mirror image of that presented in Table 1, as shown in Table 1a.

Maine has asserted the primacy of its interest in the security of transactions. In the selfish pursuit of this interest, Maine should logically desire the application of its own law (1) to all cases in which both parties reside in the state (Nos. 6, 12, and 13), and also to all cases in which the creditor is a local resident and the married woman foreign (Nos. 2, 9, 10 and 14)—in short, to all cases in which the creditor is a local resident, regardless of the married woman's residence. When the married woman is a resident and the creditor a nonresident (Nos. 3, 7, 11, and 15), Maine, by applying its own law, can advance the foreign

—the common—interest in security of transactions without impairing any interest of its own. (Maine is not assumed to be so selfish as to want to advance the interests of Maine debtors where it has adopted no relevant protective policy.) It would be indifferent, and would cheerfully apply the foreign law, to the cases in which neither party is a local resident (Nos. 4, 5, and 8).

TABLE 1a

CASE NUMBER	FACTORS					
	1	2	3	4		
	R C	R M W	K	F		
1.....	F	F	F	F	All Factors Foreign	(1)
2.....	D	F	F	F	Three Foreign Factors	(4)
3.....	F	D	F	F		
4.....	F	F	D	F		
5.....	F	F	F	D		
6.....	D	D	F	F	Two Foreign Factors	(6)
7.....	F	D	D	F		
8.....	F	F	D	D		
9.....	D	F	F	D		
10.....	D	F	D	F		
11.....	F	D	F	D		
12.....	D	D	D	F	One Foreign Factor	(4)
13.....	D	D	F	D		
14.....	D	F	D	D		
15.....	F	D	D	D		
16.....	D	D	D	D	All Factors Domestic	(1)

By a repetition of the process previously employed to appraise the results of application of the law of the place of making in terms of the interests of the states concerned (the details need not be repeated here) we can arrive at the results shown in Table 6a, which is, of course, correlative to Table 6.

TABLE 6a

I. Domestic interest advanced without detriment to foreign interests.....	Case No. 12 (D D D F)	(1)
II. Foreign interest advanced without detriment to domestic interests.....	Case No. 15 (F D D D) Case No. 7 (F D D F) Case No. 5 (F F F D)	(3)
III. Domestic interest advanced at expense of foreign interests.....	Case No. 14 (D F D D) Case No. 10 (D F D F)	(2)
IV. Foreign interest advanced at expense of domestic interests.....	Case No. 9 (D F F D) Case No. 2 (D F F F)	(2)
V. Foreign interest subverted with no advancement of domestic interests.....	Case No. 8 (F F D D) Case No. 4 (F F D F) Case No. 11 (F D F D) Case No. 3 (F D F F)	(4)
VI. Domestic interest subverted without advancement of foreign interests.....	Case No. 13 (D D F D) Case No. 6 (D D F F)	(2)

[Table 7 compares, for the fourteen conflict-of-laws cases, the results which would be reached in the advancement of the selfish interests of Massachusetts (Column 1), in the advancement of Maine's selfish interests (Column 2), and by the uniform application of the law of the place of making (Column 3). (The plus sign [+] indicates that the contract would be held valid; the zero [0] that it would be held invalid.) This merely confirms what we have already observed, *viz.*, that in six of the fourteen cases the result of the uniform application of the law of the place of making is contrary to that dictated by the interests of both states (Nos. 3, 4, 6, 8, 11, and 13), while in only four (Nos. 5, 7, 12, and 15) does the result conform to that indicated by the interests of both states. In the remaining four cases (Nos. 2, 9, 10, and 14) the result is contrary to the interest of one state or the other.

TABLE 7

CASE NUMBER	LAW APPLIED AND RESULT					
	1		2		3	
2.....	Mass	0	Me	+	Mass	0
3.....	Me	+	Me	+	Mass	0
4.....	Mass	0	Mass	0	Me	+
5.....	Mass	0	Mass	0	Mass	0
6.....	Me	+	Me	+	Mass	0
7.....	Me	+	Me	+	Me	+
8.....	Mass	0	Mass	0	Me	+
9.....	Mass	0	Me	+	Mass	0
10.....	Mass	0	Me	+	Me	+
11.....	Me	+	Me	+	Mass	0
12.....	Me	+	Me	+	Me	+
13.....	Me	+	Me	+	Mass	0
14.....	Mass	0	Me	+	Me	+
15.....	Me	+	Me	+	Me	+

III

The utility of a rule which operates so capriciously must certainly be suspect. That such a rule should have been announced and followed at all seems almost incredible.³⁰ In fact, as everyone knows, it has not been followed consistently. When the indicated result is absurd and is perceived to be so, there are means of escaping it. The connecting factor—the place of contracting—is not always intractable, and re-examination of the facts may lead to its relocation.³¹ In the cases falling into Group IV (Table 6), applicability of the foreign law may be conceded and the result avoided by invoking “local public policy”; in a case like No. 4 (Table 1) (D D F D) the same idea can be expressed and the same result reached through the expletive “fraud on the law.” Alternative choice-of-law rules are available (law of the place of performance, law intended by the parties, law giving validity to the contract, law of the place having the most sub-

³⁰ Neuner, *op. cit.* *supra* note 25, at 498, offers the most charitable explanation.

³¹ Compare *Mutual Life Ins. Co. v. Liebong*, 259 U.S. 209 (1922), with *New York Life Ins. Co. v. Dodge*, 246 U.S. 357 (1918). See Cavers, *A Critique of the Choice-of-Law Problem*, 47 *Harv. L. Rev.* 173, 182 (1933) (AALS Readings, at 107 et seq.).

stantial connection). Fortified with knowledge of the availability of these devices, an uninitiated reader might well ask whether any court would actually reach such results as are indicated in Groups V and VI (Tables 6 and 6a).

It may be doubted that Mr. Justice Gray would have done so. Like an Alpinist ascending an unknown slope, he left inconspicuous little handholds to facilitate his retreat if the route should lead to danger.³² Let there be no doubt, however, that courts actually do reach the results which seem so indefensible. Bad law makes hard cases. The hypnotic power of the ideas of territorial jurisdiction and vested rights is not to be underestimated. It must not be forgotten that only a few years ago the United States Supreme Court was able to hold that an attempt by a state other than that where the contract was made to control the incidents of a contract was so presumptuous an intermeddling with matters beyond the state's legitimate sphere of governmental function as to amount to a denial of due process of law—and this although the state in question had a substantial practical basis for its asserted interest.³³ In what appears to be the same spirit of conceptualism, the courts have announced capricious results in cases involving married women's contracts. In *Greenlee v. Hardin*³⁴ a married woman domiciled in Mississippi executed a promissory note dated and payable in Florida to a Florida corporation. Action was brought in Mississippi. By the law of Florida married women lacked capacity to make a valid promissory note; by the law of Mississippi there was no such incapacity. This is precisely Case No. 11 (F D F D) from Tables 1a and 6a. The Mississippi court, relying primarily on the place-of-making rule and secondarily on the place-of-performance rule, held that Florida law governed and the note was invalid. In so doing, the Mississippi court, at some inconvenience to itself, subverted Florida's subsidiary interest in the security of transactions without advancing any interest of either state in the protection of married women. And in *Burr v. Beckler*³⁵ a married woman who was a resident of Illinois executed a note for the

³² He stated that the rule was the "general" rule, implying the possibility of exceptions. He stated that a contract valid by the law of the place of making was valid everywhere, but did not state the converse proposition. He noted that the contract was not only made but to be performed in Maine. He also left open the possibility that some significance might be attached to the fact that the guaranty bore "date of Portland." Cf. *Chemical National Bank v. Kellogg*, 183 N.Y. 92, 75 N.E. 1103 (1905).

³³ *New York Life Ins. Co. v. Dodge*, 246 U.S. 357 (1918). See also *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

³⁴ 157 Miss. 229, 127 So. 777 (1930).

³⁵ 264 Ill. 230, 106 N.E. 206 (1914). It may be thought that this decision was influenced by the elements of fraud in the case. If so, we may substitute a similar decision in which there is no indication of such an explanation: *Nichols & Shepard Co. v. Marshall*, 108 Iowa 518, 79 N.W. 282 (1899). The married woman, domiciled in Iowa, signed the note while temporarily visiting in Indiana. The residence of the creditor does not appear. The Iowa court applied Indiana law to invalidate the note. This is either Case No. 11 or Case No. 13 from Tables 1a and 6a. Whatever the creditor's residence, the decision frustrated one state's interest without advancing any interest of the other.

accommodation of her husband while she was "temporarily sojourning" in Florida. The creditor interests were associated only with Illinois, by whose law married women were competent to make such contracts. Action was brought in Illinois. By the law of Florida, such contracts were invalid. The Illinois court, finding that the place of making was Florida, inexorably applied the Florida rule and held the contract invalid. This is precisely Case No. 13 (D D F D) from Tables 1a and 6a. The decision of the Illinois court, which was not reached without some inconvenience in the ascertainment of foreign law, frustrated Illinois' own interest in the security of transactions without advancing the interest of any state in the protection of married women.

We need not pause to inquire *why* courts behave in such strange ways. The history of conflict-of-laws theory makes that plain enough. The question is whether there is any rational justification for their continuing to do so, now that the infirmities of the traditional method are so well understood.

The most forceful affirmative defense that can be made for the traditional method is that it leads to uniformity of result, regardless of the state in which the action is brought. This, given the assumptions of the method, is undeniably true. It is also undeniably true that uniformity of result should be one of the primary objectives of a rational system of conflict of laws. According to the rule that the law of the place of making governs, any given case is decided in the same way irrespective of the state in which the action is brought. That is to say, this is the result if both states (1) characterize the problem in the same way, as one involving the validity of a contract, and (2) apply the rule that the law of the place of making governs (rather than some alternative rule), and (3) locate the connecting factor (the place of making) in the same way, and (4) do not invoke any second-line defenses, such as local public policy. This is a long list of "ifs," and we are well aware that the discipline of the system is not always sufficient to maintain adherence to all of the necessary conditions when the result is perceived to be anomalous.³⁶ The ideal uniformity of result is, therefore, to some extent illusory. But assume that the necessary conditions are all observed, and the ideal uniformity results. Is the achievement worth the cost at which it was attained? The cost, be it remembered, is that in six of the fourteen possible cases the interests of one state are defeated without advancement of the interests of the other, and that in two additional cases the interests of the forum are made to yield to foreign interests. In only four cases are the interests of one state advanced without impairment of a foreign interest. In two cases the interests of the forum are given preference over foreign interests. This seems an extravagant price to pay for uniformity of result—the more so since the attainment of that goal is in fact problematical. We are moved to recognize again that uniformity of result, while it is a basic and ever-present desideratum in conflict-of-laws cases, is one which should at times be made to yield to stronger con-

³⁶ See Cavers, *op. cit. supra* note 31; Paulsen & Sovern, *op. cit. supra* note 25.

siderations.³⁷ And it may be added that, in the only two cases in which uniformity can be said to be without question an imperative objective (Nos. 5 and 12, in which all factors except the place of action are associated with the same state), uniformity would be attained if the respective states did no more than consult their own legitimate interests.

Another argument that may be made for adherence to the system might be called the "dragnet" defense. Sometimes a court may be shrewdly aware that a given choice-of-law rule will sometimes subvert its own state's interest, but will nevertheless adopt the rule in the equally shrewd belief that it will operate in the vast majority of cases in such a way as to advance that interest.³⁸ So far, in this paper, we have treated each of the fourteen conflict-of-laws cases as equally probable—as if the combinations of factors were determined by pure chance. That, of course, is not always the case. For example, a Massachusetts court committed to the advancement of local interests might reason that the overwhelming majority of all conflict-of-laws cases involving contracts of Massachusetts married women must be brought in Massachusetts, since that is the only state in which it is likely that process may be validly served. It might then, if it could plausibly do so, characterize the Massachusetts rule as one of procedure, to be applied to all actions in Massachusetts courts. In this way it would approximate the implementation of Massachusetts policy, although in rare cases the logic of the system would result in a Massachusetts married woman's being held liable in a foreign court and in a foreign married woman's escaping liability in a Massachusetts court. The device has the virtue of simplicity, since it avoids embroilment in all the variations which have pre-occupied us in the discussion so far; it may also avoid, or seem to avoid, troublesome questions of constitutionality. No such manipulation of the system seems possible, however, with respect to the rule that the law of the place of making governs, in its application to the contracts of married women. There is no *a priori* or other reason for supposing that more such contracts are made at home than abroad. This is a factor, so far as appears, which is in fact determined by pure chance. The result is that the rule cannot be defended on the ground that, in addition to being simple, it will effectuate Massachusetts policy in the bulk of the cases. It will do so in only half.

The last excuse for adhering to the capricious rule which exalts the law of the place of making is that no acceptable substitute has been found. Though purely negative, this defense is a formidable one and doubtless constitutes, at least in modern times, an important reason for the endurance of the system.

³⁷ Cf. Rheinstein, *The Place of Wrong: A Study in the Method of Case Law*, 19 Tul. L. Rev. 4, 29-30 (1944); Katzenbach, *op. cit. supra* note 25, at 1097-1101; Harper, *Policy Bases of the Conflict of Laws: Reflections on Rereading Professor Lorenzen's Essays*, 56 Yale L. J., 1155, 1159 (1947); Freund, *op. cit. supra* note 18, at 1211, 1236.

³⁸ Cf. *Emery v. Burbank*, 163 Mass. 326, 39 N.E. 1026 (1895); *Bullington v. Angel*, 220 N.C. 18, 16 S.E.2d 411 (1941).

The available alternative rules for choice of law are not satisfactory substitutes. The place of performance would be quite as irrelevant in the context of the *Pratt* problem as the place of making. This is not to say that the place of performance is always irrelevant; a contract to dance naked in the streets of Rome can hardly be considered without reference to Roman law. It is difficult to perceive any connection, however, between the law of the place where payment is to be made and the capacity of a married woman to contract. The rule that the law intended by the parties shall govern (in so far as it is not a pure fiction, totally incapable of explaining the choice) accords to the incapacitated party the power to contract out of her disability—a privilege she may be assumed not to enjoy in a purely domestic case; and the result is pro tanto the subversion of the interest of the state to which she belongs. Similarly, a rule permitting the selection of the law of any state having a connection (in terms of the given factors) with the case, so long as that law gives validity to the contract, must to some extent impair the apparent interest of a state which has, and has asserted, an interest in protecting the incapacitated party.³⁹ The rule that points to the law of the state having the most real or substantial connection with the case seems an amorphous substitute for the analysis which must go into any satisfactory handling of this difficult problem.⁴⁰

It is obvious that in this paper considerable emphasis has been placed upon the relationship of the parties to the states involved—*i.e.*, to their residence, or domicile, or nationality. That emphasis is indispensable in any consideration of the respective policies involved; yet a return to the rule, rejected by Mr. Justice Gray, that the contractual capacity of a person is governed by the law of his domicile, is not a satisfactory solution. It is true that, since this rule turns upon a factor which is relevant to the policies involved instead of one which is irrelevant, the results would lack the sheer perversity of those produced by the place-of-making rule. The fact remains that domicile is an intolerably elusive factor in commercial transactions; and, even if this objection could be largely met by substituting a factual concept of “settled residence,”⁴¹ a choice-of-law

³⁹ See generally Cheatham, Goodrich, Griswold & Reese, *Cases and Materials on Conflict of Laws* 502–505 (4th ed., 1957), and materials cited. However, the English doctrine of the “proper” law of the contract seems, at least on the basis of some interpretations, to permit something like the analysis of interests here suggested. See Morris, *The Proper Law of a Tort*, 64 Harv. L. Rev. 881 (1951) (AALS Readings, at 575); and cf. Cook, *op. cit. supra* note 16, at 907–910, 917–20 (AALS Readings, at 648–49, 656–58).

⁴⁰ Cf. *Jones v. Metropolitan Life Ins. Co.*, 158 Misc. 466, 286 N.Y.Supp. 4 (S.Ct., 1936).

⁴¹ Cavers, *op. cit. supra* note 31, at 191 (AALS Readings, at 113), suggests not only the relevance but the workability of the concept of “settled residence.” I do not underestimate the difficulties involved in defining and using such a concept, but I think they are overestimated in Reese & Green, *That Elusive Word, “Residence,”* 6 Vand. L. Rev. 561 (1953) (AALS Readings, at 483). Likewise, I think Messrs. Reese and Green overestimate the virtues of the concept of domicile. In part they are able to do this by maintaining, in the teeth of abundant showings to the contrary, that “at least for the same purpose, no one can have more than one domicile at a time.” *Id.*, at 563 (AALS Readings, at 484). But cf. Reese, *Does Domicil Bear A Single*

rule based on such a factor would still be open to objections, which can be most conveniently considered in the section to follow.

The final alternative, or set of alternatives, is offered by the high-minded, transcendent, and form-free counsels of those who tell us that the choice should be of "the more effective and more useful law,"⁴² or of the law that fulfills the demands of justice in the particular situation,⁴³ or of the law which fulfills the "needs and interests of the community,"⁴⁴ or of the law which produces acceptable results "in the light of these facts in the event or transaction which, from the standpoint of justice between the litigating individuals or of those broader considerations of social policy which conflicting laws may evoke, link that event or transaction to one law or the other."⁴⁵ I have not the slightest wish to imply any derision of such counsels; they represent the finest fruits of critical attempts to deal with the problem. The inescapable fact remains that they have proved ineffective, as their authors would freely concede. This cardinal disappointment is due in part to the intractable character of the problem itself. It is due in part to the fact that the proffered solutions undoubtedly beg the question; for the original question, at least—*i.e.*, the question as it stood prior to the erection by the territorialists of a structure of false questions—was precisely: What is the just result? It is due in part to the fact that the approach attributes to courts a freedom and a competence which they do not possess; for courts are committed to the administration of justice under law, and the constraint of that commitment is not lightly to be thrown off simply because the law in question may seem to the court old-fashioned, unwise, unjust, or misguided.

To my mind the clearest clue to the meaning of the Cavers method—and by the same token one of the best explanations of its ineffectiveness—is contained not in his studied formulation of principle⁴⁶ but in a pleasantry dropped by the way in the course of a discussion of the *Pratt* problem. "If the problem is to find a rule to determine the law of what state governs capacity to contract," he

Meaning?, 55 Col. L. Rev. 589, 590-91 (1955). It must be conceded that any analysis which attaches importance to either the residence or the domicile of the married woman will run into complications because either factor may be associated with more than one state. See Neuner, *op. cit. supra* note 25, at 496-97.

⁴² This expression is attributed to Aldricus (c. 1200) by Yntema, *op. cit. supra* note 4, at 301-302. Lorenzen, *Cases on Conflict of Laws* 3 (6th ed., 1951), gives fuller information, and refers the reader to 2 Neumeyer, *Die gemeinrechtliche Entwicklung des Internationalen Privat- und Strafrechts bis Bartolus 2 et seq.* (1916). Lorenzen translates the quoted phrase as the "more powerful and useful" law.

⁴³ Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 Yale L. J. 736, 748 (1924).

⁴⁴ Cook, *op. cit. supra* note 16, at 919 (AALS Readings, at 658).

⁴⁵ Cavers, *op. cit. supra* note 31, at 192 (AALS Readings, at 114).

⁴⁶ *Id.*, at 192 (AALS Readings, at 113).

says, "the fact that the law of state A is reminiscent of those days when husband and wife were one is no more material than the fact that the law of state B mirrors the latest views of the National Woman's Party on sex equality before the law."⁴⁷ Since the content of the foreign law and the result which its application would work are of basic importance in the Cavers thesis, these two facts presumably would become material if his method were employed. In what way would they be material? The reference to "those days when husband and wife were one" suggests a host of disparaging connotations—not omitting Mr. Bumble's classic characterization of the law as "a ass, a idiot." On the other hand, the reference to "the latest views . . . on sex equality before the law," despite its tongue-in-cheek reservation of the right to belittle the National Woman's Party's pretensions, suggests modernism, enlightenment, sophistication, egalitarianism, and humaneness. In short, this is a subliminal statement of a proposition which cannot with comfort be stated baldly. Baldly stated, the proposition is: In a domestic case, a judge has little choice but to apply the law of his state, no matter how silly or misguided he may think it is or how regrettable the results it produces. In a conflicts case, on the other hand, there is such a great deal of looseness in the joints of the apparatus and such a lack of any clear mandate as to how to proceed that there is available to the judge for the taking a freedom which he should employ with a will, in order to frustrate, in this limited but satisfying area of opportunity, all that is archaic and foolish in the law.⁴⁸

I think it is clear that we cannot accept any conflict-of-laws method which proceeds on such premises. In the context of the contractual capacity of married women the suggestion seems innocuous and almost palatable, since practically everyone will agree, nowadays, that the law imposing incapacity did more harm than good. Transferred to the context of live issues of policy, however, the suggestion is an alarming one. It is simply not the business of courts to substitute their judgment for that of the legislature. The content of the law to be applied must be inquired into, to be sure, and one of the grievous faults of the traditional system is its treatment of that content as immaterial. But the inquiry should be in aid of a determination of the scope of legislative policy and of the ways in which that policy is to be implemented, and not an instrument for undermining that policy. In a conflict-of-laws case a court should have just that degree of freedom to escape the compulsion of a disagreeable law that it has in a purely domestic case, and no more.⁴⁹ One thing seems reasonably sure: If the courts

⁴⁷ *Id.*, at 180 (AALS Readings, at 105-6).

⁴⁸ Cf. Lorenzen, *Tort Liability and the Conflict of Laws*, 47 L. Q. Rev. 483, 490 (1931): "What is wanted are decisions that appeal to one's sense of justice." See Neuner, *op. cit. supra* note 25, at 489.

⁴⁹ Both the attractiveness and the danger of the suggestion that a court should apply what seems to it the better law are recognized in Freund, *op. cit. supra* note 18, at 1216: "If one of the competing laws is archaic and isolated in the context of the laws of the federal union, it

were to embark upon such a free-wheeling approach to the conflict of laws, in cases in which really important policies were embodied in the laws in question, they would be brought to heel in due course by legislative mandates that local law be applied.

We have succeeded, somewhat laboriously, in arriving at a point which represents the current condition of conflict-of-laws method—that is to say, at an impasse. For want of an alternative which can convincingly be said to produce rational results with the requisite degree of simplicity and objectivity, we adhere to the discredited method of the recent past, averting our eyes from the spectacle of the unfulfilled promises and the indiscriminately destructive results of that method. In the remaining sections of this paper, an effort will be made to determine whether there is any way of escape from this unhappy situation—not for conflict of laws in general, nor for the whole vexed problem of contracts in the conflict of laws, nor for all questions of validity, but only for this one, small, trite, and not very practical problem concerning married women's contracts.

IV

The fourteen possible conflict-of-laws cases which have been enumerated fall into two classes. The ten cases in the larger class present *no real conflicts problem*. The four cases in the smaller class present real problems, but they are problems which *cannot be solved* by any science or method of conflict-of-laws. Recognition of these blunt facts provides a basis—so far as I can see, the only basis—for progress toward a more satisfactory method of dealing with the cases.

The cases in the first class are Nos. 3, 4, 5, 6, 7, 8, 11, 12, 13, and 15. These are “conflict-of-laws cases” according to a useful definition, which I have no disposition to disturb. That is, each is a case in which potentially (or conventionally) significant factors are associated with more than one state. They do

may not unreasonably have to yield to the more prevalent and progressive law, other factors of choice being roughly equal. A married woman's disability to make a contract, imbedded in the law of one state, may be carried away by the current if contact is made with the main stream in another state. Perhaps one of the functions of conflict-of-laws decisions is to serve as growing pains for the law of a state, at all events in a federation such as our own.” See also *id.*, at 1214–15, 1223. In my judgment, if a court is sufficiently convinced that a law of the forum is so obsolete that it should not be applied in a mixed case, the courage of its convictions should lead it to abrogate the law for domestic purposes as well. The holding in *Thompson v. Taylor*, 66 N.J.L. 253, 49 Atl. 544 (1901), that the New Jersey law disabling a married woman from contracting with her husband was a moribund relic, seems to leave no justification whatever for the continued domestic application of that rule, especially in the light of the preference given to foreign over domestic creditors if the progressive decision is confined to mixed cases. When it is a foreign law that seems archaic, the court at the forum is not justified in nullifying that law where interests of the foreign state alone are affected. When there is a real clash between the interests of the two states, the court is thoroughly justified in applying its own law, according to the argument *infra*, without reference to whether the law of the forum is the more desirable on the merits.

not, however, present real problems, because they do not involve conflicting interests of the respective states. It is perfectly clear what the result should be in each. Either state, though approaching the case with no other purpose than to advance its own interests, would reach that result. This point will be clarified by a reference to Table 7, supplemented by reference to Tables 6 and 6a. In each of these cases, the result which Massachusetts would reach if it ignored conventional choice-of-law rules and simply consulted its own interest coincides with that which Maine would reach if it adopted the same attitude. These are the cases in which application of the law of the place of making advances the interest of one state without impairing any interest of the other (in which the result is clearly satisfactory) plus the cases in which the interest of one state is defeated without advancing any interest of the other (in which the result is clearly unsatisfactory).

The cases in the smaller class (Nos. 2, 9, 10, and 14) are the cases in which advancement of the interest of one state results in subordination or impairment

TABLE 8

CASE NUMBER	FACTORS	
	1	2
	R	R
	C	M
		W
1.....	D	D
2.....	D	F
3.....	F	D
4.....	F	F

of the interest of the other. Each state has a policy, expressed in its law, and each state has a legitimate interest, because of its relationship to one of the parties, in applying its law and policy to the determination of the case.

Another way of stating this conclusion will serve to simplify the discussion. In the course of our inquiry into the policies embodied in the respective laws we came to the conclusion that two of the presumptively significant factors—the place of contracting and the place where the action is brought—are not, in fact, significant. With only two significant factors left, the number of possible combinations is reduced to four, as shown by Table 8. Each of these cases was repeated three or four times in the previous array, the four being multiplied into fourteen by the inclusion of variations based upon the additional, immaterial factors.

Taking Table 8 to represent the standpoint of Massachusetts, and following the previous analysis, it seems reasonable to say that Massachusetts, in the advancement of its own interests, would apply its own law, or desire its application, in Cases Nos. 1 and 3. It would have no interest in applying its law to Nos. 2 and 4.

Table 8a presents the same cases, viewed from the standpoint of Maine.

Maine should desire the application of its own law in Nos. 2, 3, and 4. It would have no interest in applying its law to No. 1.

Table 9, constructed along the lines of Table 7, indicates, for each of the four cases, the result indicated by Massachusetts interests (Column 1), the result indicated by Maine interests (Column 2), and the clearly satisfactory result (Column 3).

The result in No. 1 is satisfactory because it advances Massachusetts' interests without impairment of any interest of Maine. The result in No. 2 is satisfactory for the same reason. The result in No. 4 is satisfactory for the converse reason, that it advances Maine's interests without impairment of any interest of Massachusetts. (Incidentally, it may be noted that this method leads to uni-

TABLE 8a

CASE NUMBER	FACTORS	
	1	2
	R	R
	C	M W
1.....	F	F
2.....	F	D
3.....	D	F
4.....	D	D

TABLE 9

CASE NUMBER	FACTORS		LAW APPLIED AND RESULT			
	1	2				
	R	R				
	C	M W	1	2	3	
1.....	Mass.	Mass.	Mass.	0	Mass.	0
2.....	Mass.	Me.	Me.	+	Me.	+
3.....	Me.	Mass.	Mass.	0	Me.	+
4.....	Me.	Me.	Me.	+	Me.	+

formity of result in three-fourths of the possible cases.) In No. 3, however, no satisfactory result, in terms of the conflicting interests involved, is possible. Whichever way the case is decided, one of two interests, each of equal dignity, must be subordinated. To apply the law of the place of making would be to make the result in each case depend upon an irrelevant factor, determined by chance.

The plain truth is that the apparatus designed for the handling of real problems of conflict of laws generates problems where none existed before, and more often than not disposes of those false problems unsatisfactorily; at the same time, it provides no more than the illusion of a solution for the real problems. Where the legitimate interests of two states are in genuine conflict, the system does not reconcile them, nor determine which is more important, nor even permit the state in position to do so to pursue its own interest. It simply strikes down the one interest or the other, indiscriminately, arbitrarily, on the basis of fortuitous and irrelevant circumstances. Ultimately, the survival of such a

system can be attributed only to the fact that few people care very much whether such matters are handled intelligently or not, so long as they are more or less expeditiously disposed of.

If this analysis is sound, the situation could be improved at least to the extent of eliminating the false problems which constitute the greater part of the array, together with the unfortunate results which follow in a majority of them. A legitimate question at this point is whether the conclusion—that the bulk of the cases do not present real problems, and can easily be handled to the satisfaction of all states concerned—can be translated into a workable and defensible method. It may be noted that we have proposed nothing in the nature of a traditional choice-of-law rule as a guide to the disposition of these cases, but have spoken only in terms of policies and interests—a terminology which is not congenial to the legal mind, with its insistence on precision and certainty and predictability. It is well, also, at this stage to recall the assumptions on which the analysis has been based. In the beginning, in order to free ourselves to imagine the course which a state would follow in the single-minded pursuit of its own interests, we put aside all the questions of fairness, prudence, and even constitutionality which might be raised by such a course. Is the conclusion, then, a realistic one? Can a workable guide for the courts be formulated? And are the results defensible in terms of the Constitution and of common fairness to the litigants?

There is a short reply to such questions. The mere substitution of a different traditional choice-of-law rule—that the law of the domicile of the married woman governs capacity to contract—would eliminate all the unfortunate results in the false-problem cases. But since, as has been indicated, that rule would not provide a very satisfactory method of dealing with the whole array of cases, let us approach an answer to the questions in another way.

Let us first attempt the formulation of a statement of interest and intention which may reasonably be attributed to a state legislature wishing to confirm its policy of protecting married women and to clarify the applicability of its law on that subject in conflict-of-laws cases. For added realism, let us assume that the Massachusetts legislature, having defeated the attempt to change the existing rule, is contemplating the enactment of a statute which will reaffirm the disability and clarify the applicability of the law, and has asked us, as legislative consultants, to draft the conflict-of-laws section.

We should be on safe ground in adopting, as the first principle to be incorporated in the final draft, the following:

“1. The provisions of this act shall be applied by the courts of this state, and should be applied by the courts of other states, to all cases in which both parties to the contract are residents of this state.”

Nor is the second principle very controversial:

“2. The provisions of this act shall not be applied by the courts of this state to any case in which both parties to the contract are residents of another state.

In such cases, the courts of this state shall apply the law of the common residence of the parties."

Since we are concerned for the moment only with the false problems, we may omit the formulation of a principle to cover the case of the foreign creditor and the domestic married woman (which is the case involving a real problem) and proceed to the last principle necessary for present purposes:

"3. The provisions of this act shall not be applied by the courts of this state, and should not be applied by other courts, to any case in which the creditor is a resident of this state and the married woman a nonresident."

This will not do at all. It denies to foreign married women an immunity enjoyed by local married women, for no reason except that they are foreign. Not only does such discrimination offend the sense of fairness; in all probability it is unconstitutional, applied to citizens of other states of the Union, as an infringement of the privileges-and-immunities clause of Article IV, Section 2. Let us concede this without quibbling. Let us not seek refuge in the cases which uphold a distinction drawn between "residents" and "nonresidents" as opposed to one between local "citizens" and "citizens" of other states. In those cases, the fact of residence has some significance, apart from the largely coincident fact of citizenship, tending to make the classification a reasonable one.⁵⁰ In the absence of any such significance, a discrimination between residents and nonresidents amounts, in practical effect, to a discrimination merely because of citizenship, and, where citizens of other states are concerned, is forbidden by the Constitution.⁵¹ We may concede that there is no such redeeming significance in the circumstance of residence in the case we are discussing. In fact, "residence" is only one of a set of alternatives in our scheme of discussion; at some other time, we might even be disposed to substitute citizenship for residence as the determinant of the scope of the state's protective policy.⁵² The truth is that the only justification for the third principle, as we have formulated it, is that we are seeking advancement of the selfish interests of Massachusetts without regard to other considerations. Since this is carrying that objective to impermissible lengths, we should give limits to that objective here and now.

While we are about it, we may just as well adopt an attitude of fairness toward all nonresident married women, whether they are within the protection of the privileges-and-immunities clause or not. There is no particular point in exploring here the lengths to which the ultimately selfish state might constitutionally go. A discrimination against nonresident aliens might stand,

⁵⁰ *Douglas v. New York, N.H. & H. R. Co.*, 279 U.S. 377 (1929); *La Tourette v. McMaster*, 248 U.S. 465 (1919).

⁵¹ *Blake v. McClung*, 172 U.S. 239 (1898); *Toomer v. Witsell*, 334 U.S. 385, 395 (1948); *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920); *Mullaney v. Anderson*, 342 U.S. 415 (1952).

⁵² That, however, would involve difficulties under the equal protection clause. See *Truax v. Raich*, 239 U.S. 33 (1915); *Takahashi v. Fish and Game Comm'n*, 334 U.S. 410 (1948).

though other constitutional provisions would present obstacles.⁵³ The game might not be worth the candle, however. Such an attitude would arouse resentment; it might lead to unpleasant reprisals; we might even be charged, with some justification, with intruding into the sphere of foreign relations, where federal policy should control.⁵⁴ As responsible draftsmen we would do well to counsel moderation at this point.

Does the constitutional difficulty we have encountered vitiate the analysis which proceeds on the basis of the interests of the respective states? By no means. In the immediate discussion we have been proceeding, in traditional fashion, without inquiring into the content of the law of the foreign state. We have only to remove the blindfold to discover a way out of the difficulty. The essential objective, as we have seen, is not graspingly to promote the interests of local creditors at the expense of foreign debtors. It is simply to avoid the anomaly of defeating the reasonable expectations of local creditors without advancing any interest of the foreign state. This objective can be attained if the immunity conferred by the act is extended to the nonresident married woman who enjoys a similar immunity under the law of the state of her residence, but withheld from those who have been emancipated by their home states. Where the nonresident married woman is protected by her home law, the result will be to sacrifice the interest of the local creditor and the subsidiary interest of Massachusetts in security of transactions; but the sacrifice is in favor of an interest to which Massachusetts has given primacy in its own domestic polity. We may therefore redraft the third principle as follows:

"3. The provisions of this act shall not be applied by the courts of this state, and should not be applied by other courts, to any case in which the creditor is a resident of this state and the married woman a nonresident, unless similar immunity is conferred by the law of the state of her residence."

This is clearly not a denial of the privileges and immunities of citizenship. All

⁵³ As to aliens resident in other states or federal territory, see 16 Stat. 140, 144 (1870), 42 U.S.C.A. § 1981 (1957); *Takahashi v. Fish and Game Comm'n*, 334 U.S. 410, 419-20 (1948). But as to aliens abroad, see *Disconto Gesellschaft v. Umbreit*, 208 U.S. 570 (1908); *United States v. Pink*, 315 U.S. 203 (1942). As to resident aliens, see note 52 *supra*. As to foreign corporations, compare *Kentucky Finance Corp. v. Paramount Auto Exchange Corp.*, 262 U.S. 544 (1923), with *Blake v. McClung*, 172 U.S. 239 (1898). Generally, even where constitutional principles may not be controlling, American tradition has shunned discrimination against aliens. See 2 Story, *Commentaries on the Constitution of the United States* § 1109 (4th ed., 1873); *Mulhall v. Fallon*, 176 Mass. 266, 57 N.E. 386 (1900); *Janusis v. Long*, 284 Mass. 403, 188 N.E. 228 (1933), noted in 29 Ill. L. Rev. 101 (1934); *Nadelmann, Creditor Equality in Inter-State Bankruptcies*, 98 U. of Pa. L. Rev. 41 (1949); *Nadelmann, Legal Treatment of Foreign and Domestic Creditors*, 11 Law & Contemp. Prob. 696 (1946).

⁵⁴ In the absence of international agreement (as to which see Bayitch, *Conflict Law in United States Treaties*, 8 Miami L. Q. 501, 516 [1954]) this is perhaps a radical suggestion. See Cheatham, *Federal Control of Conflict of Laws*, 6 Vand. L. Rev. 581 (1953) (AALS Readings, at 255); *Clark v. Allen*, 331 U.S. 503 (1947); Cheatham, Goodrich, Griswold & Reese, *Cases and Materials on Conflict of Laws* 616-17 (4th ed., 1957); Ehrenzweig, *Interstate and International Conflicts Law: A Plea for Segregation*, 41 Minn. L. Rev. 717, 719, 729 (1957).

married women are divided into two classes on a reasonable basis: those who are protected by the laws of their home states, and those who are not. There is no more a forbidden discrimination here than in any choice-of-law rule referring to the law of the domicile. In fact, the practical effect of the principle is exactly the same, in this context, as that of a rule referring to the law of the domicile. Moreover, there is clear precedent for framing conflict-of-laws rules in this fashion.⁵⁵

The three principles may be combined in one brief statement: "The provisions of this act shall be applied in all cases in which the married woman is a resident of this state, or of another state whose laws provide similar immunity."⁵⁶ The hope that other states will respect this mandate is implied.

Drafting a similar conflict-of-laws section for the Maine statute removing the common-law disability, we would begin with the elementary principles that the law is to be applied in all cases in which both parties are residents of Maine, and not to cases in which neither party is a resident. Passing the real problem which arises when the creditor is a resident of Maine and the debtor a (protected) nonresident, we come to the case in which the married woman is a resident of Maine and the creditor a nonresident. Since this is the most difficult of the

⁵⁵ *Dean v. Dean*, 241 N.Y. 240, 149 N.E. 844 (1925). It is regrettable that this fascinating case has been dropped from the casebooks merely because the precise problem involved became moot with the end of the era of *Haddock v. Haddock*, 201 U.S. 562 (1906). A few brief comments may suggest its continuing interest as a subject of analysis: (1) I do not understand why the commentators regarded the decision as an application of the *renvoi*. *Renvoi in Divorce Jurisdiction*, 39 *Harv. L. Rev.* 640 (1926); *The Conflict of Laws as to Foreign Divorce*, 74 *U. of Pa. L. Rev.* 738 (1926); *Divorce—Recognition of Foreign Decrees in New York*, 35 *Yale L. J.* 372 (1926); *Cook, Logical and Legal Bases of the Conflict of Laws* 250 n. 24 (1942); *Griswold, Renvoi Revisited*, 51 *Harv. L. Rev.* 1165 (1938) (*AALS Readings*, at 185). It seems to me that the New York rule was simply a conflict-of-laws rule of the kind under discussion in the text, referring simply to the law of another state. In effect, the New York court said: Given freedom to recognize or to refuse to recognize the foreign *ex parte* decree, we elect not to recognize it in cases in which the defendant spouse is domiciled at the time of the decree in New York or in another state having a similar protective policy. This simply says that the matter will be determined by reference to the law of the domicile. (2) But the New York court did not in fact decide the case as Ontario would have decided it. On the basis of American law the court decided that the wife was domiciled in Ontario, and on the basis of an Ontario case that was not in point it decided that Ontario would refuse recognition to the decree. But as Ontario law stood at the time, the wife could not maintain a domicile separate from that of her husband. Ontario therefore would have recognized the decree to which New York refused recognition on Ontario's behalf. (3) The decision therefore did not deserve the praise it received for promoting uniformity of result. (4) The precise result reached—vindicating the wife's right to support—was years ahead of its time, and coincides with the result which would be reached today by a quite different route. *Estin v. Estin*, 334 U.S. 541 (1948); *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957). It is especially interesting that Mrs. Dean changed her domicile to New York after the divorce decree. Cf. note 12 *supra*.

⁵⁶ Originally, I included the terminal clause, "and in no other cases." This might do no harm in the present context, but it would set a bad precedent for the drafting of such conflicts rules generally. There are cases in which the interests of a state do not require the application of its law, and in which the application of foreign law would serve no useful purpose. In such cases, the courts should be left free to apply local law.

false-problem cases, we may re-examine carefully at this point the analysis which has been employed. Conceivably, our first impulse might be to protect the local married woman against foreign creditors, even though the protective policy has been abandoned where domestic creditors are concerned. That, however, would be to deny to nonresident creditors rights which are given to residents, and would encounter the constitutional and other difficulties which have already been discussed. But, it may be asked, why should not Maine distinguish, as Massachusetts has done, between nonresidents who are favored by the law of their home states and those who are not? Why should we not say, "The provisions of this act shall not apply in any case in which the married woman is a resident of this state and the creditor a nonresident, unless the state of the creditor's residence has similarly removed the incapacity of married women?" The suggested principle has a certain plausibility which, however, seems superficial and largely supported by the dim notion that the development of the Maine policy should be symmetrical with that of Massachusetts. It is at least questionable whether the classification would suffice to meet the objection based on the privileges-and-immunities clause. The classification lacks the clear reasonableness that supports the distinction drawn by Massachusetts. It seems far-fetched to say that Maine is willing to "protect" foreign creditors to the extent that the laws of their own states "protect" them. The domiciliary law may be much less relevant to the rights of persons *sui juris* than it is to those of persons belonging to protected classes—which is a way of saying that domiciliary law has a relevance to questions of status, or capacity, which it may not have to other questions; and there is no question about the status of the creditor. The suggested principle seems to be not so much a distinction drawn in good faith between persons treated differently by the laws of their own states as it is a simple attempt to discriminate against as many foreigners as possible. As we said before, the most reasonable estimate of Maine policy is that it has not retained the protection of married women as a subsidiary policy, but has abandoned that policy and declared that its married women are *sui juris* and in no need of such blanket protection. If this is so, to withhold application of the Maine law in such cases would be to defeat the common policy favoring security of transactions without advancing any policy of either state for the protection of married women. If this estimate is erroneous, we shall have to classify this case as one raising a true problem of conflict of interests and treat it accordingly; but we are not forced to that position at this time.

We can summarize the three principles for incorporation in the Maine statute as follows: "The provisions of this act shall be applied in all cases in which Maine is the residence of either or both parties."

If we are right in believing that these conflict-of-laws provisions for the Massachusetts and Maine statutes fairly reflect the moderate self-interest of the respective states, then it is clear that the three cases under discussion present no real conflict of interests, and that the cases would in the normal

course be decided in the same way by both states, without the aid of any system of choice of law. The results are those shown by Table 9 with the exception that we have not so far dealt with Case No. 3, the true conflicts case.

The rules which we have proposed for incorporation into the laws of the respective states are not choice-of-law rules in the traditional sense. They have at least as much precision, but they lack that semblance of universal truth which would facilitate their incorporation into a system aimed at achieving uniformity. They do not say directly what law shall govern. They simply say that a particular law is intended to govern in certain cases.⁵⁷ It seems to me that there are advantages in this way of stating conflict-of-laws rules. It may very well avoid, or minimize the difficulties of, some of the major ambiguities inherent in the traditional form of rules for choice of law. If courts were to cultivate the practice of stating their common-law conflict-of-laws rules in this fashion, some interesting results might follow. For one thing, the courts would find themselves in step with a movement which may contribute materially to the development of intelligent modes of dealing with conflict-of-laws problems. This is the growing tendency of legislators to specify how their enactments are intended to affect mixed cases.⁵⁸ The task of drafting such provisions forces attention to the interests and objectives involved. A legislature is not likely to append to any statute dealing with a specific problem any such rule as that the law of the place where the contract is made shall control. It is much more likely to specify in realistic terms the cases to which its enactment is intended to apply. For another thing, a court which has forsworn reliance on choice-of-law rules of the traditional sort, and therefore deprived itself of the facile syllogisms of the *Restatement*, would find it quite difficult, I think, to make any such statement as: "This law, considered in the light of the moderate interests of the enacting state, is clearly intended to apply to all contracts made within the state, and to no others." As in many other instances, form exacts thought.⁵⁹ One might even risk the prediction that this is the form in which the conflict-of-laws rules of the future will be cast.

Turning now to Case No. 3 (Tables 8, 8a and 9), which involves a true conflict of interest, I can only repeat that no satisfactory solution can possibly be evolved by means of the resources of conflict-of-laws law. This does not mean that the problem cannot be solved. It cannot be solved by any effort, judicial or legislative, however brilliant in its conception, on the part of a single state

⁵⁷ See Currie, *Survival of Actions: Adjudication versus Automation in the Conflict of Laws*, 10 *Stan. L. Rev.* 205 (1958).

⁵⁸ Such specifications must, of course, be drafted with wisdom and restraint, and with careful regard to the moderate interests of the state. The fact that sometimes they have been drafted with imperialistic lack of restraint (see Rheinstein, note 37 *supra*) is not a persuasive reason why the technique should not be encouraged.

⁵⁹ "Exigencies of rime and meter
May leave the rude idea neater. . ."
Bevington, *Dr. Johnson's Waterfall* 3 (1946).

acting alone; and conflict-of-laws law, strictly speaking, is found only in the laws of individual states. It cannot be solved by the concurrent adoption by all states of the same rule for choice of law, even if the chosen rule is consistently and uniformly applied. A choice-of-law rule, designed to be applied by all states concurrently so that all courts will decide the same case in the same way, and justified in terms of "jurisdiction," is merely a device for preferring one state's policy to that of another, consistently or haphazardly, without facing the difficulties involved in such a choice. It is possible, however, that the conflict may be resolved by agreement between the states concerned, and it is clear that it can be resolved by higher governmental authority.

Paradoxically, the problem is insoluble with the resources of conflict-of-laws law precisely because it is a true problem of conflict of interests, which is presumably the type of problem for which the system of conflict of laws was devised. Maine is committed to a policy of security of transactions, and has a legitimate interest in enforcing that policy where Maine creditors are concerned. Massachusetts is committed to a policy of protecting married women, and has a legitimate interest in enforcing that policy where Massachusetts married women are concerned. The policies are here in direct conflict. Who is to say which is the more important, or the more deserving, or the more enlightened? Not even the United States Supreme Court is in position to do so.⁶⁰ Certainly it is not for the courts of one state to sacrifice local policy because they feel that it is relatively old-fashioned or misguided. The legislature might do so; it might conceivably direct that its protective law should not apply to cases in which the local married woman is sued by a foreign creditor; but in such apparent favoritism to foreign as distinguished from domestic creditors it would be destroying the problem, not solving it. In the process it might better remove the disability altogether.⁶¹

A Massachusetts court, lacking legislative guidance, might tentatively take a similar position with some justification. It might reason: Certainly our law expresses a policy for the protection of married women, and there is no doubt that that policy is to be enforced in the domestic situation. But how far is it to be carried? When a local creditor deals with a local married woman, he is "presumed to know the law," or at least he cannot be heard to assert that he did not know it. But how is it when a Massachusetts woman deals with a businessman in another state, where the law imposes no such disability, who is accustomed to dealing with married women as persons *sui juris*? Isn't it a bit unfair to "presume" that he knows our law, or to impose on him the burden of ascertaining it? Are we really so deeply concerned about our married women as

⁶⁰ *Watson v. Employers Liability Ins. Corp.*, 348 U.S. 66 (1954); *Pacific Employers Ins. Co. v. Industrial Comm'n*, 306 U.S. 493 (1939); *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532 (1935). See generally Cheatham, *op. cit. supra* note 54; Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 Col. L. Rev. 1 (1945) (AALS Readings, at 229).

⁶¹ See note 49 *supra*.

to want the protective policy pushed that far? Perhaps it should be applied only where both parties are local residents.⁶²

This would be a rational position. It is a recognition of the fact that local policy is relatively weak, and suitable only for home consumption. It is a solution—but, again, one for a case which does not present a true problem of conflicting interests. It will not serve when local policy is strong, or is thought to be strong. The legislature, if it disagrees with the court's estimate of the force of the policy, can direct that its law be applied where the married woman is a local resident and the creditor a nonresident, and we will be back where we started.

There is no conceivable choice-of-law rule which will solve the problem, even though both states adopt it and consistently apply it. The rule that the law of the place of making governs (which ought to be discarded, in the first place, because of the bad results it produces in the majority of the false-problem cases), will advance domestic policy at the expense of foreign in just half of the cases, since the place where a contract is made appears to be a matter of pure chance; in the other half, it will advance foreign policy at the expense of domestic. The rule that the law of the married woman's domicile governs (which eliminates the bad results in the false-problem cases) will always advance the protective interest at the expense of the common interest in security of transactions. There is no apparent warrant for such an arbitrary preference of the one policy over the other; indeed, the result would be quite reactionary in terms of the modern consensus as to the unwisdom of such protective policies. Since most actions against married women may be assumed to be brought in the states where they reside, the application of that rule might not create much excitement, since the court would in those cases be advancing local policy. If the same rule were applied in an action brought at the creditor's residence, however, the preference for foreign policy over domestic should lead to some raised eyebrows in the local law reviews, at least.

The sensible and clearly constitutional thing for any court to do, confronted with a true conflict of interests, is to apply its own law. In this way it can be sure at least that it is consistently advancing the policy of its own state. It should apply its own law, not because of any notion or pretense that the problem is one relating to procedure, but simply because a court should never apply any other law except when there is a good reason for doing so.⁶³ That so doing will promote the interests of a foreign state at the expense of the interests of the forum

⁶² Cf. *Thompson v. Taylor*, 66 N.J.L. 253, 49 Atl. 544 (1901) (holding that removal of most disabilities of married women constituted an abandonment of protective policy, residual disabilities being mere "regulations"); *Bowles v. Field*, 78 Fed. 742 (C.C. Ind., 1897). "This court, except as restrained by principle and the great weight of authority, is free to take its own stand, to declare for this state what shall be, in the particular situation, its public policy, till the source for written law shall have acted in the matter." *International Harvester Co. v. McAdam*, 142 Wis. 114, 125, 124 N.W. 1042, 1046 (1910) (a case, however, in which all contacts at the time of the transaction were associated with the foreign state under whose law the contract was valid).

⁶³ Cf. *Griswold*, op. cit. supra note 55, at 1192 (AALS Readings, at 198).

state is not a good reason. Nor is the fact that such deference may lead to a conjectural uniformity of results among the different forums a good reason, when the price for that uniformity is either the indiscriminate impairment of local policy in half of the cases or the consistent yielding of local policy to the policy of a foreign state.

Returning, then, to our legislative drafting project, it is clear that in Case No. 3, where the creditor is a resident of Maine and the married woman a resident of Massachusetts, we should adopt for each state the principle that its own law will be applied. As it happens, the form in which we have summarized the principles in each case already embodies this principle. For Massachusetts' protective statute the conflicts section will be: "The provisions of this act shall be applied in all cases in which the married woman is a resident of this state, or of another state whose laws provide similar immunity." For Maine's emancipation statute the section will be: "The provisions of this act shall be applied in all cases in which Maine is the residence of either or both parties." The results are those indicated in Table 9. There is still no "clearly satisfactory result" in Case No. 3. The result, unhappily for the quest for uniformity, will depend upon the forum. That is not a satisfactory result, but, the ideal being unattainable, it is the one that makes the best sense; it is better than chasing rainbows.

By adding a dimension to our problem we may bring ourselves to confront the ultimate futility of the attempt to solve such problems by conflict-of-laws methods. So long as we confine the case to two states, we can fall back on the sensible and fairly comfortable expedient of applying the law of the forum in cases where the policies are in conflict. But what if, in Case No. 3, the action is brought in a third state? There is no conceivable reason why the forum should prefer the policy of Maine to that of Massachusetts, or vice versa. The forum has no interest in applying its own law, since neither party is within the reach of the forum's governmental concern.⁶⁴ Conceivably, the forum might decide to apply the foreign law which coincides with its own—although the connection of the forum with the matter is so slight that it would not justify the application of the law of the forum if both parties were residents of the same foreign state. Application of the law of the place of making means that the disinterested third state would casually defeat now the one and now the other policy, depending upon a purely fortuitous circumstance. One is almost tempted to suggest that it would be better to flip a coin, since that procedure would produce the same results more economically.

⁶⁴ In some cases, though not in all, a broadened doctrine of *forum non conveniens* would provide a handy solution for the third state's difficulty. In the federal courts, the grounds for transfer under § 1404(a) of the Judicial Code are sufficiently broad to include such a case. *Norwood v. Kirkpatrick*, 349 U.S. 29 (1955). If the action were brought in a federal court in the third state, the question of what law should be applied upon transfer to Maine or Massachusetts would be one of considerable difficulty. See Currie, *Change of Venue and the Conflict of Laws*, 22 U. of Chi. L. Rev. 405 (1955).

It will be said that this is a "give-it-up" philosophy. Of course it is. A give-it-up attitude is constructive when it appears that the task is impossible of accomplishment with the resources which are available. It would have been constructive if geometricians had given up long before they did the effort to square the circle by means of straight-edge and compass. "The application of analysis to geometry saves effort by showing the direct way to success for soluble problems, and no less by showing certain others to be insoluble. . . . The classic example is the squaring of the circle by an Euclidean construction. For centuries, geometers were convinced that only a little more skill or luck was wanted for success, and no one was then in a position to assert that every conceivable attempt must fail. By the aid of analysis, that assertion is now proved."⁶⁵ It would be constructive if legal scholars were to give up the attempt to construct systems for choice of law—an attempt which cannot result in the satisfactory resolution of true conflicts of interest between states, and which is very likely to result in the creation of problems which do not otherwise exist, and which are badly resolved by the system. It would be constructive if the energies thus released were directed to the solution of the true problems by other means, for by the use of other means they may be solved. Let us examine briefly what those other means are.

V

We have suggested that a true conflict of interests between states may perhaps be resolved by agreement between the states concerned, or by competent higher authority. The agreement would probably have to be a negotiated one; mere reciprocity would seem to have no application in the case under discussion. Suppose the objective, in Case No. 3, is to have the protective policy of Massachusetts yield to the common interest in security of transactions. The Massachusetts courts will defer to Maine policy, and apply Maine law, if Maine will—do what? There seems no sensible way to complete the sentence in terms of reciprocity. The concession which Maine will make in return apparently must relate to some interest other than the specific one involved in the conflicts problem at hand. Obviously, the considerations are political, and thus beyond the competence of courts—though not necessarily beyond the competence of lawyers and legal scholars.

The concurrent adoption of uniform laws, while highly commendable because it diminishes the number of conflicts, does just that; it treats the problem by destroying, not by solving, it. For that reason it is not a method which is available for dealing with deeply rooted conflicts.

Even the negotiated agreement, especially when it is conceived as bilateral, turns out on closer inspection to be a less promising device than might at first appear. It is not a comfortable thought that the protection which Massachusetts feels is necessary for its married women might be traded away in exchange for

⁶⁵ 1 *Encyclopaedia Britannica* 869 (1955).

some collateral concession by Maine to other Massachusetts interest groups. Nor is it a comfortable thought that Case No. 3 might be decided differently in the Massachusetts courts if the creditor were from a state other than Maine, the party to the bilateral agreement, even though the law and policy of the state of the creditor's residence were exactly the same as Maine's.⁶⁶ In the field of international private law, fairness to the litigants ought to be the primary consideration. That the application of the law of the place of making flagrantly disregards that principle does not justify its disregard in treaties. It is at least questionable whether that principle can be reconciled with the political considerations which apparently must determine the bilateral agreement between states.

The multilateral agreement may be a more useful device. Conceivably, at a world congress of nations at Geneva, the weight of enlightened opinion might induce a fair number of backward countries to adhere to the principle that the common policy of security of transactions should prevail over obsolete protective policies. One may guess, however, that the resulting preferential treatment of foreign creditors by signatories which retained the protective policy for domestic cases would soon lead to abandonment of the policy at home. The inference is that the multilateral agreement, like the uniform law, may not promise very much where conflicting policies are deeply rooted.⁶⁷

It may be that the chief utility of the interstate agreement is not in resolving true conflicts of interest, but in controlling those cases in which a state asserts an unsubstantial, or collateral, or predatory interest.⁶⁸ Such agreements may perform the minimal function which is performed by the privileges-and-immunities, full-faith-and-credit, and due-process clauses of our federal constitution, proscribing rank discrimination and the provincial approach to matters with which the state has no legitimate concern. If so, they are not needed by our states, though they may be indispensable among nations. By the same token, since the international agreement is the only method available to independent, sovereign states for the resolution of true conflicts of interest, the limitations of that method may help to explain why continental legal systems have adhered so persistently to the ill-fated effort to find a metaphysical system for resolving those conflicts. There is no reason, however, why we in this coun-

⁶⁶ Cf. Ehrenzweig, *Interstate and International Conflicts Law: A Plea for Segregation*, 41 Minn. L. Rev. 717, 723 n. 31 and related text (1957).

⁶⁷ On the extent to which conflict-of-laws matters have been covered by treaties negotiated by the United States, see Bayitch, *Conflict Law in the United States Treaties*, 8 Miami L. Q. 501 (1954); 9 id. 9 (1954); 9 id. 125 (1955). Further references on the utility of the international agreement in matters of conflict of laws are given in Cheatham, Goodrich, Griswold & Reese, *Cases and Materials on Conflict of Laws* 615 n. 2 (4th ed., 1957). See also Jitta, *The Development of Private International Law through Conventions*, 29 Yale L. J. 497 (1920).

⁶⁸ Cf. 38 Stat. 1164, 1165 (1915), as amended, 46 U.S.C.A. § 597 (1944); *Strathearn S.S. Co. v. Dillon*, 252 U.S. 348 (1920); *Zeis*, *American Shipping Policy* 70 (1938). See also Nadelmann, *Creditor Equality in Inter-State Bankruptcies: A Requisite of Uniformity in the Regulation of Bankruptcy*, 98 U. of Pa. L. Rev. 41 (1949).

try should persist in following these influences, since we have in the federal Union a governmental authority which can deal with such conflicts between the states forthrightly and effectively.

The power of the states of the Union to make agreements among themselves is, of course, limited by the compacts clause of the Constitution.⁶⁹ We need not pause to inquire into the extent to which that clause would impede the making of agreements of the sort here contemplated. Bilateral agreements, to the extent that they seem to offer any contribution at all, are unnecessary. No agreement would be very useful unless substantially all of the states were parties to it, and the mechanics of achieving such a many-sided agreement would be prohibitively cumbersome in comparison with available and better ways of attaining the same end.

Turning, then, to the possibilities of employing federal authority in the resolution of true conflicts of interest between states, we first put aside the use of federal legislative power under Article I to regulate the transaction in question. This power is, of course, a mighty weapon for dealing with conflicts between states. Rather than resolving the conflict, however, it displaces the conflicting laws and policies by an overriding national law and policy, applicable in all cases, whether the "factors" are associated with one state or many. Thus the enactment of the Federal Employers' Liability Act destroyed interstate choice-of-law problems, theretofore rife,⁷⁰ involving injuries to employees of interstate railroads. Congress has not yet seen fit to regulate the subject of injuries to passengers on interstate railroads, though it could presumably do so. But congressional regulation of the subject under Article I is not the only, nor even necessarily the most desirable, federal approach to dealing with interstate conflicts; and there are many such conflicts (as, for example, those relating to grounds for divorce) which cannot be reached by the exercise of Article I powers.

We should put aside, also, any primary reliance on federal judicial power. This means, first of all, that we should not expect the United States Supreme Court, in reviewing decisions of state courts, to resolve conflicts such as these. We have already made allowance for the restraining influence of the privileges-and-immunities and equal-protection clauses. The due-process clause and the unimplemented full-faith-and-credit clause are appropriately employed not to resolve true conflicts of interest, but only to restrain the assertion of unsubstantial or frivolous interests.⁷¹ The considerations involved in a resolution of truly conflicting interests of different states are, to repeat, not merely "economic and sociological" (which might lead us in these days to contemplate their evaluation by the courts), but political (which should make us realize at once that the courts should have nothing to do with them).

⁶⁹ Art. I, Sec. 10, cl. 3.

⁷⁰ See, e.g., *Alabama G. S. R. Co. v. Carroll*, 97 Ala. 126, 11 So. 803 (1892).

⁷¹ See note 59 *supra*.

We have no choice but to put aside one judicial device which was employed, in some instances, for almost a century: the application in the federal courts of a general federal common law, superseding conflicting state laws in the federal courts much as congressional legislation under Article I supersedes them in all courts.⁷² It is a plausible view that, to the framers of the Constitution, "controversies . . . between citizens of different states" may have seemed a reasonably accurate and comprehensive description of conflict-of-laws cases, and that the intention may have been to provide a federal forum and a federal common law for their determination.⁷³ For the time being, however, that issue is settled; and, in any event, if it were settled otherwise, a general federal common law to be applied in the federal courts could not resolve conflicts encountered in the state courts. And, of course, the experience of a century under federal common law was not exactly that which would be considered the ideal product of a system of conflict of laws.

I have previously expressed the hope that the extension of the *Erie* doctrine which requires federal courts in diversity cases to apply state conflict-of-laws rules⁷⁴ may be modified.⁷⁵ I retain that hope, since modification would solve some thorny problems in connection with change of venue and, in addition, would permit the federal courts to reach sensible results in the false-problem cases without doing violence to the policy of any state. I do not think that modification would contribute materially to solution of the problem of truly conflicting interest. A federal court is in no better position than a state court to make the political judgments which must enter into any decision that the legitimate interests of one state must yield to the legitimate interest of another.⁷⁶ In addition, the development of independent choice-of-law rules by the federal courts can contribute only indirectly to the development of conflict of laws in the state courts, except where the Constitution is involved.

Plenary power is given to Congress to resolve such conflicts by the second sentence of the full-faith-and-credit clause: "And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."⁷⁷ The power had not been used since 1790

⁷² *Swift v. Tyson*, 16 Pet. (U.S.) 1 (1842), overruled in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

⁷³ 1 Crosskey, *Politics and the Constitution in the History of the United States* 642 et seq. But cf. Hart, *The Relations between State and Federal Law*, 54 Col. L. Rev. 489, 500 et seq. (1954); Kurland, Mr. Justice Frankfurter, *The Supreme Court and the Erie Doctrine in Diversity Cases*, 67 Yale L. J. 187, 195 et seq. (1957).

⁷⁴ *Klaxon Co. v. Stentor Electr. Mfg. Co.*, 313 U.S. 487 (1941).

⁷⁵ See Currie, op. cit. supra note 64, at 502-3.

⁷⁶ But cf. Hart, op. cit. supra note 73, at 513-15.

⁷⁷ Cook, *The Powers of Congress under the Full Faith and Credit Clause*, 28 Yale L. J. 421 (1919), reprinted in Cook, *The Logical and Legal Bases of the Conflict of Laws* c. IV (1942); Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 Col. L.

when Cook rediscovered it in 1919; nor has any further use been made of it since that time, despite Cook's clear demonstration of its availability and utility in the treatment of conflict-of-laws problems. This is not the place for a full-dress review of the constitutional question involved; it should be sufficient to note that Cook's interpretation of the clause has not been shaken, and to add that Professor Crosskey's researches⁷⁸ may provide a further basis for a holding that the power of Congress is not limited to prescribing the effect of state statutes, as Cook supposed, but extends also to state common law. Those who may regard with apprehension the prospect of federal laws which, on a rational basis, require the policy of one state to yield to that of another are welcome to such comfort as they can find in the present metaphysical system, whereby state policies are frustrated irrationally and at random.⁷⁹

It would be naïve to expect that Congress, which has not used its powers under the full-faith-and-credit clause since 1790, will use those powers now to resolve the conflict of interests in cases of married women's contracts. There must, however, be problems of sufficient importance to justify congressional action; and the expectation of such action might become realistic if legal and other scholars would devote their energies to direct study of the legal, social, economic, and political factors which bear upon the choice of policies in specific conflict situations. I should suppose, for example, that the present conflict-of-laws situation with respect to workmen's compensation⁸⁰ gives rise to industrial difficulties of substantial magnitude, and that a supportable legislative program for resolving the conflicting interests involved might well merit some congressional attention. An act resolving conflicting interests between states in this situation would, by the way, bring order into an area which is largely within the scope of federal legislative power under the commerce clause—but without substituting national for state policy.

Even in areas where there is critical need for resolution of conflicting governmental interests, it is unlikely that congressional action will be forthcoming, or that it will be soundly formulated if it is forthcoming, unless the energies which

Rev. 1, 21 (1945) (AALS Readings, at 229, 244); Cavers, Review of Cook, *supra*, 56 Harv. L. Rev. 1170 (1943); *Yarborough v. Yarborough*, 290 U.S. 202, 215 n. 2 (1933) (dissenting opinion); 1 Crosskey, *op. cit. infra* note 78, at 553-54.

⁷⁸ 1 Crosskey, *Politics and the Constitution in the History of the United States* 545-47 (1953). See also Jackson, *op. cit. supra* note 77, at 11-12 (AALS Readings, at 237-38); Paulsen & Sovern, "Public Policy" in the Conflict of Laws, 56 Col. L. Rev. 969, 1012 (1956); Cheatham, Federal Control of Conflict of Laws, 6 Vand. L. Rev. 581, 602-3 (1953) (AALS Readings, at 255, 272-73).

⁷⁹ "[T]he states have less to fear from a strong federalist influence in dealing with this than with most other constitutional provisions. The Federal Government stands to gain little at the expense of the states through any application of it." Jackson, *op. cit. supra* note 77, at 33 (AALS Readings, at 254).

⁸⁰ See Cheatham, Goodrich, Griswold & Reese, *Cases and Materials on the Conflict of Laws*, c. 9 (4th ed., 1957).

are now consumed by the metaphysics and the frustrations of conflict of laws are diverted to the formulation and justification of specific legislative programs. Here is challenge enough. Here is the "grand objective"⁸¹ in an attainable, or at least approachable, form. Here is a means of bringing the full capability of the mind to bear upon the problem of "integration of the diversity of laws."⁸² In America at least, conflict of laws, that "much maligned branch of the law,"⁸³ will richly deserve its disrepute so long as we leave the instrument for intelligent resolution of conflicting policies to rust in desuetude, while we waste our energies in the futile search for an *elixir vitae* that will relieve us from the necessity of facing the real problem and from the pain that must ensue when the policy of one state is made to yield to that of another.⁸⁴

⁸¹ Yntema, *op. cit. supra* note 4, at 312 (AALS Readings, at 42).

⁸² *Id.*, at 297 (AALS Readings, at 31).

⁸³ *Id.*, at 300 (AALS Readings, at 32).

⁸⁴ "But the full faith and credit clause is the foundation of any hope we may have for a truly national system of justice, based on the preservation but better integration of the local jurisdictions we have. If I have any message to the legal profession . . . it is this: that you must not suffer this lawyer's clause to become the orphan clause of the Constitution." Jackson, *op. cit. supra* note 77, at 34 (AALS Readings, at 254).