The Constitution and the Transitory Cause of Action

Brainerd Currie

Follow this and additional works at: https://chicagounbound.uchicago.edu/journal_articles

🔗 Part of the Law Commons

Recommended Citation

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.
Professor Currie, having developed in the first part of his article the theory that the Supreme Court erred in grounding its decision in Hughes v. Fetter on the full-faith-and-credit clause instead of the equal-protection clause, now proceeds to consider situations in the conflict of laws in which the former provision is applicable. His conclusion sets forth the boundaries of a state's obligation to provide a forum for causes of action created by the laws of a sister state.

IV. Full Faith and Credit as an "Open Door" Policy

The most significant paragraph in the majority opinion in Hughes v. Fetter is the second. Here the Court first states the question to be decided, assuming in the process that the right of action to be enforced was one created by the laws of Illinois. Then comes the following chain of reasoning: (1) The Illinois statute is a "public act" within the meaning of the full-faith-and-credit clause; (2) Wisconsin cannot escape "this constitutional obligation to enforce the rights and duties validly created under the laws of other states by the simple device of removing jurisdiction from courts otherwise competent"; (3) but the operation of full faith and credit is not automatic; it is for the Court to "choose in each case between the competing public policies involved." This is followed by a particularly significant passage:

The clash of interests in cases of this type has usually been described as a conflict between the public policies of two or more


163 341 U.S. at 611.

164 As the tenth footnote emphasizes, no choice-of-law problem was before the Court. 341 U.S. at 612 n.10. The plaintiff had expressly founded his complaint on the Illinois statute.

165 Id. at 611. (Emphasis added.)

166 Id. at 611.
states. The more basic conflict involved in the present appeal, however, is as follows: On the one hand is the strong unifying principle embodied in the Full Faith and Credit Clause looking toward maximum enforcement in each state of the obligations or rights created or recognized by the statutes of sister states; on the other hand is the policy of Wisconsin, as interpreted by its highest court, against permitting Wisconsin courts to entertain this wrongful death action.  

It is indeed true that the Court had previously approached problems of full faith and credit to the public acts of a sister state in terms of the respective policies, or interests, of the states involved. Why, then, did not Mr. Justice Black employ that approach here? Offhand, one might surmise that the Court was shying away from the "delicate" and "refractory" problem of weighing and choosing between conflicting state interests; a federal-state conflict is easier to handle since, whatever the relative merits of the two policies, the supremacy clause will in the end require that national policy prevail. On closer inspection, a more cogent reason appears: If the Court had stated the problem in terms of the opposing interests of the respective states, it could hardly have avoided the conclusion that Illinois, the state of injury, had no interest in the enforcement of a cause of action for wrongful death in the circumstances. Wisconsin, as the home state of all the parties and the state in which the action was brought, was the only state concerned, and it had declared its policy — albeit one which, on the analysis employed in this paper, was unconstitutional because of its discriminatory character. An analysis of the interests of the two states, therefore, would have led to the conclusion that Wisconsin was under no obligation to defer to the policy of Illinois, and to affirmance of the Wisconsin Supreme Court's judgment. This, however, was a result from which the majority instinctively recoiled, and this

167 Id. at 611-12. (Footnotes omitted.)
168 See generally Currie, The Constitution and the Choice of Law: Governmental Interests and the Judicial Function, 26 U. Chi. L. Rev. 9 (1958). It is also true that on occasion the Court had treated such problems in a conceptualistic manner which took no account of state interests. Id. at 75-76.
170 U. S. Const. art. VI, para. 2.
171 See pp. 45-49 supra.
172 See pp. 60-66 supra.
reaction was thoroughly justified for reasons which have been indicated. The infirmities of the Wisconsin policy in the light of the equal-protection clause had not been called to the attention of the Court by counsel; accordingly, the Court sought a treatment which would invalidate the policy under the full-faith-and-credit clause and seized upon the concept of conflict between state and national policy.

In terms of the future development of the law, this was an unfortunate decision. The full-faith-and-credit clause does, of course, express a national policy, but what is it? Certainly not that each state shall be required to conform to the Restatement. In support of his proposition that national policy "look[s] toward maximum enforcement in each state of the obligations or rights created or recognized by the statutes of sister states," Mr. Justice Black cited only three cases—two dealing with full faith and credit to judgments and one requiring application of the laws of the state wherein a fraternal insurance society was incorporated, in which he had expressed a vigorous dissent.

These cases fall far short of furnishing an adequate basis for the proposition that the full-faith-and-credit clause requires a state to provide a forum for every wrongful-death action based upon injury in a sister state, to say nothing of the proposition that in the interest of uniformity the law of the state of injury must be applied. The policy embodied in the full-faith-and-credit clause is that each state shall give appropriate effect to the public acts, records, and judicial proceedings of sister states, and shall refrain from intruding its own notions and policies into matters which are properly the concern of others. Just how the Court is to determine what effect is appropriate, and where the concerns of one state end, is of course a basic and difficult question. Mr. Justice Black, however, would be among the last to contend, or even to concede, that the determination is to be made with reference to talismanic "contacts" which are thought to support the exercise of territorial power. There exist situations in which obli-

173 341 U.S. at 612.
176 In addition to his dissent in the Wolfe case, supra note 175, see Watson v. Employers Liab. Ins. Corp., 348 U.S. 66 (1954); Hoopeson Canning Co. v. Cullen, 318 U.S. 313 (1943).
gations or rights rest exclusively upon the laws of a foreign state, and in which the Constitution requires maximum recognition of those rights in the forum state. In such situations, however, the foreign state has a legitimate interest in the effectuation of the policy embodied in its laws and the forum state has no interest in the effectuation of any conflicting policy of its own. Hughes v. Fetter did not present such a situation.

The Hughes case, therefore, is distinctly aberrational as an application of the full-faith-and-credit clause. This is not to say, however, that the clause never requires a state to provide a forum for the enforcement of claims predicated upon the laws of a sister state. The extent to which it must do so is the problem to be considered here. We are not primarily concerned with the choice-of-law cases, i.e., those in which a state has voluntarily provided a forum and then has applied its own law in preference to that of a sister state, but rather with those in which a state has simply refused to entertain the action. In these cases the forum does not, openly at least, pose any disagreement with the social and economic policy embodied in the foreign law; instead it invokes, more or less explicitly, some independent local law or policy relating to the jurisdiction or administration of its courts. Sometimes it may do this in order to camouflage what is in fact a purpose to discriminate against foreign interests (though we shall not encounter again anything so bizarre as the incidental discrimination by Wisconsin and Illinois against their own citizens). Our principal concern, however, will be with the situation in which the forum state has no ulterior motive, but simply closes the doors of its courts in accordance with a bona fide policy relating to matters of judicial administration.

---


179 The treatment will not be exhaustive. A number of topics might be treated under the head of denial of access to courts on grounds relating to judicial administration. See generally Hill, The Erie Doctrine and the Constitution, 53 Nw. U.L. Rev. 541, 568-74 (1958). In particular, the invocation of various "procedural" laws of the forum, such as the statute of limitations, to support dismissal may involve policies relating to the administration of courts, but other policies may be involved also. Here we shall concentrate upon the overt refusal of a state to open the doors of its courts in the first place.
A. Actions on Judgments of Sister States

The national policy embodied in the full-faith-and-credit clause, "looking toward maximum enforcement in each state of the obligations or rights created . . . by . . . sister states," has been most clearly articulated and implemented with respect to judgments — particularly for money. Concerning judgments, Congress has meaningfully exercised its power to declare the effect in one state of the public acts, records, and judicial proceedings of another: They are to be given such faith and credit "as they have by law or usage in the courts of such State . . . from which they are taken." Neither the outraged interests of the forum nor manifest error on the part of the rendering court will justify a refusal of enforcement. If a state may refuse to enforce a sister state's money judgment on grounds of policy relating to judicial administration, a fortiori it should be able to refuse on such grounds to enforce claims not reduced to judgment. With respect to such claims Congress has not spoken in any meaningful way.

In 1903 the Supreme Court held that New York was not obliged by the full-faith-and-credit clause to enforce an Illinois money judgment at the suit of one Illinois corporation against another. New York's refusal was based upon a section of the Code of Civil Procedure providing that an action might be maintained against a foreign corporation by another foreign corporation, or by a nonresident, only in certain enumerated cases, one of which was "where the cause of action arose within the State." The purpose of the provision had been stated by the New York Court of Appeals as follows:

The discrimination between resident and non-resident plaintiffs is probably based on reasons of public policy, that our courts should not be vexed with litigations between non-resident parties.

[Footnotes]

180 341 U.S. at 612.
183 See Fauntleroy v. Lum, 210 U.S. 230 (1908).
185 See note 162 supra.
over causes of action which arose outside of our territorial limits. Every rule of comity and of natural justice and of convenience is satisfied by giving redress in our courts to non-resident litigants when the cause of action arose, or the subject-matter of the litigation is situated within this state.188

These reasons are substantially those underlying the doctrine of forum non conveniens.188 They express a policy relating to the administration of the courts. There is no suggestion whatever of any hostility on the part of New York to the underlying cause of action, which arose out of ordinary commercial transactions; nor is there any suggestion of a desire to shield local against foreign interests. The case therefore presents in the clearest possible way the issue of whether the forum's policies relating to the administration of its courts can justify the refusal to enforce a foreign judgment.

With characteristic brevity, Mr. Justice Holmes seized upon the fact that the New York Court of Appeals had, in passing, referred to the limitation imposed by the Code of Civil Procedure as one on the jurisdiction of courts,190 and proceeded to declare that the full-faith-and-credit clause is not a rule of jurisdiction, requiring the state to provide a forum, but only a rule of evidence stating how the judgment in suit is to be treated if the state does provide a forum. As we shall see, the distinction is neither workable nor convincing.191 The only apparent justification for the decision is that, despite the national interest in maximum enforcement of state-created rights, the interest of Illinois in the effectuation of its legal policies, and the interest of the plaintiff in the enforcement of its adjudicated rights, the counterinterest of New York in keeping its courts free from the burden of litigation with which it has no concern is sufficient to deflect the force of the full-faith-and-credit clause.

On the face of the matter, this seems a not unreasonable justification. But suppose that the only assets of the judgment debtor are located in the state in which enforcement is sought. In such a case, a policy like that of New York will effectually deprive the plaintiff of what the Illinois courts have adjudicated to be his; and this, in view of the clear constitutional and congressional policy of interstate respect for judgments, seems a high price to pay for New York's autonomy in regulating the business of its courts. The actual situation in the case under discussion was equivalent to that which has been supposed: The judgment defendant was insolvent; its only asset was a judgment which it had obtained in New York against the plaintiff. The defendant's judgment, which arose out of the same series of transactions as the plaintiff's, was in an amount greater than the Illinois judgment in suit. The defendant was taking steps to collect its judgment in New York, and the only purpose of the suit on the Illinois judgment was to establish it as a set-off. The net result of the litigation was that the attempted set-off was frustrated. Such a result seems indefensible. There is little reason why a judgment creditor should engage in forum-shopping in suing on his judgment. Normally, his only purpose in bringing such an action is to reach assets or, as here, to establish a set-off; the choice of forum is dic-

192 I have elsewhere defended the position that the counterinterest of the forum state is sufficient to defeat a demand that the law of the foreign state be applied to a case which the forum has undertaken to adjudicate. See Currie, The Constitution and the Choice of Law: Governmental Interests and the Judicial Function, 26 U. Chi. L. Rev. 9 (1958).


194 It is not clear how, in the face of § 1780 of the Code of Civil Procedure, the defendant was able to obtain its New York judgment. The objection seems not to have been raised in that proceeding. See Record, Anglo-American Provision Co. v. Davis Provision Co., No. 2, 191 U.S. 376 (1903). It may be that § 1780 did not apply because the cause of action in that proceeding was considered as having arisen in New York.

195 Actually, a United States district court in New York, whose sympathy for the plaintiff's plight led it to stretch its jurisdiction in an effort to afford relief, came to the conclusion that there was no right of set-off on the merits, since the rights which ripened into the New York judgment had been assigned in good faith and for a valuable consideration to another. See Record, pp. 129-32, Anglo-American Provision Co. v. Davis Provision Co., No. 2, 191 U.S. 376 (1903). But the decision in Anglo-American No. 1 takes no account of that circumstance; and in a similar case today, involving a genuine right to set-off, counsel would have considerable difficulty in distinguishing the precedent; the insolvent defendant would logically recover its New York judgment in full.
tated simply by the location of the defendant's assets.\textsuperscript{196} Moreover, the burden on the New York courts of entertaining suits on sister-state judgments is slight, since the original cause of action is, of course, merged, and the issues which are open to litigation are few. In the case under discussion, entertaining the action would probably have involved no more than the routine entry of summary judgment. New York's interest is attenuated, and the considerations favoring enforcement are very strong.

We must be wary, however, of any suggestion that the Supreme Court should have treated the New York interest as "outweighed" by the countervailing interests. New York's interest in the efficiency of the courts which it maintains at its own expense is not negligible. A determination that that interest is less important than the interest of Illinois in the enforcement of its judgments involves essentially the exercise of political discretion. The Court, I believe, would have been justified in requiring New York to entertain the action only on one of two theories: (1) that Congress, in the exercise of its power to declare the effect of the judgments of one state in the courts of another, has in fact determined that the forum state's interest in regulating the business of its courts must yield to the interest in nationwide enforcement; or (2) that the interest of a state in regulating the business of its courts is of a different and lower order than the interest of a state in regulating its social and economic structure apart from the court system, so that the Court itself is in position to say that the former type of interest shall yield to the latter. The first of these theories is an appealing one. The second is rather more difficult to accept, and we shall be concerned with it in connection with the problem of access to courts for actions not based upon judgment.

Seventeen years later Mr. Justice Holmes, speaking for the Court in the \textit{Kenney} case, said: "[T]t is plain that a state cannot escape its constitutional obligations by the simple device of denying jurisdiction in such cases to courts otherwise competent."\textsuperscript{197}

\textsuperscript{196} In \S 1780 itself New York recognized the reasonableness of this general kind of resort to its courts by nonresidents, allowing suits for the purpose of recovering real or personal property located in the state.

\textsuperscript{197} Kenney v. Supreme Lodge, Loyal Order of Moose, 252 U.S. 411, 415 (1920). In his youth Mr. Justice Holmes was greatly influenced by Ralph Waldo Emerson. See Howe, \textit{Justice Oliver Wendell Holmes: The Shaping Years} 54 (1957); Bowen, \textit{Yankee From Olympus} 199 (1944). It was Emerson who said: "A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines. With consistency a great soul has simply
Confronted with his earlier declaration that the full-faith-and-credit clause establishes a rule of evidence rather than of jurisdiction, he replied, "Anglo-American Provision Co. v. Davis Provision Co. was a suit by a foreign corporation on a foreign judgment against a foreign corporation. The decision is sufficiently explained without more by the views about foreign corporations that had prevailed unquestioned since Bank of Augusta v. Earle, 13 Pet. 519, 589-591, cited 191 U.S. 375." 198

Kenney, it will be recalled, was the case in which the Court held unconstitutional the exclusionary proviso of the Illinois wrongful-death statute as applied to judgments. 100 Two residents of Alabama died in the process of being initiated into a local lodge of the Loyal Order of Moose, an Indiana corporation. 200 Having recovered in the Alabama courts, the administrators brought suit on their judgments in Illinois, where they were able to attach property of the corporation. 201 More specifically than had the New York Court of Appeals in the Anglo-American case,

nothing to do." Emerson, Self-Reliance, in Essays 83, 93 (Jordan ed. 1907).

198 252 U.S. at 414. The citation referred to is as follows: "The general power of a State to restrict the right of a foreign corporation to sue in its courts is assumed in Bank of Augusta v. Earle, 13 Pet. 519, 589-591." There is no other reference in the opinion to the power over foreign corporations. Three years after the Kenney case, over Mr. Justice Holmes' dissent, the Court held that the equal-protection clause imposes limits on the power of a state to obstruct access to its courts by a foreign corporation seeking recovery of personal property in the state. Kentucky Fin. Corp. v. Paramount Auto Exch. Corp., 262 U.S. 544 (1923).


200 The details are not important except, perhaps, insofar as they may be thought to have affected the sympathies of the Court. An account of them is reproduced here primarily because no such account is to be found either in the reports or in the record:

Two candidates for membership in the Loyal Order of Moose were killed some years ago during an initiation in a lodge at Birmingham, Alabama. They were Donald A. Kenny, president of the local Chauffeurs' Union, and Christopher Gustin, an iron moulder. Physicians were undecided as to whether they were frightened to death or killed by electricity. It is stated that a metal emblem of the order was made red hot while they looked on. Their chests were bared and they were blindfolded. A magneto was attached to one leg of each candidate, a chilled rubber emblem was placed against the breast, and an electric current was completed by a small wire touching the shoulder. The aim evidently was to make them believe that the red hot metal was applied to the flesh. Both men fainted. It was thought they were feigning, and the presiding officer did not stop the initiation till it was seen that the two men were dying. The lodge physician was unable to revive them.

Preuss, A Dictionary of Secret and Other Societies 258 (1924).

201 Record, pp. 3, 9-13. While the Order was incorporated in Indiana, id. at 3, it is possible that it may have been regarded as a local enterprise by the Illinois courts, since the national headquarters were in Illinois and a sizable establishment was maintained there. See Preuss, op. cit. supra note 200, at 258-59.
the Illinois Supreme Court declared the local statute a limitation on the jurisdiction of the courts. The two cases, then, are nearly parallel. The superficial differences between them — the fact that in one the plaintiff was a foreign corporation while in the other he was a nonresident administrator, and the difference between the causes of action merged in the respective judgments — seem unimportant. There is a less obvious difference, however, which is significant. The New York courts had expressly declared a policy relating to the efficiency of the state's judicial system; the Illinois courts, as we have seen earlier, had at no time articulated the policy underlying that state's exclusionary proviso. That proviso stood as an unexplained and arbitrary limitation on the jurisdiction of the courts; if the surmises advanced previously have any validity, a statement of the real purpose, which was to protect local interests against the interests of nonresidents, would not have been conducive to a different decision. In short, these two cases may be regarded as consistent and as supporting the proposition that a state may legitimately apply a policy of forum non conveniens, if it has such a policy, to actions on sister-state judgments. Such a proposition, however, does not comport well with the needs of the federal system and with the resolution of the conflicting interests which was apparently made by the first Congress. At least in cases in which the state where the action on the judgment is filed is the only one in which there are assets of the judgment debtor, the equal-protection clause should perhaps be applied to afford relief if the full-faith-and-credit clause, implemented by congressional action, is inadequate for the purpose.

Further support for the view that a policy directed in good faith to the administration of the judicial system of the forum state is an adequate reason for not entertaining an action on a sister-state judgment is provided by the well established rule that

---

203 In Fauntleroy v. Lum, 210 U.S. 230 (1908), the Court had held quite firmly that hostility to the underlying cause of action did not provide an excuse for refusing relief on a sister-state judgment; this position was reaffirmed in Kenney. 252 U.S. at 415. See also Milwaukee County v. M. E. White Co., 296 U.S. 268 (1935).
the forum may apply its own statute of limitations. A statute of limitations may reasonably be interpreted as expressing two policies: one of protecting persons within the scope of the state's governmental concern from the risk of liability where lapse of time has rendered the plaintiff's evidence unreliable and the defendant's evidence difficult to produce, and one of protecting the courts against the difficulties and frustrations of adjudication in such circumstances. If the latter of these policies seems a bit far-fetched, it nevertheless suggests the only hypothesis on which one can give a meaningful explanation for the general practice of applying the forum's statute of limitations in cases in which the forum state can have no possible interest except one relating to the administration of its courts.

The other cases in which the Court has dealt with a state's refusal to enforce the judgment of another state make it clear that antipathy toward the underlying cause of action is not an excuse. The most interesting thing about them, in this context, is that in not one of them did the forum state suggest that its refusal was grounded in concern for the administration of its judicial system. The net result is that, apart from the protection of local people and enterprises when the judgment itself is a stale claim, no interest whatever of the forum state can justify its refusal to enforce the money judgment of a sister state—except an interest in the administration of its court system. This is in marked contrast to the situation in which an action is predicated on foreign law rather than a foreign judgment, and the full-faith-and-credit clause is relied on as controlling the choice of the applicable law. There, broadly speaking, any legitimate interest of the forum state suffices to justify its application of its own law

---

206 As distinguished from an explanation based on the rule of thumb that matters of "procedure" are governed by the law of the forum.
207 Intimations to the contrary in Huntington v. Attrill, 146 U.S. 657 (1892), and Wisconsin v. Pelican Ins. Co., 127 U.S. 265 (1888), have been discredited. See Milwaukee County v. M. E. White Co., 296 U.S. 268 (1935); Fauntleroy v. Lum, 210 U.S. 230 (1908). See also Roche v. McDonald, 275 U.S. 449 (1928); Christmas v. Russell, 72 U.S. (5 Wall.) 290 (1866); Jackson, Full Faith and Credit—The Lawyer's Clause of the Constitution, 45 Colum. L. Rev. 1, 9 n.38 (1945). In a slightly different category is Morris v. Jones, 329 U.S. 545 (1947), in which the interest of the forum state which was overridden by the constitutional mandate was that asserted by Illinois in conducting a unitary administration of the affairs of a local insurance enterprise upon its insolvency.
rather than that of the other state. The contrast is basically un-
derstandable, since rights reduced to judgment have a definiteness which rights asserted under general laws do not, and since the original act of Congress implementing the full-faith-and-credit clause dealt expressly with the effect of judgments in such a way as to support an inference of intent to subordinate the conflicting policies of the forum state. What is difficult to understand is the apparent exception in favor of the forum state's policies relating to judicial administration. The exception would seem anomalous because of its uniqueness alone; it seems doubly so in the light of the suggestion that this kind of policy may be of a relatively low order, inferior to what may be called the "substantive" policies of a state relating to social and economic matters in general.

B. Penal Causes of Action

Not long after the War of 1812, Mr. Chief Justice John Marsh-
all, in the course of developing the argument of his opinion in a case which involved, along with difficult questions of international law, freedom or slavery for a boatload of unfortunate Africans who had been taken from their captors by an American naval vessel, posed a hypothetical problem and gave his solution to it. The problem: In time of peace an American naval vessel boards and searches a Spanish vessel on the high seas and finds it engaged in the slave trade. The trade is prohibited by American law and repugnant to our sensibilities. It is also prohibited by the law of Spain. The American vessel brings the Spanish vessel and its human cargo into an American port for adjudication. The United States insists that the captives be set free; their Spanish "owners" demand restitution. What should the American admiralty court do? The solution: It should order restitution. The American position with respect to the events leading to the late war with England made it clear that in the absence of treaty we could neither recognize nor assert a right of visitation and search except in case of piracy or a violation of the law of nations—and trading in slaves was neither. Moreover, it was not the business of Ameri-
can courts to enforce the Spanish laws against the slave trade by decreeing forfeiture of the loot held by the Spanish malefactors; that could be left to the courts of Spain.

208 See Jackson, supra note 207, at 11.
The reader may well inquire what this has to do with the subject under discussion. So far as I can tell it has no relevance whatever. However, in making his point Marshall coined an aphorism which the courts persist in quoting, in cases of a type with which this discussion is concerned, as if it were immutable truth and indispensable datum: "The Courts of no country execute the penal laws of another . . . ." Since the courts obviously consider this statement important to the subject under discussion, we must give attention to it, and, of course, we cannot disregard its context.

More than half a century later one Attrill, a resident of New York, swore to and caused to be recorded a certificate to the effect that the whole of the capital stock of a New York corporation of which he was a director had been paid in. The certificate was false, as Attrill knew; no part of the capital stock had been paid in. Under a New York statute Attrill was in these circumstances liable for the debts of the corporation, and a New York creditor, Huntington, recovered judgment against him in New York accordingly. This judgment being unsatisfied, Huntington found that Attrill had owned stock in a Maryland corporation and had transferred the stock to himself as trustee for his wife and daughters in an attempt to defraud his creditors. Huntington thereupon applied to the courts of Maryland to have the fraudulent transfer set aside and the stock subjected to the payment of his claim. The Maryland Court of Appeals denied relief, saying: "'[I]t is well settled that no State will enforce penalties imposed by the laws of other States . . . .'" The Supreme Court reversed, but not without first paying deference to Marshall's aphorism as the essential point of departure for the discussion.212

The case is very nearly an ideal one for purposes of the present discussion. At the time of the transactions in question—and they were strictly New York transactions—all parties were residents of New York. Indeed, even at the time of the Maryland litigation no party had any connection with the forum state; Attrill and his family had become residents of Canada. The only

210 *Id.* at 123.
circumstance relating Maryland to the affair was that the action was brought there, and this was so only because the assets sought to be reached consisted of stock in a Maryland corporation, which presumably had no interest in the outcome. Maryland did not assert any interest in applying its law to determine the rights of the parties. Its refusal to grant relief could be predicated only upon a policy relating to the administration of its courts—or upon Marshall's "incontrovertible maxim" without reference to any conscious policy of the state.

Since the action was on a judgment, the considerations discussed in the preceding section are applicable. Applying those considerations, we should conclude that developments since this case was decided probably render immaterial the fact that the underlying cause of action may have been of a type to which the forum was free to close its doors. That was not the situation as it appeared to the Court at the time, however; in order to understand the Court's analysis, we must temporarily put aside the developments which make the character of the underlying cause of action irrelevant. It is with the application of the full-faith-and-credit clause to the underlying cause of action that we are primarily concerned.

In his generally able and impressive opinion, Mr. Justice Gray assumed that if the action in Maryland had been predicated upon the original liability created by the New York statute rather than upon a judgment, no federal question would have been presented, although the cases which he cited to this effect could not have presented a question of full faith and credit. On this assumption, he quite properly ruled that the question whether

214 Although in Milwaukee County v. M. E. White Co., 296 U.S. 268 (1935), the Court expressly left open the question whether the penal character of the underlying cause of action affects the obligation of full faith and credit to a judgment, 296 U.S. at 279, it also expressly disapproved Wisconsin v. Pelican Ins. Co., 127 U.S. 265 (1888), "so far as the opinion can be taken to suggest that full faith and credit is not required with respect to a judgment unless the original cause of action would be entitled to like credit . . . ." 296 U.S. at 278.
215 146 U.S. at 683.
216 Roth v. Ehman, 107 U.S. 319 (1882); New York Life Ins. Co. v. Hendren, 92 U.S. 286 (1876). It is now established, of course, that a federal question under the full-faith-and-credit clause or the due-process clause may be raised by the denial of rights asserted under the laws of a sister state. See generally Currie, The Constitution and the Choice of Law: Governmental Interests and the Judicial Function, 26 U. Chi. L. Rev. 9 (1958).
the cause of action is penal is one to be decided by the law of the forum; the characterization given it (usually for domestic purposes) by the state creating the right is not controlling.\textsuperscript{217} When, however, the action is not on the original liability but on a judgment, the forum's refusal to entertain the action raises a question under the full-faith-and-credit clause. Although Mr. Justice Gray conceded that the nature of the original cause of action was not changed by the judgment — and hence that, if the original cause of action were penal, the judgment was not entitled to full faith and credit — he insisted upon the right of the Court to determine for itself, in an action on the judgment, the nature of the original cause of action.\textsuperscript{218} The constitutional mandate of full faith and credit to the judgment would be circumvented if the basis for the recognized exception had no objective existence. Having determined, by an examination of the common-law authorities in general, that the underlying cause of action was not penal in the international sense, he concluded that full faith and credit had been denied to the judgment.

The decision stands as indirect authority for the proposition that a cause of action which is "penal" need not be entertained by the courts of a state other than that whose law creates the right; if a judgment based upon a penal cause of action would not be entitled to recognition, a fortiori the original cause of action would not be. It is unfortunate that this interpretation of the full-faith-and-credit clause was based not upon an analysis of the interests of the respective states in the context of the federal system, but upon common-law precedents reflecting the provincialism of independent sovereignties, and in particular upon the views of John Marshall as to the appropriate restraints upon our enthusiasm for abolishing the slave trade throughout the world. The Court had earlier taken the step of expanding Marshall's dictum so that it applied "not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws . . . ."\textsuperscript{219} It remained only to inquire whether the underlying cause of action was for a penalty, and this question of "interna-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{217} 146 U.S. at 683.
\item \textsuperscript{218} Id. at 683–84.
\item \textsuperscript{219} Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 290 (1888).
\end{itemize}
\end{footnotesize}
The transitory cause of action was resolved by reference to precedents representing the point of view of the forum state, some having no relation to the federal system and none considering explicitly the needs of that system. While the result in the case before the Court was favorable to the federal interest and the interest of New York in interstate recognition of the judgment, the way was left open for a contrary result if reference to the same precedents should characterize the cause of action as penal. The best that can be said of this technique is that it was premised on the theory that the full-faith-and-credit clause did not require a state to entertain causes of action which were not entertained as a matter of comity among independent nations at the time the Constitution was adopted. While this was perhaps at one time a plausible interpretation, the clause takes on greater vitality and makes more sense as an instrument of federalism if it is interpreted and applied in accordance with an analysis of the interests of the respective states. Such an analysis would have required a statement of the policy of the forum state underlying its refusal to entertain penal causes of action. No such statement was forthcoming. It is difficult, in the circumstances of the Huntington case, to attribute to the forum state any policy other than that of avoiding the burden which would be cast upon the local courts by such foreign litigation. If this is the policy, explicit statement of it would enable the Court to treat the problem as it has treated other similar problems of conflicting state interests.

The nature of the policy considerations which may be of concern to the forum state is suggested by Wisconsin v. Pelican Ins. Co. The case does not involve the full-faith-and-credit clause, strictly speaking, but the original jurisdiction of the Supreme Court. The significant point is that the Court was concerned about the effect of its becoming a tribunal for the collection of

220 146 U.S. at 683.

221 "The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin." Milwaukee County v. M. E. White Co., 296 U.S. 268, 276–77 (1935).

222 127 U.S. 265 (1888).

223 Indeed, some reliance was placed upon the language of the act, 1 Stat. 80 (1789) (now 28 U.S.C. § 1251 (1952)), defining the original jurisdiction in terms of "controversies of a civil nature . . .," Id. at 297.
state claims — even those reduced to judgment — upon its efficiency in the performance of its primary duties:

If this court has original jurisdiction of the present case, it must follow that any action upon a judgment obtained by a State in her own courts against a citizen of another State for the recovery of any sum of money, however small, by way of a fine for any offence, however petty, against her laws, could be brought in the first instance in the Supreme Court of the United States. That cannot have been the intention of the Convention in framing, or of the people in adopting, the Federal Constitution.\(^2\)

Such a statement of realities has more persuasive force than any number of reiterations of the dictum that “the courts of no state enforce the penal laws of another.”\(^3\)

The case of *Atchison, T. & S.F. Ry. v. Nichols*\(^2\)\(^4\) may serve as a reminder that the refusal of a state to entertain a cause of action having foreign aspects on the ground that it is “penal” can never be evaluated in the abstract, whether the reason is stated in terms of the rule of thumb or of realistic concern for the efficiency of the local courts. The action was brought in a California court for a death occurring in New Mexico, and was removed to the United States district court because of diversity of citizenship. The New Mexico statute provided that the defendant should “forfeit and pay for every person or passenger so dying, the sum of five thousand dollars . . . .”\(^2\)\(^6\) The Court held this statute not penal in the international sense, following *Huntington v. Attrill*. This falls short of a holding that the full-faith-and-credit clause required that the action be entertained, since the case was in the federal courts by virtue of diversity of citizenship and the *Erie* doctrine\(^2\)\(^7\) had not been announced. Yet in a repetition of the case since the *Erie* decision a contrary result, refusing to entertain the action, would present substantially the same constitutional question that was presented by *United Air Lines*.\(^2\)\(^8\) The plaintiff was a citizen of California\(^2\)\(^9\) and so, presumably, was his wife, the deceased. The defendant was a Kansas corpora-

\(^{224}\) Id. at 300.
\(^{225}\) 264 U.S. 348 (1924).
\(^{226}\) N.M. Laws 1882, ch. 61, § 1, as amended, N.M. STAT. ANN. § 22-20-4 (1953).
tion doing business in California. Thus the same considerations which required the district court in Illinois to entertain the action for wrongful death in *United Air Lines* would be operative in such a case — whether they stem from the full-faith-and-credit clause or the equal-protection clause.

C. Claims for Taxes

*Milwaukee County v. M. E. White Co.* effectively disposes of any doubt that the full-faith-and-credit clause requires a state to enforce the judgment of a sister state even though the underlying cause of action was a tax claim. Again, this was a pre-*Erie* diversity case; yet the Court deliberately addressed itself to the question whether the full-faith-and-credit clause required a state to entertain an action on a sister-state judgment for taxes, and reached an affirmative answer. There is perhaps room for a trace of doubt as to whether a clear demonstration of a policy of the forum state designed to relieve its courts of the burden of such litigation would have tended to produce a different result. The only policy attributed to the forum was one of avoiding involvement in the relations between the taxing state and its taxpayers, and thus avoiding commitment of the forum "to positions which might be seriously embarrassing to itself or its neighbors." Rightly enough, the Court dismissed this rather speculative policy as unsubstantial in application to an action on a judgment brought by the taxing state itself. Yet the reasoning of the opinion leaves little basis for belief that much greater weight would have been accorded a plea that to entertain actions on tax judgments would unduly burden the courts of the forum state. Strong emphasis was placed upon the act of Congress prescribing the effect of judgments, and on the relative simplicity of the action based on a judgment. The implication is that Congress is understood to have resolved the conflict of interests by declaring in effect that the conflicting interest of the forum state must yield.

The question of full faith and credit to the taxing statutes of a

230 Id. at 75.
231 296 U.S. 268 (1935).
232 Id. at 273–79.
233 Id. at 275.
234 Id. at 276–77.
235 Id. at 273, 276.
sister state was deliberately left open,²³⁶ thus leaving as the leading precedent on that question the somewhat tangential one of Moore v. Mitchell.²³⁷ That case held only that the treasurer of a county in Indiana had no standing to sue in a federal court in New York, in an action predicated on diversity of citizenship, to recover taxes allegedly due his county. His capacity was likened to that of chancery receivers and administrators; the Court actually found it “not necessary to express any opinion upon the question considered below, whether a federal court in one State will enforce the revenue laws of another State.”²³⁸ Several states have voluntarily opened their courts to unliquidated claims by sister states for taxes, with or without consideration of the full-faith-and-credit clause.²³⁹ No suggestion is offered here that the Milwaukee County case is dispositive of this problem; the act of Congress cannot be given the same force with respect to the public acts of sister states as with respect to their judgments, and actions on the original tax liability pose litigation problems quite different from those posed by actions on tax judgments. It is to be hoped, however, that when this question is presented to the Court the decision will be in terms of the interests of the respective states rather than in terms of the tired cliché to the effect that no state enforces the revenue laws of another.²⁴⁰

D. Stockholders’ Liability

In 1897 the legislature of New Jersey enacted the following provision:

No action or proceeding shall be maintained in any court of law of this state against any stockholder, officer or director of any domestic or foreign corporation by or on behalf of any creditor of such corporation to enforce any statutory personal liability of such stockholder, officer or director for or upon any debt, default or obligation of such corporation, whether such statutory personal liability be deemed penal or contractual, if such statutory per-

²³⁶ Id. at 275.
²³⁷ 281 U.S. 18 (1930).
²³⁸ Id. at 24.
²⁴⁰ See Note, 7 Nat’l BJ. 354 (1949); Comment, 47 Mich. L. Rev. 796 (1949); Note, 18 Cornell L.Q. 581 (1933).
personal liability be created by or arise from the statutes or laws of any other state or foreign country, and no pending or future action or proceeding to enforce any such statutory personal liability shall be maintained in any court of this state other than in a nature of an equitable accounting for the proportionate benefit of all parties interested, to which such corporation and its legal representatives, if any, and all of its creditors and all of its stockholders shall be necessary parties.  

Thereafter a banking corporation known as the Bank of the United States was organized under the laws of New York. Those laws imposed upon stockholders of the bank personal liability for corporate debts to the extent of the par value of their stock, and imposed upon the superintendent of banks the duty of making assessments and enforcing the liability of stockholders. On the insolvency of the bank the superintendent, after taking the steps prescribed by the New York statutes, sued in a law court in New Jersey to enforce the statutory liability of stockholders who were residents of that state. His complaint was stricken on the authority of the New Jersey statute quoted above. On appeal, the Supreme Court reversed, holding that New Jersey had denied full faith and credit to the public acts of New York. The equitable proceeding allowed by the statute, in which the presence of the corporation, all its creditors, and all its stockholders was a jurisdictional prerequisite, was a legal impossibility; the statute effectively denied the right of the superintendent to resort to the New Jersey courts to enforce the liability of New Jersey residents.  

There could be no clearer holding that in some circumstances the full-faith-and-credit clause requires a state to entertain, or furnish a forum for, a cause of action asserted under the statutes of a sister state. The question is: How broad is the requirement, and in what circumstances is it imposed? We have seen that the legitimate interests of the forum state are not to be disregarded. What policy of New Jersey was subordinated to the law and policy of New York by this decision?

244 Id. at 639.  
245 “[T]he full faith and credit clause requires that this suit be entertained.” Id. at 647.
Available sources of information will be searched in vain for any articulation—to say nothing of a candid statement—of New Jersey’s policy. That state did not itself, so far as appears, impose personal liability upon stockholders in domestic corporations; but the mere absence of provisions for such liability could hardly be taken as expressive of an affirmative policy of protecting stockholders in foreign corporations. Probably New Jersey had, prior to the enactment of this statute, enforced the liability of its residents as stockholders in foreign corporations; at least we find a New Jersey court, even after the statute, saying that such liability is governed by the law of the state of incorporation, subject to the “procedural” provisions of the statute. The act of 1897 which blocked the action in Broderick v. Rosner had another section which was not mentioned in the litigation. This provided, in substance, that no action should be maintained (either at law or in equity) to charge a stockholder in a domestic corporation with personal liability under the law of another state. The purpose of this latter section seems clear enough. Not all states were willing to go along with the rule that the liability of stockholders is determined by the law of the state of incorporation; plausible arguments could be made that the state in which a corporate creditor resided, and in which the creditor contracted with the corporation, had a legitimate interest in the application of its own law imposing personal liability on the stockholders. New Jersey was seeking to protect its residents against liability thus imposed. Yet even this falls short of a forthright declaration of a policy of protecting local residents against personal liability as corporate stockholders. New Jersey might the next day have imposed a degree of personal liability on stockholders in domestic corporations without affecting this section; the statute was aimed at foreign law alone, and expressed no general policy. It was as if New Jersey had said: No action shall be maintained in our courts (i.e., against our residents) to enforce any liability imposed by the wrongful-death statute of another state. If New Jersey has no wrongful-death statute of its own, this may be regarded as an attempt to make explicit the common-

246 Johnson v. Tennessee Oil, etc. Co., 74 N.J. Eq. 32, 69 Atl. 788 (Ch. 1908).
law policy of protecting the wrongdoer against liability to the victim's family, and the state of the wrongdoer's residence has an interest in so protecting him. Even so, such an expression of policy is crafty and devious, couched as it is in terms of jurisdiction or procedure. The state does not forthrightly announce its protective policy; indeed, it reserves the right to change that policy by enacting a wrongful-death statute without, on the face of things, affecting its declared hostility to foreign-based claims.

The portion of the statute involved in Broderick v. Rosner probably has a similar explanation. At the time of its enactment the question of full faith and credit to statutes imposing personal liability on stockholders had by no means been settled, but the developing choice-of-law rule was that the law of the state of incorporation was controlling, and that the liability would be enforced by any competent court provided it was "contractual" rather than "penal." The New Jersey legislature disliked this choice-of-law rule and set out to change it; such actions were not to be maintained in New Jersey courts (i.e., against New Jersey residents) whether the liability be considered contractual or penal, except under conditions which were impossible of fulfillment in the ordinary case. The deviousness which has been observed in the first section of the statute is repeated and aggravated here: Not only is there no forthright declaration of a policy that local residents shall not be personally bound as stockholders; there is not even a forthright effort to deprive the local courts of jurisdiction, but only a Machiavellian and wholly pretended concern for matters relating to procedure and parties.250

It is not perfectly clear to me what the Supreme Court should do when a state has not forthrightly declared a social and economic policy but when one can be inferred by patient and under-


250 This interpretation is substantially in agreement with that in Ross, "Full Faith and Credit" in a Federal System, 20 MINN. L. REV. 140, 176-80 (1936). "It is submitted the case of Broderick v. Rosner goes no further than to hold that a state may not deny recovery on foreign facts when its own domestic law would award recovery on parallel facts occurring within its own borders." Id. at 178. I cannot find basis for the view that New Jersey would have imposed liability on resident stockholders in domestic corporations; it is clear, however, that the state had not in any law expressed a social and economic policy hostile to such liability. See Hilpert & Cooley, The Federal Constitution and the Choice of Law, 25 WASH. U.L.Q. 27, 35-36 n.26 (1939).
standing interpretation of a statute drafted to conceal, rather than declare, the policy. The state has only itself to blame, however, if the Court in such a case refuses to recognize the policy's existence. *Broderick*, therefore, presents the following situation: New York had expressly declared a policy of protecting the creditors of banks by imposing personal liability on stockholders. It had a clear interest in the application of the policy to a New York bank, both for the security of local depositors and to enhance the credit of the bank in general. New Jersey had declared no conflicting policy of protecting its residents, as stockholders, against such liability. Neither had it suggested any reason relating to the administration of its courts why actions to enforce such liability should not be brought in New Jersey. It had only pretended a concern for the procedural aspects of such actions, without giving any explanation which would alter the character of the procedural conditions as a merely arbitrary closing of the doors of its courts. In such circumstances, New York having a legitimate governmental interest in the application of its policy and New Jersey having none, the Court quite properly held that New Jersey must entertain the action, and with equal propriety intimated that New Jersey must apply the law of New York.251

251 *Broderick v. Rosner*, 294 U.S. 629, 643-44 (1935). *Converse v. Hamilton*, 224 U.S. 243 (1912), is entirely consistent with this analysis. With respect to the question of choice of law that case contains expressions which apparently disregard any interest of the forum state in the application of its own policy: "The subject . . . is peculiarly within the regulatory power of the State of Minnesota; so much so that no other State properly can be said to have any public policy thereon. And what the law of Wisconsin may be respecting the relative rights and obligations of creditors and stockholders of corporations of its creation, and the mode and means of enforcing them, is apart from the question under consideration." *Id.* at 260-61. So far as appears, Wisconsin did not impose personal liability upon stockholders in corporations generally except for wages. *Wis. Stat.* § 1769 (1898) (now *Wis. Stat.* § 180.40(6) (1957)). However, the only reason offered by the Wisconsin court in *Converse v. Hamilton* for denying relief was that "as to such a cause of action, the courts of this state could, if they chose, close their doors and refuse to entertain the same." *Converse v. Hamilton*, 136 Wis. 589, 591, 128 N.W. 190, 191 (1908), *rev'd*, 224 U.S. 243 (1912). This position is traced back through *Hunt v. Whewell*, 122 Wis. 33, 37-38, 99 N.W. 599, 601 (1904), to *Finney v. Guy*, 106 Wis. 256, 82 N.W. 595 (1900), *aff'd*, 189 U.S. 335 (1903), in which the court refused relief against local stockholders in a Minnesota bank although "the nature of the statutory liability of stockholders of a bank to its creditors under the laws of Minnesota is precisely the same as under the laws of this state . . ." *Id.* at 263, 82 N.W. at 597. Thus Wisconsin never opposed its policy to that of Minnesota. Similarly consistent is *Hancock Nat'l Bank v. Farnum*, 176 U.S. 640 (1900). In that case the Supreme Court required Rhode Island to entertain an action by a creditor of the Commonwealth Loan & Trust Co., a Kan-
E. Mortgage Deficiencies and Miscellaneous Subjects

When a citizen of Virginia sued a citizen of North Carolina to recover the portion of the purchase price of Virginia land not realized upon foreclosure of the purchase-money mortgage, the North Carolina courts closed their doors.\textsuperscript{252} When the case reached the Supreme Court — not by the usual direct route, but circuitously as a result of the plaintiff's decision to start over again in a North Carolina federal court on the basis of diversity of citizenship — it was held that inquiry into the constitutionality of the North Carolina courts' refusal to afford relief was foreclosed by the principles of res judicata.\textsuperscript{253} The question of interest here is: What would have been the result if the plaintiff had appealed directly from the Supreme Court of North Carolina to the United States Supreme Court? In the opinion of the Court by Mr. Justice Frankfurter there is much emphasis on his right to take that course;\textsuperscript{254} one would not be warranted, however, in reading into the opinion any intimation as to the outcome of such an appeal on the merits. Mr. Justice Frankfurter was apparently concerned only with showing that review by the Supreme Court was available as a matter of right rather than of discretion, and that an appeal in the circumstances would have presented a substantial federal question. Mr. Justice Reed, in dissent, agreed as to the availability of review by appeal and expressly reserved any opinion as to the constitutional issue.\textsuperscript{255} The dissenting opinion of Mr. Justice Rutledge, however, is replete with expressions of the opinion that the chances of a successful appeal on the merits were so remote as to be hardly worthy of consideration.\textsuperscript{256}

\textsuperscript{252} Bullington v. Angel, 220 N.C. 18, 16 S.E.2d 411 (1941).
\textsuperscript{253} Angel v. Bullington, 330 U.S. 183 (1947).
\textsuperscript{254} Id. at 188-90.
\textsuperscript{255} Id. at 193, 201.
\textsuperscript{256} Id. at 204, 205 n.11, 207, 209.
On the basis of the precedents which have been examined here, Mr. Justice Rutledge was too pessimistic. The interest of Virginia in the application of its law and policy allowing recovery of the deficiency was clear where a Virginia creditor and Virginia land were concerned. North Carolina had expressed no contrary policy which it might have an interest in applying for the protection of resident purchasers. It had done no more than pass a noncommittal statute to the effect that the mortgagee should not be entitled to a deficiency judgment, and the highest court of the state said only that this statute was a limitation on the jurisdiction of its courts. No explanation was offered; no reference was made to any social or economic policy of the state; certainly nothing was said to differentiate this kind of litigation from all the similar litigation of a commercial sort which the courts of the state habitually entertained. The doors of courts otherwise competent were simply and arbitrarily closed. The statute could hardly have been an application of the doctrine of forum non conveniens, since it was applied to an action in contract at the home of the defendant. If in truth the policy underlying the statute was one of protecting domestic debtors, in which case North Carolina would have had a countervailing interest in the application of its own law, the North Carolina court did not say so. Perhaps it thought, like the New Jersey legislature with respect to the statute in Broderick, that such a policy should be dissembled. In such a case, unless the Supreme Court is to be expected to ferret out a statutory policy which the state court has not put forward in defense of its own action, the full-faith-and-credit clause requires the state not only to provide a forum but to apply the law of the only state having a relevant policy and an interest in its application.

V. CONCLUSION

The two recent cases — Hughes v. Fetter and First Nat'l
Bank v. United Air Lines\textsuperscript{260} — in which the Supreme Court has dramatically held that the full-faith-and-credit clause requires a state to provide a forum for an action predicated on the public acts of a sister state do not, upon analysis, support that proposition. Full faith and credit to the public acts of a state implies full faith and credit to the private rights created by those acts. Not only did the Supreme Court disclaim any holding that the forum must apply the law of the state of injury, but the relationship of the forum, in each case, to the parties and to the litigation was such that under other decisions of the Court the law of the forum was appropriately applicable as a constitutional matter. Moreover, it is clear that under earlier decisions of the Court the forum may disregard any provision of the foreign act purporting to localize the action.\textsuperscript{261} The result in Hughes and United Air Lines, requiring the state to provide a forum but leaving it free to apply its own law, is justified by the equal-protection clause but cannot be explained by reference to the full-faith-and-credit clause.

Although the Court has thus far consistently held that statutory attempts by a state to localize causes of action created by its laws are ineffectual if the cause is "transitory," its decisions have been based upon common-law precedents which take no account of the relations among the states in the federal system. In the future, one may hope, the Court may adopt an approach more consistent with the federal system and the full-faith-and-credit clause, determining the question in accordance with an analysis of the interest of the enacting state in localizing the action and the interest of the state to which the plaintiff resorts in providing a forum.

There are situations in which the full-faith-and-credit clause requires a state to furnish a forum for causes of action originating under the laws of a sister state. Their most striking feature is that, without exception, they are situations in which the forum is also required by the full-faith-and-credit clause to apply the law of the sister state, and in which the forum state has no policy relating to the administration of its judicial system which would be contravened by entertaining the action. The privileges-and-immunities clause\textsuperscript{262} as well as the equal-protection clause may require a state to furnish a forum while leaving it free to apply

\footnotesize{\textsuperscript{260}342 U.S. 396 (1952).}
\footnotesize{\textsuperscript{261}See pp. 70–78 supra.}
\footnotesize{\textsuperscript{262}See note 90 supra.}
its own law; but when the full-faith-and-credit clause requires that a forum be provided, it requires application of the sister state's law "to measure the substantive rights involved." Otherwise, we should be continually confronted with the paradox presented by *Hughes v. Fetter* — that while full faith and credit requires that the action provided by foreign law be entertained, it does not require recognition of the private rights created by that law.

The cases in which the full-faith-and-credit clause requires that a forum be provided include both actions on judgments and actions predicated on the laws of a sister state. These may be reviewed briefly, first with respect to the point that the forum not only must entertain the action but must also apply foreign law, and second with respect to the point that this is true only when the forum state interposes no exclusionary policy relating to the functioning of its judicial system.

So far as actions on judgments are concerned, it is almost, but not quite, a truism to say that the law of the rendering state must be applied. The act of Congress expressly requires reference to the law of that state. An element of doubt was injected by cases which condoned the refusal to enforce a judgment when the forum could have interposed policy objections to the enforcement of the underlying cause of action; it is now completely clear, however, that antipathy to the original cause of action is no excuse, even though as an original matter the forum state would have had an interest in the application of its contrary law and policy. It may be said that with respect to all matters antedating the judgment the interest of the forum state is foreclosed. With respect to matters subsequent to the rendition of the judgment the forum state may assert an interest in the application of its own policy — as, for example, that embodied in its statute of limitations; to the extent that it may do so, there is no requirement that it entertain the action.

Turning to actions predicated upon the laws of a sister state,

---

266 See p. 278 supra.
THE TRANSITORY CAUSE OF ACTION

we find no case in which a forum has been required under the full-faith-and-credit clause in which it is not evident that the forum must also apply the law of the sister state. (The Hughes and United Air Lines cases, of course, are excepted.) Huntington v. Attrill presents linguistic problems in this context, since it was a suit on a judgment; but, treating the decision as one which may throw light on the constitutional obligation to provide a forum for the underlying cause of action, we must conclude that Maryland, having no connection with any of the parties nor with the transaction, had no interest in applying any substantive policy of its own respecting the liability of corporate directors. If the decision, supplemented by later ones, can be construed as intimating that Maryland would be required by the full-faith-and-credit clause to entertain the original cause of action based on the New York statute, it is equally probable that Maryland would be required to apply the New York law. By contrast, California in the Nichols case would not be required by the full-faith-and-credit clause to provide a forum — though it probably would be required to do so by the equal-protection clause; and California should be free, according to the tenth footnote in Hughes, to apply its own law because of its manifest interest in the case. The Court’s one clear pronouncement on full faith and credit in the field of taxation deals with judgments, and yields very little by way of inference as to the status of claims not based on judgments. If, however, the Court should be confronted with the problem of full faith and credit to the taxing statutes of a sister state, it is likely to say, as it said in the Milwaukee County case, that “no state can be said to have a legitimate policy against payment of its neighbor’s taxes . . . .” Accordingly, if the forum is required to entertain the action, it will also be required to apply the law of the taxing state. In the stockholder-liability cases, in which the full-faith-and-credit clause required that a forum be provided, it is quite clear that the forum was required to apply the law of the state of incorporation. In not one of these cases had the forum declared a policy of protecting its residents against such liability, although in Broderick v. Rosner the Court, if it

288 146 U.S. 657, 666 (1892).
290 264 U.S. 348 (1924); see pp. 284–85 supra.
271 See pp. 286–90 supra.
had been disposed to probe beneath the surface, might have found that the procedural requirements of the New Jersey statute camouflaged a policy of protecting them against such liability imposed by foreign law. Finally, in *Angel v. Bullington*, while the North Carolina legislature may have intended to declare a policy for the protection of local mortgagors, the North Carolina Supreme Court did not so interpret the statute. With the clear interest of Virginia thus opposed only by an arbitrary closing of the doors of the courts, without reference to any declared policy, it seems probable that North Carolina would have been required to entertain the action—and to apply the law of Virginia.

Reviewing the cases with reference to the forum state’s judicial-administration policies, and considering first those in which the action was on a judgment, we find first of all that the Court has regarded with indulgence—probably with too great indulgence—the interposition of a forum non conveniens policy. Indeed, it may be questioned whether the preclusive policy approved in the *Anglo-American* case was a defensible application of the doctrine of forum non conveniens. Conceding that the action was between foreign corporations and that the cause of action “arose” outside New York, the circumstances made resort to the courts of that state something quite different from a gratuitous imposition upon their jurisdiction. It seems most doubtful that a court applying the common-law doctrine of forum non conveniens would have reached the result which the New York court reached as a matter of statutory construction. The incentives for forum-shopping are minimal where actions on judgments are concerned, the burden on the court is slight, and the policies favoring uniform enforcement are strong. Yet the Court recognized New York’s interest in applying a policy intended to relieve its courts of the burden, such as it is, of such actions between foreigners. In the *Kenney* case, Illinois interposed no such policy, but only an apparently arbitrary curtailment of the jurisdiction of its courts. In the remaining cases in this category there was no suggestion of a policy relating to the administration of the courts, but only hostility to the underlying cause of action.

---

276 See p. 278 & note 207 supra.
Huntington v. Attrill and the Milwaukee County case may serve as a bridge between the judgment cases and those concerning actions predicated on foreign law, since they concern actions on judgments but may be regarded as having significance for the cause of action not reduced to judgment. The most favorable explanation of Maryland's refusal to entertain the action in Huntington is that it was grounded on a policy, similar to that of the Supreme Court in the Pelican case, of promoting the efficiency of local courts by shielding them from the burden of enforcing the police regulations of other states. The Court's decision that the underlying cause of action was not "penal" amounts to a ruling that Maryland failed to show that the case at bar fell within the asserted policy. The implication—if we may assume that the Court was not simply dealing in slogans—was that if the case had been brought within the policy the state's interest in thus protecting its judicial system would have been recognized. The force of this implication is very considerably impaired by the Milwaukee County case, although, as has been observed, no policy relating to the forum's problems of judicial administration was there put forward, but only an insubstantial policy of not intervening in the relations between the sister state and its taxpayers. However, the solicitude shown by the Court in Anglo-American for the forum state's judicial-administration policies might conceivably be revived, even in an action on a judgment for taxes, if the forum state were to put forward in good faith an argument that its judicial system was not equipped for the task of thus assisting in the enforcement of the revenue laws of the other forty-nine states.

Any such development would be most unfortunate, of course. It would amount to virtual obliteration of the progress which the Milwaukee case represents. In the long run it would probably disserve the true interests of all states, since the collectibility of

---

277 146 U.S. 657 (1892); see pp. 280-83 supra.
278 296 U.S. 268 (1935); see p. 285 supra.
279 127 U.S. 265 (1888); see pp. 283-84 supra.
280 Moreover, on its facts the case presents as good an occasion for invocation of the doctrine of forum non conveniens as did the Anglo-American case. All parties were foreign and the cause of action arose outside the state. Just as in Anglo-American, the forum was chosen because it was the only one in which the assets of the judgment debtor could be effectively reached. But since it does not appear that Maryland had a forum non conveniens policy, its interest in applying such a policy is academic.

HeinOnline -- 73 Harv. L. Rev. 297 1959-1960
tax judgments may be more important than the minor burden on the courts. By the same token, the holding in Anglo-American was most unfortunate.\textsuperscript{281} Against such unfortunate developments the safeguard, or remedy, which is most readily available and least likely to produce collateral complications is a square holding that Congress, in the exercise of its powers under the full-faith-and-credit clause, has already determined that judicial-administration policies as well as social and economic policies of the forum state must yield to the national interest, and the interest of the rendering state, in the uniform enforcement of judgments.

In connection with claims not reduced to judgment the problem becomes more difficult. Congress has not exercised in any meaningful way its power to declare the effect in one state of the public acts of another. The effect upon judicial-administration policies of litigation concerning matters not reduced to judgment is likely to be relatively serious; among other things, the incentives for forum-shopping will be greatly increased as compared with those in actions on judgments. The Supreme Court has never given a clear and reliable indication of its attitude toward reliance on such policies as a reason for refusing to entertain an action on a foreign claim not reduced to judgment.

In \textit{Huntington v. Attrill}, the Court assumed that refusal to entertain such an action raised no federal question; but clearly this is no longer authoritative.\textsuperscript{282} In \textit{Milwaukee County}, the Court expressly left open the question whether a state is required to entertain a sister state's original cause of action for taxes,\textsuperscript{283} and assumed for purposes of the decision that there was no such requirement. If it is suggested that the same reasoning employed by the Court could by extension be employed to override the forum's objections to entertaining the original action, it is necessary to recall that the Court did not have occasion to deal with the problem of the burden which such litigation would impose on the judicial system of the forum state. In the stockholder-liability cases\textsuperscript{284} no forum state ever interposed an objection based upon a policy adopted in good faith for reasons relating to the administration of its courts.

\textsuperscript{281} So is the implication of \textit{Huntington v. Attrill} that a judgment based on a "penal" cause of action need not be enforced if the forum interposes a policy relating to judicial administration.

\textsuperscript{282} See note 216 \textit{supra}.

\textsuperscript{283} 296 U.S. at 275.

\textsuperscript{284} See pp. 286–90 \textit{supra}.
A variety of such policies is conceivable. One is that expressed in the doctrine of forum non conveniens. It is in the highest degree unlikely that the Court would strike down such a policy, honestly applied in accordance with precedent to protect the local courts against the burden of litigation (of claims not reduced to judgment) with which the state has no concern whatever, and which rationally should be conducted elsewhere. Another, which may be attributed to the slogans against foreign claims for penalties and taxes, is that of protecting the courts against the substantial burdens of litigation the only purpose of which is to further what may be called the "corporate" interests of the sister state. But a state may be concerned with the character and purpose, as well as with the quantity, of the litigation in its courts, although its concern is solely for the courts rather than the parties. Thus New York's abolition of the remedies for alienation of affections, criminal conversation, seduction, and breach of contract to marry expressed a social policy which reached all persons and transactions within the scope of New York's legitimate concern, and also a policy relating to the administration of local courts which was operative irrespective of the relationship of the parties and events to other states. In the judgment of the New York legislature, such litigation served no social purpose sufficient to justify the expense of providing courts for it; moreover, the moving parties in such litigation were using the courts as instruments of extortion and blackmail. New York may reasonably assert an interest in protecting its judicial system against such abuses even though it has no interest in applying its social policy to a case in which, at the relevant times, the parties and the transactions were associated entirely with a state whose law created substantive rights. It may be that a state's refusal to entertain a foreign claim arising from a gambling transaction expresses a somewhat similar policy concerning the social utility of the court system.

Those who believe it is the function of the courts to "weigh" the conflicting policies of the states may feel that the problems

285 As distinguished from the governmental interests of the state, which may be involved in private litigation.


288 See Paulsen & Sovern, supra note 287, at 973.
thus presented can be solved one by one, simply by considering in each case the character of the claim asserted and the strength of the forum's exclusionary policy. Assuming such a process, one might expect the prevailing spirit of "liberalism" in such matters to call for recognition of the policy of forum non conveniens in personal-injury cases, but to decry any effort by the forum state to protect its courts against the burdens of foreign tax litigation; to approve a state's refusal to permit abuse of its courts in "heart balm" cases, but to insist upon a more sophisticated attitude toward foreign claims associated with gambling. It seems clear that the judgments involved in such a process are purely political and beyond the competence of any court, state or federal. If they are to be made they must be made by Congress in the exercise of its powers under the full-faith-and-credit clause.

There is, however, a modification of the interest-weighing approach which may deserve some consideration. When the social and economic policies of two states are in conflict, it seems quite clear that a court is in no position to choose between them. When, however, the social and economic policy of one state is opposed only by the judicial-administration policies of another, a court might with some justification hold that the latter policy is of a lower order and ought to yield.289 This view might find some support in an interpretation of the full-faith-and-credit clause such as that suggested by the Court's reference to "the strong unifying principle embodied in the Full Faith and Credit Clause looking toward maximum enforcement in each state of the obligations or rights created or recognized by the statutes of sister states ..."290 On such an interpretation, the clause declares a national policy of uniform recognition and enforcement of substantive rights which are admittedly created by the laws of a state; the Constitution itself decrees that conflicting policies relating merely to matters of procedure, or the administration of courts, shall give way.291

289 In fact, however, in the cases involving actions on judgments the Court has made exactly the opposite evaluation. Compare Fauntleroy v. Lum, 210 U.S. 230 (1908), with Anglo-American Provision Co. v. Davis Provision Co., No. 1, 191 U.S. 373 (1903).


291 Even under such an interpretation there would probably be some limits. It would be going rather far to require a state which has only administrative machinery for processing claims for industrial injury to provide a forum for the adjudication of a workmen's compensation claim in accordance with foreign law. See Note, 6 Vand. L. Rev. 744 (1953).
tion is untenable; the choice between conflicting state policies is no less political when policies of judicial administration are involved than it is when only social and economic policies are involved. The subordination of procedural policies would destroy the doctrine of forum non conveniens; and while that doctrine is, in the main, the product of judicial decision, if it is to be declared illegitimate as state policy the declaration ought to come from Congress, and not from the Supreme Court which has embraced the same policy for the federal judicial system. It may be that all states in the long run would benefit if each were required to enforce the tax claims of the others, despite the cost of the increased caseload; but I do not have the information on which to base such a judgment, and it is difficult to see how such information could be made available to the Supreme Court, or how the Court could justify its use to support the judgment if it were available. Such a judgment can appropriately be made only by the states themselves, or by Congress. With respect to "heart balm" cases based upon the law of other states, the subordination of procedural policies would make the courts of New York the instruments of blackmail and extortion which they were before 1935; it will be a bold Supreme Court which interferes in such fashion with the New York legislature's design for keeping its own house in order.

It is instructive to compare the obligation of a state to provide a forum for a cause of action created by federal law. The Supreme Court has never held that such an obligation exists notwithstanding an express and bona fide state policy relating to judicial administration. When Rhode Island refused to entertain a consumer's action for damages under the Emergency Price Control Act because the action was "penal" it gave no policy content to that concept. It simply reiterated the formula to the effect that no state is required to enforce the penal laws of

293 The Court has held that the time within which an action may be brought to enforce a federal right may not be shortened by state statutes of limitation and nonclaim, e.g., Cox v. Roth, 348 U.S. 207, 210 (1955), but in such cases the policy of the statute as one related to the administration of the courts (as opposed to one concerned with protection of the defendant) was not clearly asserted. Cf. Wells v. Simonds Abrasive Co., 345 U.S. 514 (1953).
another. Certainly there was no declaration of a Rhode Island policy relating to the administration of courts which was inconsistent with providing a forum.295 Indeed, if any policy basis for the refusal is discernible, it is one of hostility to the national price-control policy and a desire to protect local enterprise against sanctions which were deemed unduly severe.296 Plainly, Rhode Island had no interest in the application of such policies, the subject being within the power of Congress and Congress having determined what the policy should be. The supremacy clause in such a case forecloses state social and economic policies just as the full-faith-and-credit clause forecloses them when the subject is solely within the control of a sister state. The Supreme Court, in reversing, justly treated Rhode Island’s refusal to entertain the action as an attempt to interpose that state’s own notions of wartime price-control policy.297 Its decision does not necessarily mean that, in the absence of an express directive from Congress requiring the states to provide a forum for federal causes of action, a state policy grounded in good faith upon considerations relating to the efficiency and cost of the local judicial system would be overridden. Indeed, the Court has made it clear that a state may decline to entertain an action under the Federal Employers’ Liability Act on grounds of forum non conveniens, so long as that policy is applied in good faith and in a nondiscriminatory way.298 There is little doubt that Congress

---

295 The closest approach to anything of the sort is the statement that “the contrary view would make the state courts, nolens volens, in effect, inferior federal courts to enforce all federal statutes, whenever congress so declares.” Robinson v. Norato, supra note 294, at 274, 43 A.2d at 475. The force of this is diminished if one recalls that Congress was not required to set up a system of inferior federal courts at all, and the original position of the defenders of states’ rights was that no such system should be established. See Hart & Wechsler, The Federal Courts and the Federal System 17–18, 28 (1953); Frankfurter & Landes, The Business of the Supreme Court 4–5 (1927); Frank, Historical Bases of the Federal Judicial System, 13 Law & Contemp. Prob. 3, 10 (1948).

296 Robinson v. Norato, 71 R.I. 256, 257, 43 A.2d 467, 468 (1945). “It is possible under that section for a landlord, who may have overcharged a weekly tenant as trifling a sum as ten cents a week, to be mulcted in damages at the end of the year in the sum of $2600, plus attorney’s fees and costs, although plaintiff’s actual damages would be only $5.20 and costs.” Id. at 262, 43 A.2d at 470.

297 Testa v. Katt, 330 U.S. 386 (1947). “For the policy of the federal Act is the prevailing policy in every state. Thus . . . this Court stated that a state court cannot ‘refuse to enforce the right arising from the law of the United States because of conceptions of impolicy or want of wisdom on the part of Congress in having called into play its lawful powers.’” Id. at 393. See also id. n.10.

298 Missouri ex rel. Southern Ry. v. Mayfield, 340 U.S. 1 (1950); Douglas v.
could, if it chose to do so, impose an obligation upon the state courts to provide a forum for federal causes of action regardless of local policies relating to judicial administration.\textsuperscript{299} Similarly, it could impose such an obligation under the full-faith-and-credit clause to entertain actions predicated on the laws of sister states. It is one thing for such an obligation to be imposed by Congress, in which all the states are represented and in which the necessary political decision can be made on the basis of information gathered by an investigating committee. It is quite another thing for it to be made by the Supreme Court.

I conclude that, in the absence of congressional action, the full-faith-and-credit clause does not require a state to provide a forum for causes of action predicated on the law of a sister state when the refusal to do so is grounded in good faith upon a policy of promoting the efficiency of the local courts and protecting them against abuse.