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Louis C. James

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THE EFFECTS OF FEDERAL DUE PROCESS OF LAW AND FULL FAITH AND CREDIT LIMITATIONS ON A FORUM STATE USING ITS PUBLIC POLICY TO NEGATE PARTIES' AUTONOMY IN THE VALIDITY OF CONFLICT-OF-LAWS CONTRACTS

PART TWO—FULL FAITH AND CREDIT

LOUIS C. JAMES*

FULL FAITH AND CREDIT CASES

I shall speak mainly in this section of the application of full faith and credit to statutes; I believe that many will agree with me that if there is jurisdiction in the forum, full faith and credit will usually be given to judgments of sister states.\(^{139}\)

In *Alaska Packers Ass'n v. Industrial Acc. Comm'n of Calif.*,\(^ {140}\) an alien, non-resident worker in California made a contract of employment there with appellant, an association doing business in California, whereby he would be transported as a seasonal worker to Alaska and returned to California when the work was completed. The agreement stipulated that in the event of an injury to the worker in the course of his employment, Alaska law, where he was to work, would apply. The worker was injured in the course

* Professor of Law, the American University, Washington College of Law, Washington, D.C.

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\(^{139}\) See *Alaska Packers Ass'n v. Industrial Acc. Comm'n of Calif.*, 294 U.S. 532, 546 (1935), in which the Court lists those types of cases in which a state court is not required to give full faith and credit to state judgments. See also, Reese, *Full Faith and Credit to Statutes: The Defense of Public Policy*, 19 U. of Chi. L. Rev. 339 (1951-52). Also, see Leflar, Conflict of Laws §§ 71, 74, 133-137, 141-143 (Student ed. 1959); Goodrich, Conflict of Laws 611-614 (3d ed. 1949); Stumberg, Principles of Conflict of Laws 111-133 (2d ed. 1951); Ehrenzweig, Conflict of Laws 206-234 (1962).

\(^{140}\) 294 U.S. 532 (1935).
of his employment in Alaska. Upon his return to California, he sued the appellant association under that state's workmen's compensation law. Two constitutional issues developed: (1) Would the due process of law clause of the Federal Constitution prevent California from assuming jurisdiction? and (2) Would California have to give full faith and credit to the Alaska Workmen's Compensation Statute?

The Court answered both questions quite definitely. California's interest in and contacts with the agreement, in an issue characterized as contract rather than tort, were of such weight that it did not have to fear any jurisdictional due process of law constitutional restrictions and did not have to give full faith and credit to the Alaska public policy. California was therefore permitted to use its own law (public policy) in the decision.

Mr. Justice Stone (later Chief Justice) delivered the Court's opinion. Said the Court:

Section 58 of the California Workmen's Compensation Act was then in force [when the contract of employment was made] which provides: "The commission shall have jurisdiction over all controversies arising out of injuries suffered without the territorial limits of this State in those cases where the injured employee is a resident of this State at the time of the injury and the contract of hire is made in this State . . . ."141

The California Workmen's Compensation Act further provided that "No contract, rule or regulation shall exempt the employer from liability for the compensation fixed by this act . . . ."142 Continued the Court:

Insofar as the California statute denies validity to the agreement that the parties should be bound by the Alaska Workmen's Compensation Act, and attempts to give a remedy for injuries suffered by a non-resident employee without this state, it is challenged as a denial of due process.143

Said the Court:

Petitioner [appellant association] also insists that as the Alaska statute affords, in Alaska, an exclusive remedy for the injury which occurred there, the California courts denied full faith and credit

141 Id. at 540-541.
143 294 U.S. at 539.
to the Alaska statute by refusing to recognize it as a defense to the application for an award under the California statute.\textsuperscript{144}

The Court first considered the due-process-of-law defense. Said the Court:

The California statute does not purport to have any extraterritorial effect, in the sense that it undertakes to impose a rule for foreign tribunals, nor did the judgment of this state court give it any. The statute assumes only to provide a remedy to be granted by the California Commission for injuries, received in the course of employment entered into within the state, wherever they may occur. [Observe contract made in California, which gave that state a most significant contact with the agreement.]\textsuperscript{145}

The Court then assumed that in Alaska the injured employee, if he had so chosen, could have asserted his rights to benefits under the Alaska statute. In such a case, if any effect were then given to the statute of California, it would be only by comity or possibly under the full faith and credit clause. The Court found that California's vital interests in and important contacts with essential elements of the transaction were such that it had due-process-of-law jurisdiction over the controversy. Also, the Court readily characterized the issue as one in contract rather than in tort. In so doing, the Court admitted that the results might have been different had a tort characterization been made by stating that:

While similar power to control the legal consequences of a tortious act committed elsewhere has been denied, \textit{Western Union Telegraph Co. v. Brown}, 234 U.S., 542, 547; \textit{Western Union Telegraph Co. v. Chiles}, 214 U.S. 274, 278; compare \textit{Western Union Telegraph Co. v. Commercial Milling Co.}, 218 U.S. 406, the liability under workmen's compensation acts is not for a tort. It is imposed as an incident of the employment relationship, as a cost to be borne by the business enterprise, rather than as an attempt to extend redress for the wrongful act of the employer. See \textit{Bradford Electric Light Co. v. Clapper}, supra., 157, 158 [286 U.S. 145 (1932)].\textsuperscript{146}

The Court looked at the peculiar factual situation presented by this case. It found that,

The employee, an alien more than two thousand miles from his home in Mexico, was, with fifty-three others, employed by petitioner in California. The contract called for their transportation

\textsuperscript{144} \textit{Ibid.}
\textsuperscript{145} \textit{Id. at 540.}
\textsuperscript{146} \textit{Id. at 541.}
to Alaska, some three thousand miles distant, for seasonal employment of between two and three months, at the conclusion of which they were to be returned to California, and were there to receive their wages.\textsuperscript{147}

The Court continued,

The meager facts disclosed by the record suggest a practice of employing workers in California for seasonal occupation in Alaska, under such conditions as to make it improbable that the employees injured in the course of their employment in Alaska would be able to apply for compensation there. It was necessary for them to return to California in order to receive their full wages. They would be accompanied by their fellow workers, who would normally be the witnesses required to establish the fact of the injury and its nature. The probability is slight that injured workmen, once returned to California, would be able to retrace their steps to Alaska, and there successfully \textit{[was the Court speaking in terms of convenient or inconvenient forum?] }procure their claim for compensation. Without a remedy in California, they would be remediless, and there was the danger that they might become public charges \textit{[vital interests of California demonstrated]}, both matters of grave public concern to the state.\textsuperscript{148}

Therefore, thought the Court, California had a reasonable basis for the use of its statute rather than that of Alaska. There was, in the Court's view, a superior governmental interest in California instead of Alaska, such that its public policy instead of that of Alaska should be used. Then the Court stated:

Even though the compensation acts of either jurisdiction may, consistently with due process, be applied in either, the question remains whether the California court has failed to accord full faith and credit to the Alaska statute in refusing to allow it as a defense to the award of the California Commission.\textsuperscript{149}

If there is a conflict of two states in their public policies, then one must give way\textsuperscript{150} to the other depending upon vital interests and contacts of the two states with essential elements of the contract. Which public policy must give way is dependent upon which state has a better balance of equities in its favor under the facts of the particular situation. California had held in its state courts that it did not have to give full faith and credit to the public policy of Alaska.\textsuperscript{151} The Court said,

\textsuperscript{147} \textit{Id.} at 542.
\textsuperscript{148} \textit{Ibid.}
\textsuperscript{149} \textit{Id.} at 544.
\textsuperscript{150} Hughes v. Fetter, 341 U.S. 609 (1951), Mr. Justice Black speaking for the Court.
\textsuperscript{151} 294 U.S. at 545.
To the extent that California is required to give full faith and credit to the conflicting Alaska statute, it must be denied the right to apply in its own courts a statute of the state, lawfully enacted in pursuance of its domestic policy.\textsuperscript{162}

Did full faith and credit under this factual pattern require the California Courts to give more credit to an Alaskan statute than to a California law? The Court then said:

It has often been recognized by this Court that there are some limitations upon the extent to which a state will be required by the full faith and credit clause to enforce even the judgment of another state, in contravention of its own statutes or policy. [Note the conjunction "or" in this last sentence.] See Wisconsin v. Pelican Insurance Co., 127 U.S. 265; Huntington v. Attrill, 146 U.S. 657; Finney v. Guy, 189 U.S. 335; see also Clarke v. Clarke, 178 U.S. 186; Hood v. Mchee, 237 U.S. 611; compare Gasquet v. Fenner, 247 U.S. 16.\textsuperscript{158}

Then the Court examined the equity of always requiring a forum, under all conditions, to give full faith and credit to the statutes of other states in its courts when there is a conflict between statutes.

When statutes of two states conflict, there must be

\ldots some accommodation of the conflicting interests of the two states. \ldots A rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be enforced in its own. Unless by force of that clause a greater effect is thus to be given to a state statute abroad than the clause permits it to have at home, it is unavoidable that this Court determine for itself the extent to which the statute of one state may qualify or deny rights asserted under the statute of another. [The Court seems to be stating that in any factual situation involving a clash of public policies of two states in Conflict-of-Laws matters, the Court must rationally make a decision from its own subjective appraisement of the facts before it.]

The Court thought that in any multistate conflict of states' public policies in regard to a contractual transaction

\ldots rights claimed under one statute prevail only by denying effect to the other. In both the conflict is to be resolved, not by giving automatic effect to the full faith and credit clause, compelling the courts of each state to subordinate its own statutes to those of the other, but by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight. [Again, we observe the element of equity, fairness,

\textsuperscript{162} Ibid.
\textsuperscript{158} Id. at 546.
\textsuperscript{154} Id. at 547.
reasonableness, and non-discrimination in the Court’s remarks. How else is the equation of Order versus Liberty to be balanced except by these factors of a least common denominator of constitutional construction?\textsuperscript{155}

In its decision, the Court stated that,

The enactment of the present statute of California was within state power and infringes no constitutional provision. Prima facie every state is entitled to enforce in its own courts its own statutes, lawfully enacted. One who challenges that right, because of the force given to a conflicting statute of another state by the full faith and credit clause, assumes the burden of showing, upon some rational basis, that of the conflicting interests involved those of the foreign state are superior to those of the forum. It follows that not every statute of another state will override a conflicting statute of the forum by virtue of the full faith and credit clause; that the statute of a state may sometimes override the conflicting statute of another, both at home and abroad; and, again, that the two conflicting statutes may each prevail over the other at home, although given no extraterritorial effect in the state of the other.\textsuperscript{156}

Let us pause for a moment and see what the Court has said. First, it is quite obvious that for full faith and credit to be considered at all, there must be jurisdiction of the forum over the controversy. Otherwise, there would be a taking of property without due process of law.\textsuperscript{157} That this due process jurisdiction is premised upon the vitality of the contacts and interests of a state in a multistate contractual transaction is hardly open to doubt.\textsuperscript{158} Second, after we are sure of jurisdictional standing of the forum, we begin with a presumption that a lawful enactment of the public policy of a forum having jurisdiction over the controversy is due respect in the forum by forum courts;\textsuperscript{159} that the burden of showing that the statute of another state is owed full faith and credit because that state has superior contacts with and interests in an essential element of the transaction rests upon the party who alleges it. Third, that if there is a balance between important contacts and interests of states with the transaction, then each state has a right in its own courts to use its public policy in the litiga-

\textsuperscript{155} Ibid.

\textsuperscript{156} Id. at 547-548.


\textsuperscript{158} Ibid.

\textsuperscript{159} Alaska Packers Ass'n v. Industrial Acc. Comm'n of Calif., 294 U.S. 532, 547-548 (1935).
tion arising in its courts. Fourth, that there has to be an arbiter in cases involving states with conflicting policies when those states each have contacts and interests in the transaction; that this arbiter is the United States Supreme Court. Fifth, that the Court will rationally but subjectively appraise the respective factual situations in each case as it arises, and, as best it can, weigh the contacts and interests of each state with the transaction to determine which state, if any, has the superior governmental interests in and contacts with an essential element of the transaction; the state having this superiority will be permitted to use its policy determinants in the case; if the other state refuses to give full faith and credit to the superior state's statutes, then the Court will, as arbiter, see that it does. Sixth, that full faith and credit is not an automatic constitutional norm with absolutes as standards but depends upon equitable considerations of fairness and justice by the Court in making its own determination of where the superior governmental contacts and interests lie. Seventh, that when the contacts and interests with essential elements of the transaction are evenly balanced between the states involved, then the Court will leave each state its power to apply in its courts its own policy determinants. The equation of Order versus Liberty based upon factors or elements of the least common denominator in arriving at the decision will prevail in all cases as the Court rationally but subjectively sees the balancing of contacts and governmental interests of the respective states concerned. Behind the Court's decision, therefore, in each case must be ranged the factors of fairness, justice, equity, reasonableness, and non-discrimination. Any party litigant proceeding in one of these multistate factual situa-

160 Ibid.
161 See Hughes v. Fetter, 341 U.S. 609 (1951). In a federal system, an arbiter is a necessity by the very nature of the system of government when there is a conflict between the parts of the system. The Supreme Court has, on the whole, assumed much of the duties of an arbiter in such matters.
163 See Hughes v. Fetter, supra note 161.
165 This is certainly implied in both Alaska Packers Ass'n v. Industrial Acc. Comm'n of Calif., supra note 162, and Watson v. Employers Liab. Assurance Corp., Ltd., supra note 164.
166 Ibid.
167 Ibid.
tions had as well recognize these intangibles at the start and direct his efforts in getting a decision by a showing of superior equities in the policy he desires to be applied to the decision by the Court. Eighth, it appears that characterization may play a very important part in many case decisions; as, for instance, it may be quite vital whether the issue is characterized as tort or contract in jurisdictional attainment and the exercise of full faith and credit. It would appear that there are constitutional restrictions under due process of law and even under full faith and credit as to how far a state court may proceed to characterize the question arbitrarily and unreasonably in order to attain the use of its public policy.

Ninth, it is uncertain how far the concept of a convenient or inconvenient forum may be a part of the bases of acquiring jurisdiction in the first place; possibly, this is even more hazy under the full faith and credit clause. Since important contacts and vital interests in a multistate Conflict-of-Laws contract transaction may be determining aids to the Court in fixing not only jurisdiction but choice of law as well, it seems not improbable that indirectly, if not directly, these interests and contacts so important in choosing a proper forum for jurisdictional purposes may also have some bearing, though how much is far from certain, under full faith and credit restrictions. Tenth, as to the effect of full faith and credit restrictions on a forum’s use of its public policy to negate parties’ autonomy, it would appear that if the state law chosen by the parties to control their agreement has superior contacts and interests, as seen by the Court, with an essential element of the transac-
tion, this stipulated law by the parties may be upheld. On the other hand, if the Court finds that the place stipulated by the parties has inferior contacts with or interests in an essential element of the transaction, or even contacts and interests equal to other states', then the stipulated law may be required to give way to another state's law (public policy).

In the Alaska Packer's case, the Court proceeds to compare the background material for its decision with that of its decision in Bradford Elec. Light Co. v. Clapper. The Court makes a comparison of governmental interests of the Clapper case and the case at bar. Said the Court,

There, [Clapper case] upon an appraisal of the governmental interests of the two states, Vermont and New Hampshire, it was held that the Compensation Act of Vermont, where the statute of employer and employee was established [this status was in California in the Alaska Packers case], should prevail over the conflicting statute of New Hampshire, where the injury occurred and the suit was brought. In reaching that conclusion, weight was given to the following circumstances: that liability under the Vermont Act was an incident of the status of employer and employee created within Vermont, and as such continued in New Hampshire where the injury occurred; that it was a substitute for a tort action [characterization is important here], which was permitted by the statute of New Hampshire; that the Vermont statute expressly provided that it should extend to injuries occurring without the state and was interpreted to preclude recovery by proceedings brought in any other state; and, that there was no adequate basis for saying that the compulsory recognition of the Vermont statute by the courts of New Hampshire would be obnoxious to the public policy of that state.

Continued the Court in regard to the Clapper case,

If, for the reasons given [immediately above], the Vermont statute was held to override the New Hampshire statute in the courts of New Hampshire [not obnoxious to New Hampshire laws if tried there], it is hardly to be supposed that the Constitution would require it to be given any less effect in Vermont, even though the New Hampshire statute were set up as a defense to proceedings

177 Undoubtedly, had the parties chosen California law in Alaska Packers, the Court, finding superior contacts and interests of essential elements of the transaction with California, would have sustained their choice of law. In a due process case, Home Ins. Co. v. Dick, 281 U.S. 397 (1930), the Court sustained the parties' choice of law when the connections were vital and the foreign nation had vital interests in the contract.


179 286 U.S. 145 (1932).

180 294 U.S. at 548.
there. Similarly, in the present case, only if it appears that, in the conflict of interests which have found expression in the conflicting statutes, the interest of Alaska is superior to that of California, is there rational basis for denying to the courts of California there to apply the laws of their own state. While in *Bradford Electric Light Co. v. Clapper*, supra., it did not appear that the subordination of the New Hampshire statute to that of Vermont by compulsion of the full faith and credit clause, would be obnoxious to the policy of New Hampshire, the Supreme Court of California has declared it to be contrary to the policy of the State to give effect to the provisions of the Alaska statute and that they conflict with its own statutes.  

The Court looked to state contacts of the transaction also in comparison of the *Clapper* case with the *Alaska Packer's* case. Said the Court:

There are only two differences material for present purposes, between the facts of the *Clapper* case and those presented in this case: the employee here is not a resident of the place in which the employment was begun, and the employment was wholly to be performed in the jurisdiction in which the injury arose. Whether these differences, with a third—that the Vermont statute was intended to preclude resort to any other remedy even without the state—are, when taken with the differences between the New Hampshire and Alaska compensation laws, sufficient ground for withholding or denying any effect to the California statute in Alaska, we need not now inquire. [Note the Court's reasoning just above and its subjective reflections.] But it is clear that they do not lessen the interest of California in enforcing its compensation act within the state, or give any added weight to the interest of Alaska in having its statute enforced in California. [The Court also considers again the vital interests of California in the Alaska Packers case. It states them in the next sentence.] We need not repeat what we have already said of the peculiar concern of California in providing a remedy for those in the situation of the present employee. Its interest is sufficient to justify its legislation and is greater than that of Alaska, of which the employee was never a resident and to which he may never return. Nor should the fact that the employment was wholly to be performed in Alaska, although temporary in character, lead to any different result. It neither diminishes the interest of California in giving a remedy to the employee, who is a member of a class in the protection of which the state has an especial interest [Since this employee in *Alaska Packers* was a non-resident and apparently had no property in California, it would seem that if he became destitute and could not pay his bills, then the taxpayers of California had to pay them for him.], nor does it enlarge the interest of Alaska whose temporary relationship with the employee has been severed. [Compare the "technical domicile" in due process considerations of *Dick*]

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181 *Id.* at 548-549.
Then the Court found that the interests of Alaska in the case at bar were not shown superior to those of California; that no persuasive rationale was shown for denying to a California forum the right to use its own public policy in its home courts; that the full faith and credit clause, under these circumstances, weighed subjectively, as the Court sees the factual situation in this particular case, did not require the California statute to yield to that of Alaska. As the Court subjectively saw both the Clapper case and the Alaska Packers case, it was doing equity to all parties concerned. Full faith and credit is not automatic; it has fair, just, and equitable underpinnings upon which the decision of each case must rest.

Before leaving these two cases, we must observe that characterization played important roles in each; that convenient or inconvenient forums certainly were considered in the Alaska Packers case in jurisdictional findings; and that although the Court did not mention the role of the stipulated law in Alaska Packers, it seems rational to surmise that the Court took the stipulated law into consideration, but, finding that more important contacts and interests were with California, the parties were restricted in their choice of law accordingly. This is not out of line with our “general rule.”

In Aetna Life Ins. Co. v. Dunken, we find much the same type of balancing of interests among all the parties concerned with the transaction; there is a consideration of governmental interests and vitality of state contacts with essential elements of the transaction. A seven-year term policy, which was issued by a life insurance company in Connecticut and delivered to the insured in Tennessee

183 294 U.S. at 549-550.
187 Ibid.
188 See the "general rule" explained in the first part of this article.
189 266 U.S. 389 (1924).
where he then resided, provided that at the sole option of the insured and upon any anniversary of its date, without medical examination, the policy would be convertible into a 20-payment-life commercial policy, which would bear the same date, etc., on the payment of the difference between the premiums then paid and those to be required under the converted policy. After the insured had become a Texas citizen and inhabitant, he exercised the option in due form, and the converted policy was sent to him in Texas. An action was brought upon the converted policy in Texas, where the insurance company had been doing business. The forum court used a Texas statute to impose a 12% penalty on the insurance company and required it to pay the claimant's attorneys fees; these would not have been allowed under Tennessee law.

The Court considered first whether the converted policy was a new policy or merely a continuation of the first policy. This was purely a matter of characterization, and, as previously pointed out, may often turn the decision. The Court decided that the converted policy was but a continuation of the first policy of insurance.

Next the Court wanted to see, logically from the facts, which state had the most important contacts with and interests in essential elements of the transaction. Of course, this involved the Court's subjective appraisal of a factual situation and the weighing of the facts according to their importance. It observed that the policy had more important contacts with Tennessee; thus, the Court held it to be a Tennessee contract, as was the converted policy.

The Court, therefore, upon appeal from the Texas courts, held that the use of Texas public policy violated the Constitution. It found that a state could not regulate business outside of its limits, and control an agreement made by citizens of other states in disregard of their laws—the proper law to be used in such matters was to be determined by the facts of the case. Said the Court,

The insurance company is a Connecticut corporation. When it issued the policy it was doing business in Texas under the laws of

that State, of which Dunken [the insured] then was a citizen and inhabitant.191

Continued the Court,

The policy in question was issued under the following circumstances: On December 17, 1910, H. B. Alexander, manager for the insurance company in the State of Tennessee, took the application of Dunken, then a resident of Tennessee, for a seven-year term policy. The policy was duly issued in Connecticut and delivered in Tennessee to Dunken.192

Then, the Court went into the nature of convertibility of the term policy into a 20-payment-commercial policy and under what circumstances it was accomplished. It considered the later residence and citizenship of the insured in Texas, and the conversion of the policy at that time. From all of the evidence the Court found that the contract was a Tennessee agreement, rather than Connecticut or Texas. It held that for Texas courts to find otherwise would violate the contract impairment clause, the full faith and credit clause, and, apparently, the due process clause.

It is interesting to note that the Court cites as authority for its opinion New York Life Ins. Co. v. Dodge193 and Mutual Life Ins. Co. v. Liebing.194 Not only was the language of these policies in the case at bar discussed as possible factors in the decisions, but the relevancy of contacts and interests can be observed, I believe, by rational inference. Are not these cases more due-process-of-law controversies195 on the whole rather than full faith and credit clause cases? May we infer, therefore, that bases of jurisdiction and bases of full faith and credit, although the two are different, are in many respects similar;196 and, that the same equitable consider-
ations that lie as a least common denominator for the one may be found in the other? May we not likewise infer that when parties to an agreement stipulate a place law to control their agreement, they must weigh carefully the importance of that place having contacts with and vital interests in essential elements of their transaction? If this is done with great care, may we not assume that the Court will hold for the stipulated place law when the Court finds that its connections and interests are superior to other multistate contacts of the transaction.

In *Aetna*, the Court, upon finding that Tennessee law applied, did not state with any high degree of particularity the one specific ground upon which it found that Texas public policy must yield to a constitutional mandate. May we not assume that possibly a reason for this was that the Court found the underpinnings of the least common denominator as a unit were sufficient; that these underpinnings were in common with due process, full faith and credit, and the contract impairment clause? Remember that the challenge to the Texas court’s opinions rested upon grounds relating to "... the contract impairment clause, the full faith and credit clause, and the several clauses of Sec. 1 of the Fourteenth Amendment of the Federal Constitution ...".

Many of the same bases of constitutional decision are presented in *Pacific Employers Ins. Co. v. Industrial Acc. Comm’n* as were...
presented in *Alaska Packers* and the *Dunken* cases. A Massachusetts corporation employee, residing in that state and regularly employed under an agreement of employment made there, was injured in the course of his employment while on a temporary assignment for his employer in California. The Workmen's Compensation Act of Massachusetts purported to provide an exclusive remedy (unless the employee notified his employer within a certain time after an injury of some other choice of remedy he desired to pursue, which, in this case, he did not do), even though the injury might be suffered in another jurisdiction. The Court distinguished the *Clapper* case\(^\text{204}\) on the ground that the public policy of the one state in *Clapper* was not obnoxious to that of the other state connected with the transaction, while in *Pacific* the California and Massachusetts laws were in direct and open conflict with each other and highly obnoxious to one another.

Again, the Court spoke in terms of its being an arbiter\(^\text{205}\) in such matters when there was a clash of states' policies; that the full faith and credit clause was not automatic; that in essence there must be a balancing of interests—state against state—and that here it seemed poor national policy to make an injured employee in California return to his state for a remedy even if California enforced Massachusetts law in its courts as the proper choice of laws. (*Could this be a reference to an inconvenient forum as a basis of application of full faith and credit?*); that California might not have the administrative machinery necessary to perform its tasks, and that California physicians, hospitals, and other parties necessary to the cure of the patient should not be made to wait on a Massachusetts decision and the administration of Massachusetts law to obtain redress for any costs entailed by the injured employee in California. Here we see just how vital the California forum's interests are in the case. The Court felt that in this litigation the policies of each state—Massachusetts and California—were entitled to be administered as that state thought best, but the contacts with

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When there is conflict among states of a federation, there must be an arbiter. In our system of government, the United States Supreme Court seems to fill that position quite well.
California were too important to force it automatically to give full faith and credit to the Massachusetts statutes.

The Court looked into the human societal issues of the equities in California which, as we have seen, underlie much of constitutional mandate in regard to state public policies under full faith and credit. Said Mr. Justice Stone for the Court:

The question is whether the full faith and credit which the Constitution requires to be given to a Massachusetts workmen's compensation statute precludes California from applying its own workmen's compensation act in the case of an injury suffered by a Massachusetts employee of a Massachusetts employer while in California in the course of his employment.\(^{206}\) [Is not the Court balancing equities here?]

The Court, in its decision that California need not give full faith and credit to the Massachusetts statute, found that each state in its own courts could apply its own public policy because of the weight of contacts and interests, but that neither had to give full faith and credit to the statutes of the other. In other words, equity demanded that the equation of Order versus Liberty be grounded upon principles of fairness, reasonableness, and nondiscrimination since the forcing of one state to give full faith and credit to the other's statutes when contacts and interests were so well matched in each would amount to unfair discrimination. Full faith and credit is not automatic in a clash of states' interests; it must be weighed in the scales of justice and equity depending upon the peculiar factual pattern of each case. In such an event, it would seem that a stipulation in this case for Massachusetts law to control, might fall to an equal interest and contact of California with the transaction. When contacts and interests are evenly divided between states in a multistate contract, the public policy of the forum—it being one of the interested states—may or may not be overridden in the interest of the parties' stipulated intent theory by means of the full faith and credit clause, depending on the Court's equitable evaluation of parties' intended place law as having vital contacts and interests with an essential element of the transaction.

*Pink, Supt. of Ins. of New York v. A.A.A. Highway Express, Inc.*,\(^{207}\) again underlines the principles of full faith and credit con-

\(^{206}\) 306 U.S. at 497.

\(^{207}\) 314 U.S. 201 (1941).
stitutional construction thus far advanced in this article. New York was the state of incorporation of the Auto Mutual Indemnity Company, which became insolvent and subject to winding up by the New York Superintendent of Insurance, Pink. By the laws of New York, policyholders of a mutual insurance company became members of the company and subject to assessments as fixed by such laws when the company was in liquidation under state proceedings. The policies in this case were purchased by Georgia residents and citizens. The policies did not indicate that by the purchase of the insurance the buyers would become stockholders; there was a reference to such law on the back of the policies, but no reference to it in the contract itself. The New York Insurance Superintendent sought to require Georgia to give full faith and credit to judgments in New York winding up the company. It was admitted that mailed notices of such suits for judgments were sent to the Georgia purchasers, but they did not appear and recognize the jurisdiction of the New York court. It was admitted by the New York authorities in the case that these judgments were not personal against the Georgia policyholders. The Georgia court interpreted (determined or characterized) the policies and found that the reference to the New York law on the reverse side of the contracts was not a part of the agreement; that the policyholders apparently were therefore not stockholders in the New York company; that therefore it did not have to give full faith and credit to the New York law concerning a matter domestic to Georgia and involving a mere interpretation by the Georgia court of the policies of insurance.

The Court, upon appeal, agreed with Georgia. It found that these policies were local (i.e., it characterized them as local) Georgia policies, (apparently delivered in Georgia) and subject to Georgia domestic policy in interpreting whether the policyholders, by the policies, became members of the New York company as stockholders and were, therefore, liable for the New York insurance Superintendent's special assessments under New York statutes. The policyholders had not appeared or been personally served in the New York suit leading to the New York judgment in liquidation of the company. Said the Court:

208 In teaching Conflict of Laws, I have found that students have less difficulty with
Without the command of some constitutionally controlling statute, the Georgia court was free to interpret [characterize] the obligation of the policy as limited to those stipulations expressed on its face and as excluding any stipulation for membership or for liability to assessment which the contract did not mention.\textsuperscript{209}

Continued the Court:

Every state has authority under the Constitution to establish laws, through both its judicial and its legislative arms, which are controlling upon its inhabitants and domestic affairs. When it is demanded in the domestic forum that the operation of those laws be supplanted by the statute of another state, that forum is not bound, apart from the full faith and credit clause, to yield to the demand, and the law of neither can, by its own force, determine the choice of law for the other.\textsuperscript{210}

Then, the Court observed that:

To the extent that Georgia must give full faith and credit to the New York statutes and judicial proceedings, it must be denied authority to adjudicate the meaning and domestic effect under its own laws of a contract entered into by its own inhabitants and containing no stipulation that they should be bound by obligations extrinsically imposed by New York law.\textsuperscript{211} [\textit{Did the Court at this point mean that had the parties stipulated expressly to be bound by New York law that such a stipulation might have been basic in the decision? Possibly, therefore, had the parties stipulated expressly for New York law to control, it might have been permitted by the Court.}]

Then, the Court continued:

It was the purpose of that provision [\textit{full faith and credit clause}] to preserve rights acquired or confirmed under the public acts and judicial proceedings of one state by requiring recognition of their validity in others. But the very nature of the federal union of states, to each of which is reserved the sovereign right to make its own laws, precludes resort to the Constitution as the means of compelling one state wholly to subordinate its own laws and policy concerning its peculiarly domestic affairs to the laws and policy of others. [\textit{Note peculiarly 'domestic affairs' characterization.}] When such conflict of interest arises, it is for this Court to resolve it by determining how far the full faith and credit clause demands the qualification or denial of rights asserted under the laws of one state, that of the forum, by the public acts and judicial proceedings of another.\textsuperscript{212}

\textsuperscript{209} 314 U.S. at 209.
\textsuperscript{210} Ibid.
\textsuperscript{211} Id. at 209-210.
\textsuperscript{212} Id. at 210.
The Court continued with a discussion of the peculiar domestic affairs in this case with which the full faith and credit clause was not intended to interfere. In other words, Georgia, in superior interests and contacts, surpassed New York under this factual pattern as the Court subjectively saw the picture. The Court readily cited *Griffin v. McCoach*,\(^{218}\) as in point. Then, the Court observed that:

\begin{quote}
Were it not for the New York statute, there could be no question of Georgia's authority to adjudicate the rights and obligations arising under the policies. And as we have seen [subjective appraisal by the Court], the only basis for the imposition by New York of its commands on the Georgia court and policyholders is the assumption by the latter of membership in the New York company. But this, in the circumstances of this case, depends upon the meaning and effect of all the provisions appearing on the policies with respect to the assumption of membership, which is for Georgia [to characterize] to determine.\(^{214}\)
\end{quote}

The Court then found that full faith and credit was not required by Georgia because of the peculiar factual pattern of local or domestic interests and contacts of the agreements with Georgia which overrode the contacts and interests of New York.

*Carroll v. Lanza*\(^{215}\) seems to buttress what we have said before, both in regard to constitutional construction and in regard to the effects of full faith and credit limitations on a forum's arbitrary and discriminatory use of its public policy to negate the parties' stipulated place law. The petitioner, Carroll, was employed by Hogan, an intervenor, who was in turn a subcontractor performing work for Lanza, the respondent, and the general contractor. Both Hogan and Carroll were residents of Missouri. Carroll's employment agreement with Hogan was made in Missouri, but the work under this contract was performed in Arkansas where the injury occurred. Carroll was not aware that he had remedies under the law of Arkansas and received some thirty-four weeks of payments for the injury under the Missouri Compensation Act. This Act was applicable to injuries received either inside or outside the state in case the employment agreement was made in the state. The Act also provided that every employer and employee

\(^{213}\) 313 U.S. 498 (1941).
\(^{214}\) 314 U.S. at 211.
\(^{215}\) 349 U.S. 408 (1955).
shall be "conclusively presumed to have elected to accept" its provisions unless "prior to the accident" the employee filed with the Workmen's Compensation Commission of the state a written notice that he had "elected" to refuse this provision of the Act.\textsuperscript{218} It appears that no notice, as required, was filed. Also, the Act provided that the rights and remedies which should be granted by it "shall exclude all other rights and remedies . . . at common law or otherwise," by reason of the injury or death of the employee.\textsuperscript{217}

Also, there was an Arkansas provision for Workmen's Compensation under its Act. This Act provided for an exclusive remedy of an employee against his employer, but not against any third party. The lower court had ruled upon a review of Arkansas authorities that a general contractor, such as the respondent, Lanza, was a third party under the Arkansas Act.

During the period that Carroll was receiving his weekly payments under the Compensation Act of Missouri, he decided to bring suit against Lanza for common-law damages in the courts of Arkansas. The case was removed to the federal courts. Here a judgment was had for Carroll. It seems that the Court of Appeals,\textsuperscript{218} in agreeing with the lower court that the judgment was proper under the law of Arkansas, reversed on the constitutional ground that the full faith and credit clause prevented recovery. There was an appeal to the United States Supreme Court upon the doubts that existed as to the correctness of the decision under \textit{Pacific Employers Ins. Co. v. Comm'n}.\textsuperscript{219}

The Court of Appeals had thought that \textit{Magnolia Petroleum Co. v. Hunt},\textsuperscript{220} was controlling. In the \textit{Magnolia} case, the employee had received a final award for workmen's compensation in his forum, which was also the place of injury. After this, he returned to his home state and brought suit to recover under his home state's workmen's compensation statutes. The Court in that case held that the home state was precluded under the constitutional mandate of full faith and credit from rendering an award. In the

\textsuperscript{216} Mo. Rev. Stat. 1949, § 287.060.
\textsuperscript{217} Mo. Rev. Stat. 1949, § 287.120
\textsuperscript{218} 216 F.2d 808 (8th Cir. 1954).
\textsuperscript{219} 306 U.S. 493 (1939).
\textsuperscript{220} 320 U.S. 430 (1943).
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Carroll case, though, there was no final award as in Magnolia. Under the Missouri Act, the payments were apparently begun automatically upon receipt of notice of the injury to the employee. Although there was a provision which provided for an adjudication under the Missouri Act in cases similar to the one at bar, in fact no adjudication was sought or gotten under the Missouri Act.

Said the Court:

Nor do we have a case where an employee, knowing of two remedies which purport to be mutually exclusive, chooses one as against the other and therefore is precluded a second choice by the law of the forum. Rather we have the naked question whether the Full Faith and Credit Clause makes Missouri's statute a bar to Arkansas's common-law remedy.221

Then the Court said:

A statute is a “public act” within the meaning of the Full Faith and Credit Clause. . . .222

Continued the Court:

The Pacific Employers Insurance Co. case223 allowed the Compensation Act of the place of injury to override the Compensation Act of the home State. Here [case at bar] it is a common-law action that is asserted against the exclusiveness of the remedy of the home State; and that is seized on as marking a difference. That is not in our judgment a material difference. [Observe the Court's subjective rationalization at this point.] Whatever deprives the remedy of the home State of its exclusive character qualifies or contravenes the policy of that State. [Note the equating of policy and law of a state.] and denies it full faith and credit, if full faith and credit is due. But the Pacific Employers Ins. Co. case teaches that in these personal injury cases the State where the injury occurs need not be a vassal to the home State and allow only that remedy which the home State has marked as the exclusive one. The State of the forum also has interests to serve and to protect. Here Arkansas has opened its courts to negligence suits against prime contractors, refusing to make relief by way of workmen's compensation the exclusive remedy. . . . Here interests are large and considerable and are to be weighed not only in the light of the facts of this case but by the kind of situation presented. [Is the Court “compartamentalizing” here so that we must note the nature of the action, its purpose, the nature of the damage done, etc., so that we have rules separate and distinct for each case segment in a Conflict-of-Laws case?] For we write not only for this case and this day alone, but for this type of case. [Do we have to find special contacts and interests in this type of case in order to determine the Court's

221 349 U.S. at 411.
222 Ibid.
223 Supra note 219.
decisional bases? The State where the tort occurs [Is the Court mixing Tort and Contract concepts in its inferred characterization here?] certainly has a concern in the problems following in the wake of the injury. The problems of medical care and of possible dependents are among these, as Pacific Employers Insurance Co. v. Commission, supra., emphasized. [Is this not true of all types of litigation?] . . . . A State that legislates concerning them is exercising traditional powers of sovereignty. [Is this not true of most types of state legislation?] Cf., Watson v. Employers Liability Corporation, 348 U.S. 66, 67. Arkansas therefore has a legitimate interest in opening her courts to suits of this nature, even though in this case Carroll's injury may have cast no burden on her or on her institutions.224

Then the Court tried to distinguish Hughes v. Fetter225 from the case at bar. It stated that:

This is not a case like Hughes v. Fetter, 341 U.S. 609, where the State of the forum seeks to exclude from its courts actions arising under a foreign statute. In that case, we held that Wisconsin could not refuse to entertain a wrongful death action under an Illinois statute for an injury occurring in Illinois, since we found no sufficient policy considerations to warrant such refusal. And see Broderick v. Rosner, 294 U.S. 629. The present case is a much weaker one for application of the Full Faith and Credit Clause. Arkansas, the State of the forum, is not adopting any policy of hostility to the public Acts of Missouri. It is choosing to apply its own rule of law to give affirmative relief for an action arising within its borders.226

Then, the Court concluded that Missouri, apparently because of its important contacts and interests, may make her compensation statutes as exclusive as she likes and do as much as she wishes with them in her own courts. But the constitutional issue is raised if and when Missouri attempts to extend her laws or policy determinants into other jurisdictions which have, as subjectively viewed by the Court, as important and vital contacts and interests as does Missouri; and, thus, the other state in its courts may do in its courts the same as Missouri may do in its. Said the Court:

Arkansas can adopt Missouri's policy [laws] if she likes. Or, as the Pacific Employers Insurance Company case teaches, she may supplement it or displace it with another, insofar as remedies for acts occurring within her boundaries are concerned. [Note the Court's differentiation here between substantive law and adjective law by means of characterization.] Were it otherwise, the State where the  

226 349 U.S. at 413.
injury occurred would be powerless to provide any remedies [Are we to take remedies here as characterized as procedural, or are remedies spoken of in terms of a broader perspective?] or safeguards to nonresident employees working within its borders. We do not think [subjective appraisement again by the Court.] the Full Faith and Credit Clause demands that subserviency from the State of the injury.\textsuperscript{227}

There was a noteworthy Frankfurter dissent in this case.\textsuperscript{228} It would appear that Mr. Justice Frankfurter would rely on the "Abstention Doctrine,"\textsuperscript{229} although he did voice his opinion on the factual situation. The dissent was concurred in by Justices Burton and Harlan.\textsuperscript{230} In spite of his views on "Abstention," Mr. Justice Frankfurter seemed to think that the choice of law should have been either that of Arkansas or Louisiana rather than the law of Missouri. He found from the facts that Hogan (the subcontractor) was a Missouri employer and had a Missouri employment agreement with Carroll (the injured workman). Therefore, when Carroll sought compensation in Arkansas (where he was injured), Hogan and his insurer might have relied upon the statutes of Missouri and the \textit{Clapper}\textsuperscript{231} case as a defense. Why they did not is not certain. Then, Justice Frankfurter found that Lanza (the general contractor) was not a Missouri employer; that the record did not disclose that he had a Missouri employment contract with either Carroll or with Hogan. He observed that the basic agreement between Hogan and Lanza was on a Louisiana letterhead and was a contract for work apparently to be done in Arkansas exclusively. It seems that Hogan had promised to secure workmen and, "It is further understood that . . . Hogan . . . will carry the necessary insurance on his men in according (sic) with the rules of the state of Arkansas." (Is not this a stipulation for Arkansas law to control the agreement, indirectly, if not directly?) Frankfurter then observed that the supplemental agreement for the special work on which Carroll was injured consisted of a letter bid by Hogan to Lanza and a similar means of reply authorizing Hogan to proceed. So, from the choice of law in the case, it seemed to him that the choice should lie between the law of Louisiana or

\textsuperscript{227} Id. at 408, 413, 414 (1955).
\textsuperscript{228} Id. at 414-426.
\textsuperscript{230} 349 U.S. at 414-426.
\textsuperscript{231} \textit{Bradford Elec. Light Co. v. Clapper}, 286 U.S. 145 (1932).
that of Arkansas, but in no event should it be governed by Missouri law.

Mr. Justice Frankfurter also asked why Arkansas law should be allowed to prevail. He stated that:

... the interest of the forum here is solely dependent on the [fortuitous] occurrence of the injury within its borders. No rights of Arkansas residents are involved, since none of the parties is an Arkansan; the workman was removed immediately to a Missouri hospital and has, so far as appears, remained in Missouri. What might be regarded as the societal interests of Arkansas in the protection of the bodily safety of workers within its borders is an interest equally true of any jurisdiction where a workman is injured and exactly the sort of interest which New Hampshire had in Clapper.

He then stated that to make the interest of Arkansas override that of Missouri would require that Clapper be expressly overruled, which has not been done. And, if Clapper is to be overruled, he stated,

... it should be done with reasons making manifest why Mr. Justice Brandeis' long-matured, weighty opinion in that case was ill-founded. It should not be cast aside on the presupposition that full faith and credit need not be given to a sister-state workmen's compensation if the law of the forum happens to be more favorable to the claimant. [Is this by indirect an indictment of Douglas' reasoning?]

Would not Mr. Justice Frankfurter apparently be more free in the use of full faith and credit to limit the forum's policy determinants when in conflict with those of a sister state than would the majority opinion written by Mr. Justice Douglas? He stated:

... the forum cannot, by statute or otherwise, refuse to enforce a sister-state statute giving a transitory cause of action, whether in contract or tort. [He cites numerous cases as authority.] The forum may, however, apply its own more restrictive statute of limitations to an outside wrongful death action, Wells v. Simonds Abrasive Co., supra., [345 U.S. 514 (1953)] and dicta indicate that it may refuse to enforce a penal law, a law found to be antagonistic to the forum's public policy, or a law which requires specialized proceedings or remedies not available in the forum, see Broderick v. Rosner, 294 U.S., at 642-643; Hughes v. Fetter, 341 U.S., at 612.

232 It would appear that Mr. Justice Frankfurter was thinking in terms of the "happen chance" or the fortuitous.
233 349 U.S. at 420-421.
234 Id. at 422.
235 Compare 349 U.S. at 414-426 with Id. at 408-414.
236 Id. at 415.
To put it mildly, with the shifting of minorities and majorities on the Court by death or retirement, does not constitutional mandate still remain inconstant as well as a pragmatic thing dependent upon many uncertain factors. Some certainty in the law is advisable for all; yet, that certainty should not be a strait-jacketed uniform preventing elasticity in the application of equitable principles. I believe, on the whole, the Court tries, in its decisions, to use equitable principles of fairness, justice, reasonableness, and non-discrimination. If perchance, at times, it gets off the "proverbial path" of meaningful norms and standards, it is a human court.

It seems to me that the majority opinion in *Watson v. Employers Liab. Assurance Corp.*, written by Mr. Justice Black, is far more comprehensible than that of *Carroll*. This suit arose out of an agreement made between the Employers' Liability Assurance Corporation, a British concern, and the Toni Company, which was a division of the Gillette Safety Razor Company, a Delaware corporation, with its principal offices in Massachusetts. The agreement contained a provision that,

No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.

Alleging injuries sustained in Louisiana where the product was bought and used, the plaintiffs brought an action against the insurer under a Louisiana statute which gave an injured person a right of direct action against the insurer before final determination of the insurer's obligation to pay, and irrespective of whether the contract was executed in Louisiana or whether it contained a clause forbidding such direct action.

It appears that the agreement was issued and delivered to Gillette in Massachusetts and a copy delivered to Toni in Illinois.

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238 How are lawyers to advise clients unless there is a great deal of certainty in law?

239 Principles of equity and justice demand some elasticity. Certainly, no one would contend that statutes, often drawn by inarticulate legislators, may be, on all occasions and under all circumstances, interpreted with a mathematical exactitude.

At the beginning, therefore, we have a possible choice of law from Massachusetts or from Illinois to control incidents flowing from the agreement since there are at least some connections of the agreement with these states, and each state had possible interests in the contract. It appears that both of these states recognize the right of an insurance company to protect its finances by making its indirect accountability to a third party contingent on a judgment against the insured or some type of compromise settlement which would be participated in by the insurer. But to subject the insurance company to a suit by a third person claimant directly against the company before a judgment against the insured would appear to subject the company to an obligation for which it had not contracted and which it expressly refused to assume. Thus, in sanctioning protection of the insurance funds by the "no-action" clause, it appears that both Illinois and Massachusetts had expressed their state policies, which would seem to be of the same constitutional perspective as Louisiana asserted in its own legislation which permitted direct actions. It may be observed that Massachusetts is deeply concerned with the financial well-being of the insurance companies whose activities center within its borders; this is of considerable interest to Massachusetts citizens. Also, both Illinois and Massachusetts share some concern for the interest of the insured in the nature and scope of the obligations which may bind as well as protect him. Also, the premiums paid by the insured under this policy varied somewhat directly with the losses which were paid by the insurer; to that extent, at least, the insured had an interest in the "no-action" clause.

Under the Louisiana code parties injured were allowed to bring direct actions against a liability insurance company which had issued a policy agreeing to pay liabilities which were imposed on parties who inflicted harm on others. The suit here involved this type of action. Mr. and Mrs. Watson in a state court of Louisiana claimed damages against the appellee, the Employers' Liability Assurance Corporation, Limited, because of certain alleged personal injuries suffered by Mrs. Watson. The suit charged that the injuries took place in Louisiana when Mrs. Watson bought and used in Louisiana a "Toni Home Permanent," a hair-waving concoction, which she alleged had within it highly dan-
gerous latent ingredients placed there by its manufacturer. The producer of this product was the Toni Company of Illinois, which was a subsidiary of the Gillette Safety Razor Company.

Mr. Justice Black wrote the opinion of the Court. He stated that:

The particular problem presented with reference to enforcing the Louisiana statute in this case arises because the insurance policy sued on was negotiated and issued in Massachusetts and delivered in Massachusetts and Illinois. This Massachusetts-negotiated contract contains a clause, recognized as binding and enforceable under Massachusetts and Illinois law, which prohibits direct actions against the insurance company until after final determination of the Toni Company's obligation to pay personal injury damages either by judgment or agreement. Contrary to this contractual "no-action" clause, the challenged statutory provisions [Louisiana's] permit injured persons to sue an insurance company before such final determination.241

Continued the Court:

The basic issue raised by the attack on both of these provisions [Louisiana Insurance Code provisions allowing action on the insurance company directly] is whether the Federal Constitution forbids Louisiana to apply its own law and compels it to apply the law of Massachusetts or Illinois.242

The insurance company had had to comply with the Louisiana statutes which compelled such companies, in order to get certificates to do business in that state, to consent to such direct action suits. The insurance company moved in the federal court (where the case was removed on grounds of diversity) to dismiss,

... contending that the two Louisiana statutory provisions contravened the Equal Protection, Contract, Due Process and Full Faith and Credit clauses of the Federal Constitution.243

The Court dismissed the constitutional contentions based upon the Contract and Equal Protection clauses of the Constitution as without merit.244 The Court then considered the Due Process and Full Faith and Credit contentions of the allegations. It stated that:

Had the policy sued on been issued in Louisiana there would be no arguable due process question. ... But because the policy was

241 Id. at 67-68.
242 Id. at 69.
243 Ibid.
244 Id. at 70.
bought, issued and delivered outside of Louisiana, *Employers* invokes the due process principle that a state is without power to exercise 'extraterritorial jurisdiction,' that is to regulate and control activities wholly beyond its boundaries. Such a principle was recognized and applied in *Home Ins. Co. v. Dick*, 281 U.S. 397, a case strongly relied on by *Employers*. [The Court here discussed the *Dick* case] . . . . Thus, [in reference to *Dick*] the subject matter of the contract related in no manner to anything that had been done or was to be done in Texas [in *Dick* case]. For this reason, Texas [in the *Dick* case] was denied power to alter the obligation of the Mexican contract. But this Court carefully pointed out that its decision might have been different had the activities relating to the contract taken place in Texas [in *Dick*] upon which the State could properly lay hold as a basis for regulations.246

The Court reemphasized what it meant by significant contacts and interests in contradistinction to those agreements choosing states which did not have such contacts and having little or no interest in the transaction. Said the Court:

Some contracts made locally, affecting nothing but local affairs, may well justify a denial to other states of power to alter those contracts. But, as this case illustrates, a vast part of the business affairs of this Nation does not present such simple local situations. Although this insurance contract was issued in Massachusetts, it was to protect Gillette and its Illinois subsidiary against damages on account of personal injuries that might be suffered by users of Toni Home Permanents anywhere in the United States, its territories, or in Canada. As a consequence of the modern practice of conducting widespread business activities throughout the entire United States, this Court has in a series of cases held that more states than one may seize hold of local activities which are part of multistate transactions and may regulate to protect interests of its own people, even though other phases of the same transaction might justify regulatory legislation in other states.247

The Court next looked to see what contacts and vital interests Louisiana might have in the transaction. It found that:

Persons injured or killed in Louisiana are most likely to be Louisiana residents, and even if not, Louisiana may have to care for them. Serious injuries may require treatment in Louisiana homes or hospitals by Louisiana doctors. The injured may be destitute. They may be compelled to call upon friends, relatives, or the public for help. Louisiana has manifested its natural interest in the injured by providing remedies for recovery of damages. It has a similar interest in policies of insurance which are designed to assure ultimate payment of such damages. Moreover, Louisiana courts in most instances provide the most convenient forum for

246 348 U.S. at 70-71.
247 *Id.* at 71-72.
The Court, therefore, came to the conclusion that due process jurisdiction existed in Louisiana to try the case. Its contacts and interests were sufficient for it to take jurisdiction. Then the Court seems to say that the bases for due process jurisdiction are, on the whole, similar to the bases for applying full faith and credit constitutional requirements to states' clashes of policy determinants. It stated: "What we have said above goes far toward answering the Full Faith and Credit Clause contention." Then the Court observed that the full faith and credit clause was not an automatic springboard by means of which states were compelled without reason, fairness, justice, and equity to give credit to policies of other states in a multistate factual transaction and thus be denied the use of their own policies in their own forum courts. Said the Court,

Where, as here, a contract affects the people of several states, each may have interests that leave it free to enforce its own contract policies. . . . We have already pointed to the vital interests of Louisiana in liability insurance that covers injuries to people in that State. Of course Massachusetts also has some interest in the policy sued on in this case. The insurance contract was formally executed in that State and Gillette has an office there. But plainly these interests cannot outweigh the interest of Louisiana in taking care of those injured in Louisiana. Since this is true, the Full Faith and Credit Clause does not compel Louisiana to subordinate its direct action provisions to Massachusetts contract rules. Pacific Employers Ins. Co. v. Commission, 306 U.S. 493, 503. But cf. John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178; Hughes v. Fetter, 341 U.S. 609.

To reemphasize, the Court seemed to define the factors that make for Louisiana having due process jurisdiction as similar, in most respects, to those required for Louisiana not being compelled to give full faith and credit to the laws of Massachusetts. The Court balanced the interests and contacts of the two states with

248 Id. at 72.
249 Id. at 73.
250 Ibid.
essential elements of the transaction and found that Massachusetts had not proved its laws had superior contacts with and interests in essential elements of the contract than those of Louisiana. Thus, the Court, in effect, distinguished this case from the principles underlying due process considerations in Home Ins. Co. v. Dick.\textsuperscript{251}

Before we turn to Fraternal Benefit Societies, let us review briefly the case of Clay v. Sun Ins. Office, Ltd.,\textsuperscript{252} decided by the Supreme Court in May 1964. The plaintiff was a resident of Illinois at the time he purchased a personal property insurance policy from defendant company. The policy contained a twelve-month-suit clause. The defendant was licensed to do business in Florida and Illinois. Several months after the purchase of the policy, the plaintiff became a resident of Florida, and the loss under the policy occurred there two years later. A Florida statute nullified contract clauses which required suits to be filed within five years or less.

A suit to recover damages under the policy was brought in Federal District Court, Southern District of Florida, under diversity of citizenship, and resulted in a judgment for the plaintiff. However, the Fifth Circuit Court of Appeals reversed the decision.\textsuperscript{253} On certiorari, the Supreme Court vacated the judgment, remanded the case to the Court of Appeals, and deferred the constitutional question until the Florida Supreme Court, through its certificate procedure, could construe the Florida statute and resolve another local law question.\textsuperscript{254} The Florida Supreme Court answered the questions in plaintiff’s favor,\textsuperscript{255} but the Fifth Circuit Court of Appeals held that the application of the Florida statute violated due process of law, and entered judgment for the defendant company.\textsuperscript{256} Certiorari followed to the Supreme Court, which unanimously reversed the Court of Appeals and held that the application of the Florida statute did not violate either the due process of law or full faith and credit clauses. The basis of the decision seemed to be that the State of Florida, the forum, had sufficient contacts with the transaction for it to use its own public policy rather than that of Illinois.

\textsuperscript{251} 281 U.S. 397 (1930).
\textsuperscript{252} 377 U.S. 179, 84 Sup. Ct. 1197 (1964).
\textsuperscript{253} 265 F.2d 522 (5th Cir. 1959).
\textsuperscript{254} 363 U.S. 207 (1960).
\textsuperscript{255} 133 So. 2d 735 (1961).
\textsuperscript{256} 319 F.2d 505 (5th Cir. 1963).
The Clay case adds further proof of my "Premise of Constitutional Construction"; it also indicates that the Court, in balancing the equation of "Order versus Liberty" in a federal union, will not require a forum to subordinate its policy determinants to the policies of other states having vital interests in and contacts with essential elements of the transaction when the forum also has vital contacts with and interests in essential elements of the agreement. Said Mr. Justice Douglas for the Court:

The Court of Appeals relied in the main on Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., . . . and Home Ins. Co. v. Dick. . . . Those were cases where the activities in the State of the forum were thought to be too slight and too casual, as in the Delta & Pine Land Co. case . . ., to make the application of local law consistent with due process, or wholly lacking, as in the Dick case. No deficiency of that order is present here.257

Fraternal Benefit Societies,258 because of their nature, seem at present to require a possible exception to the reasoning of the Court expressed in cases so far discussed. Yet, it is doubtful that a true exception exists. The goal of all law should be the carrying out of the wishes and desires of society in time and space. The Court, possibly, believes that the goals of society today are more rationally met if we construe fairness, reasonableness, justice, and equity in a different perspective when we deal with these fraternal benefit associations than in other cases set forth above.259 Even equitable principles may be pragmatic in definition as the needs of politically organized society may change in time and space.260 Of the several cases in this area, I shall discuss Order of United Commercial Travelers of America v. Wolfe,261 as representative of the group.

Mr. Justice Burton wrote the majority opinion for the Court. He found that this action began in the courts of the state of South

257 84 Sup. Ct. at 1198-99.
259 I have discussed only one fraternal benefit society case, Order of United Commercial Travelers of America v. Wolfe, as representative of this type of case. All of the other cases in this article are different; at least the Court seems to think so.
260 It would seem that "fairness," "justice," "reasonableness," "non-discrimination" might vary with the mores of the people in time and space. This is not to deny that there may be an "absolute," "justice," et cetera. It is to state that people, being humans, are not able to determine when their concepts of "fairness," "justice," et cetera, match the "absolute," because they do not comprehend the "absolute."
Dakota, brought by a citizen of Ohio against a fraternal benefit society, incorporated in Ohio, in order to recover certain benefits claimed to have arisen by virtue of the constitution and by-laws of the society as a result of the death of an insured member who had been a citizen of South Dakota during his society membership. The issue presented was whether the full faith and credit clause of the Constitution required the South Dakota forum to give effect to a provision of the society's constitution which prohibited the bringing of an action in such matters more than six months after the disallowance of the claim by certain officials of the society when that provision was valid in Ohio, where the corporation was chartered, but when the time usually prescribed by the South Dakota statute for beginning the suit of a similar nature was six years; also, when another statute of the forum declared that:

Even stipulation or condition in a contract, by which any party thereto is restricted from enforcing his rights under the contract by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void.262

Several points were brought up by the Court. First, South Dakota allowed its own citizens to subscribe to such membership in the foreign society; therefore, it could not be hostile to this type of society. In other words, by inference, South Dakota's public policy was not hostile to society memberships of South Dakotans. Second, the very nature of this society required that there be utmost uniformity in rights and liabilities of its membership throughout the Union. This could be better attained by using a uniform law to control such rights and liabilities of members—namely, the law of the state of incorporation; in this case, that law would be the policies of the state of Ohio. Third, the society being organized under the laws of Ohio and its by-laws and constitution partaking of the nature of Ohio laws themselves; if Ohio laws were given full faith and credit so would the laws of the society. Fourth, the Court looked at the agreement to see what contacts it had with the two states. Said the Court:

The principal office of this society has been continuously in Columbus, Ohio. The Society has established subordinate councils in many states and, at all times involved in this case, has been li-

censed to do business in South Dakota as a foreign fraternal benefit society. [The Court is as much as saying—how can South Dakota public policy be so outraged at this type of agreement when it permits the society a license to do business in that state?]\(^{263}\)

Then, the Court continued its discussion of contacts and interests of the states of Ohio and South Dakota with this agreement. Said the Court:

The decedent, on July 31, 1920, applied for membership in the society through Rapid City Council No. 516, in Rapid City, South Dakota. He was 37 years old, a man in good physical condition and employed in an occupation of precisely the type contemplated for membership in this society. He named his wife [apparently also of South Dakota] as his beneficiary in case of his death from accidental means. On August 19, 1920, he was accepted by the Supreme Council as an insured member of the society under "Class A." The certificate number 169655, evidencing this acceptance was executed at Columbus, Ohio, by the Supreme Counselor and Supreme Secretary. In 1922, following a brief suspension, he applied for reinstatement in what was then Black Hills Council No. 516 in Rapid City, South Dakota, and, on December 21, 1922, was reinstated as an insured member of the society under "Class A." In his application for this renewal, he referred to himself as a traveling salesman, selling meat to dealers, and named his mother, Elizabeth Shane of Mt. Vernon, South Dakota, as his beneficiary.\(^ {264}\)

It appeared that this renewal of membership was also executed in Ohio. It, therefore, appeared that the contract was made, and possibly many acts connected with the agreement were to be performed, in Ohio. Fifth, the Court then characterized or determined that the society was a fraternal benefit society, and it characterized this type of society as requiring by its very nature more uniformity in its rules as to obligations and rights of its membership than the ordinary insurance contract. This could be the better advanced by controlling the agreement by the laws of the place of incorporation than by making rights and obligations uncertain by applying the different laws of the various states separately and unequally to members. Thus, the Court required that South Dakota give full faith and credit to the laws of Ohio controlling the society which were, by its organization under those laws, incorporated within the society's constitution and by-laws. Ohio's connection with the society was somewhat like a status rather than a contract so that the

\(^{263}\) 331 U.S. at 592-593.

\(^{264}\) Id. at 594-595.
laws of the domicile of the society should control the status of its membership.

**Summary and Conclusion**

In order for a forum to use its public policy in a Conflict-of-Laws contract, it must have jurisdiction. (We assume the forum's public policy is broad enough to encompass Conflict-of-Laws issues.) A forum must have vital interests and contacts with an essential element of the contract in order to obtain due-process-of-law jurisdiction. The Court acts here as an arbiter; it has to evaluate subjectively the importance of contacts and interests the forum may have with the transaction in making its decision.

In making this evaluation, the Court unquestionably uses principles of constitutional interpretation (or construction). Neither due process of law nor full faith and credit are automatic; they are abstract legal concepts. My research has led me to deduce that the Court may be using equitable principles of fairness, justice, non-discrimination, and reasonableness as elements of what I call a least common denominator in constitutional evaluation. True enough, the Court uses these principles as it subjectively sees them in application to the particular facts before it in each case. Possibly, the Court evaluates factual patterns pragmatically to meet the needs and desires of the people in time and space. After all, is not law a tool of politically organized society to carry out its needs and wants in time and space?

Once jurisdiction is obtained and there is a conflict of states' policy statutes in a multistate contractual matter, the Court must evaluate which set of facts meets the test of fairness and equity in arriving at a solution of which state's public policy must give way to the application of the other's public policy. Again, much as it does in finding due-process-of-law jurisdictional bases in the first instance, the Court now similarly finds which state has more equity in contacts and interests for its policy to be applied than another. Judgments of sister states are "usually" given full faith and credit in other states. Subjectively, the Court arrives at its decision. That there may be five to four decisions in either due process jurisdiction or under full faith and credit is not astounding. At times, any number of men viewing the same accident, will arrive at different
conclusions. We must remember that the Justices, although legal scholars, are after all but men and subject to the fallacies of all men. It seems strange, indeed, how they manage to do so well with the complexities of modern life and in trying to deal with them under such abstruse legal concepts as due process of law and full faith and credit.

If one state's contacts and interests are superior to that of another in jurisdictional issues or in full faith and credit, there is little trouble for the Court in rendering a decision. The difficult issues are found in cases having factual patterns that would indicate the equities of the several states are about evenly balanced in contacts and interests. To make the forum, under such circumstances, automatically give full faith and credit to the other state's policies would be to deny the forum an equity; a forum's laws should have first consideration in its own courts unless the burden of proof is borne by the one who objects. To require a forum, under such circumstances, to give full faith and credit to the policies of the other state would, in logic, mean that the forum's policies would have more strength away from its own courts than at home. This is neither logical nor equitable. In such a case, the Court may allow each state to use its policies in its courts. This is no more than a balancing of equities. Similar principles are as true in regard to attaining jurisdictional due process in the first instance as in full faith and credit considerations after jurisdiction is attained.

In arriving at its decision to use its own policies, a forum may not be permitted by the Court to characterize a question before it arbitrarily, unreasonably, discriminatorily, or unfairly. Again, in order to arrive at a decision, it would seem the Court may apply constitutional limitations (much as above) in an equitable manner to balance out the "metes and bounds" of fairness under the particular factual pattern. Certainly here, no less than under due process jurisdiction and full faith and credit, the Constitution when equitably evaluated will meet the issue. There are limits, by virtue of the Constitution, as to how a forum may use its public policy in obtaining its desires in any Conflict-of-Laws contract.

What part a convenient forum or an inconvenient forum "plays" in either jurisdictional due process of law or full faith and
credit, we are unable to say with any high degree of certainty. That the Court sees the issue, there is little doubt. Perhaps, it is one of the many factors that seems to the Court, subjectively, to sway the scales of equity one way or the other.

That leaves us with the effects of the public policy of the forum on the validity of a Conflict-of-Laws contract's specification of an intended place law to govern. What part does the Constitution "play" here? In reading the above summary analysis, one must consider it as not divorced from the intended place law of the parties to a contract. Much of what we have said equally applies to any choice of law including an intended place law of parties designation. It would seem that if the parties have evaluated past decisions of the Court and have analyzed factual patterns of the past in those decisions, they may be able to choose their own place law to govern their transactions so long as it is a place law that has, as seen by the Court, the most substantial connection with an essential element of the contract and the chosen state law has the most vital interests in the transaction. In arriving at interpretations of Court decisions, the parties ought to be ever mindful that vacancies do occur on the High Bench; that new men may have different opinions from those who may have passed. It, therefore, seems logical that the parties (or their attorneys) should keep abreast of the background of the lives of the Justices on the Bench to discern any environmental conditions or saturated beliefs that may have some bearing on a decision.