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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

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

LOUIS C. JAMES***

INTRODUCTION

T
he issue drawn in this paper relates to the question: Under what conditions may the parties to a Conflict-of-Laws contract choose the law of another jurisdiction, adequately connected with and interested in an essential element of their agreement, to con-

* I have included under due process of law of the Fourteenth Amendment both procedural and substantive due process. Is not a fair and impartial trial the "heart" of procedural due process of law? Would we expect less in substantive due process of law? The shading of procedure into substance at times makes it very difficult to differentiate the one from the other. Cf., Cook, The Logical and Legal Bases of the Conflict of Laws 154-193 (1949). Much of what we may denominate in Anglo-American law as substantive was derived from procedure. The separation remains fluid. Cf., Plucknett, A Concise History of the Common Law 354, 375, 381-2 (5th ed. 1956).

** "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. Const. art. IV, § 1.

trol the validity of their transaction, without some forum, having little or no contacts with and interests in the contract, imposing its public policy to negate the intended law? Unless there is some federal constitutional provision to prevent a forum from doing this, it would seem that all forums, as sovereign entities of the Union, might use whatever public policy they desired to accomplish their own interests in a Conflict-of-Laws contract. I have chosen what I believe to be some of the main constitutional limitations upon an unfair, arbitrary, unreasonable, and inequitable use by the forum of its public policy, or the policy of some other place law with what the forum deems to be reasonable and vital contacts with and interests in essential elements of the transaction, to control the agreement. Certain other issues may have to be developed, as, for instance, what effect will the above constitutional limitations have upon a forum's use of characterization, and convenient or inconvenient forum, to attain its ends?


2 See Leflar, Conflict of Laws 106-108, in which the author states: "It is clear that courts handling Conflict of Laws Cases are free to decide characterization problems as they please within the precedents laid down by their own appellate divisions, subject only to the superior power of the Constitution of the United States. If the highest court of the state approves a particular characterization, the determination is final unless it is found to violate the due process clause, the full faith and credit clause, the privileges and immunities clause, the equal protection clause, the interstate commerce clause, or some other provision in the federal Constitution which is superior to state law." Cf., Home Ins. Co. v. Dick, supra note 1. In this area see Dodd, The Power of the Supreme Court to Review State Decisions in the Conflict of Laws, 59 Harv. L. Rev. 533 (1926); Ross, Has the Conflict of Laws Become a Branch of Constitutional Law?, 15 Minn. L. Rev. 161 (1931); Overton, State Decisions in Conflict of Laws and Review by the United States Supreme
My method of approach has been to develop what I consider the underlying premise of constitutional construction that the

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Supreme Court may use as a least common denominator in arriving at its subjective analysis and decision in a state-to-state clash of public policies. I have assumed an equation of Order versus Liberty in a federal-state relationship involving commercial contracts that entails an arbiter, the Court, which has to make a subjective determination of the conflicting state policy which will control the issue.

**GENERAL RULE**

The Fourteenth Amendment due process of law, and Article Four, Section One, full faith and credit clauses, as interpreted (or construed) subjectively by the Court, will not permit a forum which has insignificant contacts and interests with vital elements

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7 See Mr. Justice Black, speaking for the Court, in *Hughes v. Fetter*, 341 U.S. 609 (1951). In any federal system of government, there must, of necessity, be some arbiter between the parts thereof when conflicts arise. The United States Supreme Court has greatly assumed that position in the American federal system of government.
8 A learned professor of mine once stated that he doubted if "Objectivity" ever existed on earth; everything we do is flavored by our environment—our saturated beliefs gotten, often in childhood, are never quite eliminated.
9 See, *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930); *First American Nat'l Bank of Nashville v. Automobile Ins. Co.*, 252 F.2d 62 (6th Cir. 1958). The latter case involved an action by a Tennessee mortgagee of Kentucky property against the insurers for certain fire losses. There was an attempt also to invoke provisions of a Tennessee penalty statute (public policy) which permitted recovery for additional expenses incurred where the payment by the insurer is refused in bad faith after notice and demand. The court found that at a time prior to July 30, 1954, as an integral part of its mortgage and loan business, the appellant bank, with two participating banks, loaned the New Farmers Burley Warehouse, Inc., of Kentucky, $65,000, for the construction of a warehouse in Kentucky, and received a mortgage on the completed warehouse to secure the loan. The appellee insurance companies insured the Warehouse Company against any loss by fire and provided in the loss payable clauses in their policies that any loss or damage thereunder would be payable to the appellant bank as its interests might indicate. The warehouse was totally destroyed by fire. Although proofs of loss were made, there was a delay on the part of the appellee insurance companies in making payment, with the result that the appellant bank initiated a proceeding in the District Court at Nashville, Tennessee, to recover its losses and to invoke the provisions of the Tennessee penalty statute. Would Tennessee public policy (law) be applied by the forum? The court, finding that the intention of the parties was that Kentucky law was to apply and that the major interests and contacts of the transaction were with Kentucky rather than Tennessee, held that Kentucky law applied. See also, *Leflar, Conflict of Laws* § 127, pp. 242-244 (Student ed. 1959); *Goodrich, Conflict of Laws* 31-33 (3d ed. 1949); *Stumberg, Principles of Conflict of Laws* 6-21 (1962). Cf., *Alaska Packers Ass'n v. Industrial Acc. Comm'n*, 294 U.S. 532 (1935).
of a Conflict-of-Laws contract to impose its public policy\textsuperscript{10} concepts (laws),\textsuperscript{11} or the public policy concepts of any other state similarly situated, on the agreement so as to negate the law intended by the parties to the agreement to control their transaction so long as the designated place law, as seen by the Court, has the most vital interest and the most important contact with an essential element of the transaction.\textsuperscript{12}

\textbf{A Premise\textsuperscript{13} of Constitutional Construction}

Is not one of the underlying motives of the federal Constitution found in an attempt by the Court to balance the equities of states' policy-interests clashes by the equation: Order \textit{versus} Liberty in a federal-state relationship? If this is true, then when a federal question\textsuperscript{14} may be raised in the conflict of states' policies in a Conflict-of-Laws contract validity issue, may not the equitable balancing of the states' policies depend upon several factors—all

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11 See note 1, \textit{supra}.


13 See note 4 \textit{supra}.

14 For instance, due process of law, full faith and credit, interstate commerce, and equal protection of the laws are federal questions in Conflict of Laws.
being a part of what I call a least common denominator in constitutional construction—namely, the reasonableness, fairness, justice, and non-discrimination, as subjectively seen by the Court, in the use by the forum of its policy determinants to negate the parties' intended place law of a state reasonably having the most significant interest in an essential element of the transaction? May not the Court's weighing of contacts and interests of the respective states connected with the transaction be considered the most logical and equitable means of arriving at a fair and just decision? Then, if one state, not the forum, has the most important connections with essential elements of the transaction, and has the most vital interests in the agreement, is it not equitable that its policies should control the validity of the contract when the parties desire that place law to control? On the other hand, and irrespective of the parties' attempt to stipulate a place law to control the instrument, if the states respectively connected with and interested in essential elements of the transaction have contacts and interests somewhat in balance, the forum being one of those states, might not the Court likewise view as inequitable, unfair, unjust, and discriminatory the negation of the forum's strong policy determinants in the decision?

Where, in the ultimate, would the United States Supreme Court look for an interpretation of such factors as "fairness,"

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15 Although constitutional construction may require refinements of a general base—the least common denominator—as different constitutional issues are raised in particular factual situations, it would seem that these refinements stem from equitable principles of balancing states' policies in Conflict-of-Laws questions.

16 Cf., Home Ins. Co. v. Dick, 281 U.S. 397 (1930). Although this substantive due process of law case involved Texas and a foreign nation, Mexico, it seems that the Court, in ascertaining interests and contacts, would not make any material distinction between a state of the American Union and a foreign nation.


18 See, Bodenheimer, Jurisprudence: The Philosophy and Method of the Law (1962), in which this learned author states: "There are two cardinal problems in the realm of interpreting constitutional precepts which cannot be solved without some reflection on the ultimate ends of legal ordering. The first is the question of whether uncertainties regarding the meaning of a constitutional provision should be resolved by recourse to the understanding of the provision which was prevalent at the time of its adoption or whether a constitutional provision should be interpreted in the light of knowledge, needs, and experience existing at the time when the interpretive decision is rendered." Id. at 348. In any event, no two men are likely to see the same factual situation alike. All biographies are written with much uncertainty. I use "ultimate," therefore, in view of any decision in life by any person being his own analysis of the facts before him; often, this analysis may be no more than a surmise. No man is infallible.
"reasonableness," "justice," and "non-discrimination," which may constitute the least common denominator of constitutional construction, but to its own subjective\textsuperscript{19} views of such factors? Even an historical construction\textsuperscript{20} of the Constitution must evaluate the use and meanings of the English language translated into legal concepts in different periods of history as men of those periods saw the concepts. As objective as one may wish to be, is it possible to disassociate entirely anyone from environment and early saturated beliefs?\textsuperscript{21} May not constitutional meanings, as well as emphasis on those meanings, shift in time and space\textsuperscript{22} in the balancing of the equities of the social unit as new needs and desires of the American people demand either new laws or new interpretations of old laws? Are "equities" themselves absolutes or rather pragmatic norms of the mores of a people in time and space? (Could the Founding Fathers of this nation, for instance, in drafting the Constitution, have foreseen the complexities of life in an atomic civilization of 1964?) Are not the legal concepts of due process of law,\textsuperscript{23} and full faith and credit\textsuperscript{24} excellent tools to aid the Court in the balancing of the "equation"? Does not nature itself abhor an imbalance\textsuperscript{25} in any equation of life? If law is a tool of politically

\textsuperscript{19} Note 8 supra.

\textsuperscript{20} A reading of any worth-while text on Legal History will cause the reader to agree with this statement. See, for instance, Plucknett, A Concise History of the Common Law (1956), and compare with my statement.


\textsuperscript{22} Note 4 supra.

\textsuperscript{23} See asterisk no. 1 supra.

\textsuperscript{24} See asterick no. 2 supra. See also on full faith and credit, Abel, Administrative Determinations and Full Faith and Credit, 22 Iowa L. Rev. 461 (1937); Childs, Full Faith and Credit: The Lawyer's Clause, 36 Ky. L.J. 30 (1947); Corwin, The Full Faith and Credit Clause, 81 U. Pa. L. Rev. 371 (1933); Costigan, Article IV, Section 1, of the Constitution, 4 Colum. L. Rev. 470 (1904); Page, Full Faith and Credit: The Discarded Constitutional Provision, 1948 Wis. L. Rev. 265; Radin, The Authenticated Full Faith and Credit Clause: Its History, 39 Ill. L. Rev. 1 (1944); Ross, 'Full Faith and Credit' in a Federal System, 20 Minn. L. Rev. 140 (1936); Sumner, The Full Faith and Credit Clause—Its History and Purpose, 34 Ore. L. Rev. 224 (1955); Moore & Oglebay, The Supreme Court and Full Faith and Credit, 29 Va. L. Rev. 557 (1943); Jackson, Full Faith and Credit—The Lawyer's Clause of the Constitution, 45 Colum. L. Rev. 1, 16, 17, 26, 27 (1945). See also note 4 supra.

\textsuperscript{25} A study of high altitudes in mountainous areas with nearby great ocean depths will be noted in any work of Geology. Nature demands a balance.
organized society designed to carry out the needs and wishes of a people in time and space, is it not incumbent on the Court to try to find the goals of the people at any given time and space and mold the law by construing it to fit those demands? Are the “dead hands” of a past culture forever to bind down the living needs and desires of a living culture by sterilized principles of stare decisis when life requirements have changed? (It may be questioned as to how far law would be advanced today unless, in the history of Anglo-American legal institutions, the courts of the past had not bridged gulfs in the law by liberal legal construction and even, at times, by legal fictions.)

However, since the Supreme Court is composed of humans, not Gods, is it not likely in this attempt to balance the “equation” that it may construe the Constitution as it subjectively sees the

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26 This is my definition of law, based, in some respects, upon Pound’s theory of Social Engineering.

27 Even with all due deference to legislative enactments by a duly elected democratic assembly, it is impossible for the legislatures of any people continuously to change the laws to meet the case-to-case decisions that occur from day to day. Legislatures are often too slow in the procedures to meet the requirements of the moment confronting hundreds of judges each day on the bench. Further, the English language not being a science of mathematical exactness, courts have to make law by interpretation to fit the needs of the case; governed, as courts are, by principles of stare decisis, they still must orient the judiciary to the changing needs of the times by the interpretative process. Legislative intent has to be highly theoretical because cases arise under enactments passed possibly 100 years past when the legislatures could not have possibly contemplated such matters arising under the enactment.

28 Although we need certainty in law, we must not strait-jacket it in the past so that it will die like a gourd on the vine in the fall. Law must be alive to meet the needs of the present even though in meeting those needs it may refer for guidance to the deeds of the past. Compare, Locke, Of Civil Government, Book II, An Essay Concerning the True Origin, Extent and End of Civil Government (Everyman’s Library, Edited by Ernest Rhys, 1943)— “[N]othing being necessary to any society that is not necessary to the ends for which it is made.” Id. at 157.

29 See and compare, Goodrich, Foreword 247, in Reese & Galston, Doing an Act or Causing Consequences as Bases of Judicial Jurisdiction, 44 Iowa L. Rev. 249 (1959), in which Judge Goodrich states in reference to a power basis of jurisdiction: “But the blunt physical power doctrine has already become fictionalized when insistence on continued physical presence is abandoned as a decency of civilization. The rule of law is none the worse for that; the books are full of instances where growth has come by pretending that something is true when everybody knows it is not, as for instance, that the island of Minorca is in Cheapside, London.” The judge continued: “And fictions regarding jurisdiction over foreign corporations have been plentiful as Falstaff’s blackberries. Thus, the corporation is intangible, artificial, and cannot move from its state of incorporation; it consents to be sued when in fact it does no such thing; it is present everywhere it does business.” Id. at 248.

30 All men are fallible. Since the Supreme Court is composed of men, it too is subject to error. But in defense of the Court, we should not forget the words of Jesus: “He that is without sin among you, let him first cast a stone . . . .” The Holy Bible, St. John VIII, 7, 76 (King James (Authorized) Version, no date).

31 See note 8, 18, 21, supra.
goals of the law in attaining the needs and desires of the people at any given time and space? If my assumptions are accurate, then the decisions of the Court in a Conflict-of-Laws contractual arrangement should be crystal clear (at least, insofar as legal concepts\textsuperscript{82} of the abstract proportion as those of due process of law and full faith and credit can ever be made clear and definite), but for the human factor of each Justice of the Court individually and subjectively viewing differently the goals of Constitutional Law in obtaining the needs and desires of the people in time and space.\textsuperscript{83} Let us now turn to the cases.

**Due Process-of-Law Cases**

We shall first consider jurisdictional issues of procedural due process of law of the Fourteenth Amendment as they may pertain to our problem. Unless a court has jurisdiction, how can its decisions be valid?

*International Shoe Co. v. Washington*,\textsuperscript{34} points up the balancing of the equity-policy factors in the equation of Order versus Liberty in a federal-state relationship. It points up the concern of the Court that the factors of the least common denominator in Constitutional construction, namely justice, equity, fairness, reasonableness, and non-discrimination, must be observed at all costs in cases involving the “due-process clause.” Vital interests and vital contacts are weighed on the scales of “due-process-clause” jurisdiction in an *in personam* action.

The following facts in *International Shoe* are, among others, of significance. Appellant was a Delaware corporation with its principal place of business located in St. Louis. It had solicitors in the state of Washington, who exhibited and took orders for merchandise, forwarding those orders to St. Louis where they might be accepted or rejected, and, if accepted, the merchandise was shipped f.o.b. from St. Louis or other out-of-Washington-state points to customers in the state of Washington. Collections were made for the merchandise at the place of shipment outside of Washington. Except for the above contacts with Washington, it appears

\textsuperscript{82} See and compare asterisk 2 *supra*, and notes 4, 23, 24 *supra*.
\textsuperscript{83} See and compare note 4, 18 *supra*.
\textsuperscript{34} 326 U.S. 310 (1945).
that no business was done by appellant in that state. When the state attempted to collect by action, under a Washington statute (public policy), certain unemployment taxes in Washington from the appellant by service of process upon the sales solicitor, the company resisted and raised the issue of “due process,” stating it was not doing business in Washington and had no employees there upon whom service could be had. Copy of the notice of suit was duly sent to appellant in St. Louis by registered mail. Did the Washington state statute violate the Fourteenth Amendment Due Process Clause?

The Court spoke through Mr. Justice Stone (later Chief Justice):

Appellant is a Delaware corporation, having its principal place of business in St. Louis, Missouri, and is engaged in the manufacture and sale of shoes and other footwear. It maintains places of business in several states, other than Washington, at which its manufacturing is carried on and from which its merchandise is distributed interstate through several sales units or branches located outside the State of Washington.\(^\text{35}\)

Continued the Court:

Appellant has no office in Washington and makes no contracts either for sales or purchase of merchandise there. It maintains no stock of merchandise in that state and makes there no deliveries of goods in intrastate commerce. During the years from 1937 to 1940, now in question, appellant employed eleven to thirteen salesmen under direct supervision and control of sales managers located in St. Louis. These salesmen resided in Washington; their principal activities were confined to that state; and they were compensated by commission based upon the amount of their sales [in Washington]. The commissions for each year totaled more than $31,000. Appellant supplies its salesmen with a line of samples, each consisting of one shoe of a pair, which they display to prospective purchasers. On occasion they rent permanent sample rooms, for exhibiting samples, in . . . buildings, or rent rooms in hotels or . . . buildings temporarily for that purpose. The cost of such rentals is reimbursed by appellant.\(^\text{36}\)

The State of Washington contended that these contacts of the state with these transactions amounted to the corporate appellant doing business in the state for purposes of suit in the collection of unemployment taxes. Appellant contended that Washington was

\(^{35}\) Id. at 313.

\(^{36}\) Id. at 313-314.
without jurisdiction; that in its attempt to obtain *in personam* jurisdiction, it violated the due process clause.

Said Mr. Justice Stone:

. . . due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *Milliken v. Meyer*, 311 U.S. 457, 463. See Holmes, J., in *McDonald v. Mabee*, 243 U.S. 90, 91. Compare *Hoopeston Canning Co. v. Cullen*, 318 U.S. 313, 316, 319. See *Blackmer v. United States*, 284 U.S. 421; *Hess v. Pawloski*, 274 U.S. 352; *Young v. Masci*, 289 U.S. 253.37

Then the Court pointed up further the requirements of due process. Its (due process) demands

. . . may be met by such contacts of the corporation with the state of the forum as makes it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. An "estimate of the inconveniences" [could this be that due process is also concerned with *forum non conveniens* as one of its factors?] which would result to the corporation from a trial away from its "home" or principal place of business is relevant in this connection. *Hutchinson v. Chase & Gilbert*, supra 141 [45 F.2d 139, 141].38

After considering some of the contacts with a state which will permit jurisdiction without violation of due process, the Court stated:

Finally, although the commission of some single or occasional acts of the corporate agent in a state sufficient to impose an obligation or liability on the corporation has not been thought to confer upon the state authority to enforce it, . . . , other such acts, because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit. [Could the Court have reference here to the significance of vital interests the forum might have in the transaction such that by the very nature of this interest lesser contacts at times would provide jurisdiction than at other times when the state's interests were not so significant? How would the Court determine the significance of the forum's interests except by a subjective appraisement?]39

The Court continued that it is not the quality of the acts but ". . . more realistically it may be said that those authorized acts were of such a nature as to justify the fiction. . . "40 of consent being

37 Id. at 316.
38 Id. at 317.
39 Id. at 318.
40 Ibid.
implied. What is this, but an implication of the Court's jurisdictional determination in each case by subjective appraisement?

Then the Court, as if in summary of its views on due process, stated:

It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less. . . . Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations. . . . But to the extent that a corporation exercises the privileges of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. [The Court, it seems, might have said, "We may measure the state's vital interests accordingly."] The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue. [The Court, it appears, might have said, "We always consider the policies' equities in any federal-state relationship involving the equation of Order versus Liberty."]

Since the Court found, in balancing the policy equities of the equation, that the activities of the corporation carried on in the state of Washington were neither casual nor irregular, but systematic and continuous for a sizeable period of time, and represented a sizeable sum of money in commissions paid, it found that the state's statute (policy) was not in violation of due process of law.

In McGee v. International Life Insurance Co., Lulu B. McGee, petitioner, obtained a judgment in a state court of California against International Life Insurance Company, respondent, on an insurance contract. No process was served upon respondent in California; it appears, though, that notice of suit was sent to respondent at its principal place of business in Texas by registered mail. The state court based its jurisdiction on a local statute (public

41 Id. at 319.
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policy) which subjected foreign corporations to actions in the state on contracts of insurance with residents of the state (vital interests here in residents of state getting a fair deal) even though such foreign corporations could not be served with process within the state.

After the judgment, which appeared uncollectible in California, petitioner went to Texas where she filed an action on the judgment in a local state court. The local courts of Texas refused to enforce the out-of-state judgment, holding it was invalid under the Fourteenth Amendment upon the premise that process outside California could not give California courts jurisdiction over the respondent. Of course, if the California courts exercised jurisdiction properly over respondent then it appears that Texas courts erred in not accrediting full faith and credit to the out-of-state judgment.

Said the Court:

The material facts are relatively simple. In 1944, Lowell Franklin, a resident of California, purchased a life insurance policy from the Empire Mutual Insurance Company, an Arizona corporation. In 1948, the respondent agreed with Empire Mutual to assume its insurance obligations. Respondent then mailed a reinsurance certificate to Franklin in California offering to insure him in accordance with the terms of the policy he held with Empire Mutual. He accepted this offer and from that time until his death in 1950 paid premiums by mail from his California home to respondent's Texas office. Petitioner, Franklin's mother, was the beneficiary under the policy. She sent proofs of his death to the respondent but it refused to pay claiming that he had committed suicide. It appears that neither Empire Mutual nor respondent has ever had any office or agent in California. And so far as the record before us shows, respondent has never solicited or done any insurance business in California apart from the policy involved here.43

The Court then quoted from the Shoe case,

... due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."44

The Court then found that a state's jurisdiction in this time of

43 Id. at 221-222.
44 Id. at 222, citing from International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).
expanding national commerce is, in essence, at best a pragmatic thing. Fundamental concepts of due process were not offended here. Said the Court:

It is sufficient for the purpose of due process that the suit was based on a contract which had substantial connections with that State [California]. . . . The contract was delivered in California, the premiums were mailed from there and the insured was a resident of that State [California] when he died. It cannot be denied that California had a manifest interest [vital interest] in providing effective means of redress for its residents when their insurers refuse to pay claims. These residents would be at a severe disadvantage if they were forced to follow the insurance company to a distant State in order to hold it legally accountable. [Here, once more, we find the Court considering the convenient or inconvenient forum, as factors in jurisdictional bases.] When claims were small or moderate individual claimants frequently could not afford the cost of bringing an action in a foreign forum—thus in effect making the company judgment proof. Often the crucial witness—as here on the company’s defense of suicide—will be found in the insured’s locality. Of course, there may be inconveniences to the insurer if it is held amenable to suit in California where it had this contract but certainly nothing which amounts to a denial of due process . . . . There is no contention that respondent did not have adequate notice of the suit or sufficient time to prepare its defenses and appear.45

Then the Court, through the process of characterization (determination),46 put the double knot in the appendectomy47 by finding that the statute (public policy) of California became law in 1949, which was after the respondent had entered into the contract with Franklin to assume Empire’s obligation to him; and that respondent’s contention that the application of the California law to the existing agreement would improperly impair obligations under the agreement was not true since,

We believe that the contention is devoid of merit. That statute [public policy] was remedial, in the purest sense of that term, and neither enlarged nor impaired respondent’s substantive rights or obligations under the contract. It did nothing more than to provide petitioner with a California forum to enforce whatever substantive rights she might have against respondent.48

45 355 U.S. at 223-224.  
46 I have found in class lecturing that the students grasp with more ease the concept “Determination” than they do the concepts of “Qualification,” “Classification,” or “Characterization.”  
47 A former teacher of mine stated that a great surgeon once told him that he always tied the second knot in an appendectomy so that he could rest assured that the case was secured so far as the operation procedures required. It was the final thing to do in order to “fix the operation.”  
Therefore, the Court ruled that Texas must give full faith and credit to the California judgment since there was no violation by the California public policy (statute law) of the Due Process Clause of the Fourteenth Amendment.

The *Hanson v. Denckla* case merely reinforces the jurisdictional bases discussed above. Mrs. Donner, while a domiciliary of Pennsylvania, executed in Delaware a revocable deed of trust which made a Delaware trust company trustee of certain securities. Mrs. Donner reserved the income therefrom for life and provided that the remainder should be paid to such persons as she should designate by an *inter vivos* or testamentary instrument. After some years, she became domiciled in Florida and later died there. In Florida she executed the *inter vivos* instrument by which she appointed certain beneficiaries to receive a stipulated sum of money of the trust estate and executed also a will which contained a residuary clause covering *inter alia* "... all property, rights and interests over which I may have power of appointment which prior to my death has not been effectively exercised by me. . . ." In a Florida proceeding, in which the Delaware trust company did not appear, but was given notice of the suit only by mail and publication, a Florida state court held that the trust and power of appointment were ineffectual by Florida law (public policy) and that the stipulated sum above passed under the residuary clause of the will. The Florida Supreme Court sustained this rule. In doing so, the Florida Supreme Court also held that Florida had jurisdiction over the nonresident Delaware trust company; and that under Florida law (public policy), the trust company was an indispensable party to the action. In the meantime, a Delaware court, in which a declaratory judgment had been instituted to clear these matters, with personal jurisdiction over the trust company, sustained the trust and *inter vivos* appointment. It held that the parties designated therein were entitled to the above-stipulated sum. The Delaware Supreme Court sustained. Delaware had denied full faith and credit to the Florida decree. Certiorari was granted by the United States Supreme Court.

The Court, after stating that the question before it should be

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50 Id. at 240.
characterized (determined) as pertaining to the validity of the trust rather than the appointment in Florida, found that there were insufficient contacts of the trust company with Florida for that state to entertain personal jurisdiction in the case; that the trustee was a necessary party under Florida public policy (law); that, therefore, in personam jurisdiction had to be declared invalid in Florida even to those parties there before the court; that because of the violation of the Due Process Clause of the Fourteenth Amendment by Florida, full faith and credit was not violated and did not need to be considered. Further, the Court found that the question of in rem jurisdiction was equally defective from a Florida standpoint since the securities were always apparently in Delaware and had their situs there.

Said the Court:

But jurisdiction cannot be predicated upon the contingent role of this Florida will [will was probated in Florida]. Whatever the efficacy of a so-called "in rem" jurisdiction over assets admittedly passing under a local will, a State acquires no in rem jurisdiction to adjudicate the validity of inter vivos dispositions simply because its decision might augment an estate passing under a will probated in its courts.51

Continued the Court in much the same vein of thought in regard to in rem jurisdiction:

The settlor-decedent's Florida domicile is equally unavailing as a basis for jurisdiction over the trust assets. For the purpose of jurisdiction in rem the maxim that personalty has its situs at the domicile of its owner is a fiction of limited utility.52

Thus, Florida was found not to have in rem jurisdiction apparently based upon the insignificance of contacts and interests of the transaction with that state.

In a return to a consideration of in personam jurisdiction, the Court readily admitted that the concept of in personam jurisdiction was expanding due to the needs and wants of the people in time and space by virtue of technological progress and the freer flow of trade in the United States. Then, it asked, how could Florida have jurisdiction over the Delaware trust company? What contacts of the transaction were with Florida? The Court also ad-

51 Id. at 248.
52 Id. at 249.
mitted that by means of freer flow of trade there was a concomitantly easier means of access to suits by defendants. Again, we observe the Court interested in a convenient forum as a factor in considering bases of jurisdiction.

Next, the court stated that:

In response to these changes [in times, needs, and wants of the people of America], the requirements of personal jurisdiction over nonresidents have evolved from the rigid rule of Pennoyer v. Neff, 95 U.S. 714, to the flexible standard of International Shoe Co. v. Washington, 326 U.S. 310. But, it is a mistake to assume that this trend heralds the eventual demise of all restrictions on personal jurisdiction of state courts. See Vanderbilt v. Vanderbilt, 354 U.S. 416, 418. Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. [May we not ask, is not the Court impliedly saying that we may consider the convenience of the forum as a factor of jurisdiction even though we are not ready to make it the main or only factor of jurisdiction?] They are a consequence of extraterritorial limitations on the powers of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the “minimal contacts” with that State that are a prerequisite to its exercise of power over him. See International Shoe Co. v. Washington, 326 U.S. 310, 319.53 [Did the Court include in ‘minimal contacts’ ‘vital interests’?]

Let us see what contacts this transaction had with Florida, reasoned the Court:

We fail to find such contacts in the circumstances of this case. The defendant trust company has no office in Florida, and transacts no business there. None of the trust assets has ever been held or administered in Florida, and the record discloses no solicitation of business in that State either in person or by mail. Cf. International Shoe Co. v. Washington, 326 U.S. 310; McGee v. International Life Insurance Co., 355 U.S. 220. Travelers Health Ass’n v. Virginia, 339 U.S. 643.54

Continued the Court:

The cause of action in this case is not one that arises out of an act done or transaction consummated in the forum State. In that respect, it differs from McGee v. International Life Insurance Company, 355 U.S. 220, and the cases there cited. In McGee, the nonresident defendant solicited a reinsurance agreement with a resident of California. The offer was accepted in that State and the insurance premiums were mailed from there until the insured’s death. Noting the interest California has in providing effective redress for its residents when nonresident insurers refuse to pay

53 Id. at 251.
54 Ibid.
claims on insurance they have solicited in that State, the Court upheld jurisdiction because the suit "was based on a contract which had substantial connections with that State." In contrast, this action [in the case at bar] involves the validity of an agreement [Characterization may have turned the case at this point.] that was entered without any connection with the forum State. The agreement was executed in Delaware by a trust company incorporated in that State and a settlor domiciled in Pennsylvania. The first relationship Florida had to the agreement was years later when the settlor became domiciled there, and the trustee remitted the trust income to her in that State. From Florida Mrs. Donner carried on several bits of trust administration that may be compared to the mailing of premiums in McGee. But the record discloses no instance in which the trustee performed any acts in Florida that bear the same relationship to the agreement as the solicitation in McGee. Consequently, thus it cannot be said to be one to enforce an obligation that arose from a privilege the defendant exercised in Florida.  

Also, stated the Court, in the McGee case the state of California had a special statute in such matters which indicated a special interest of California in that type of case. Again, the Court comes back to its characterization as a major determining point in the case.

The execution in Florida of the power of appointment under which the beneficiaries and appointees claim does not give Florida a substantial connection with the contract on which this suit is based. It is the validity of the trust agreement, not the appointment that is at issue here.  

Characterization is, therefore, of great significance in the determination of jurisdiction. Continued the Court:

[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities with the forum State, thus invoking the benefits and protections of its laws . . .

for the foundation to be laid of in personam jurisdiction. In order to obtain jurisdiction, Florida must show that the acts of the trustee had a substantial connection with Florida; and that Florida had a vital interest in the transaction. This was not shown. The majority opinion stated that since the Florida judgment was invalid in Florida because of a lack of due process, Delaware did not have to give full faith and credit to the Florida judgment.

55 Id. at 251-252.
56 Id. at 253.
57 Ibid.
Mr. Justice Black, in dissent, found that there were sufficient contacts of the transaction with Florida, as well as vital Florida interests in the transaction such that there was no violation of due process of law. He observed that while jurisdiction is quite different from choice of law, yet the bases of both are very similar. Justice Black also stated that the only possible drawback to Florida due-process jurisdiction was a proper evaluation and consideration of whether the litigation in Florida "... would impose such a heavy and disproportionate burden on a non-resident defendant that it would offend what this Court has referred to as 'traditional notions of fair play and substantial justice.'" Again, we find the convenient or inconvenient forum an essential element of jurisdiction. However, Black observed that we have not reached a point where state boundaries have no significance. (In other words, we still have some federalism left; states are not yet administrative adjuncts of the national policy. How soon they may become such is again, apparently, left to the needs and desires of the people in time and space.)

Justices Burton and Brennan concurred with Justice Black in the dissent. Justice Douglas wrote a separate dissent in which he apparently found sufficient contacts of Florida with the transaction by a characterization of the trust and will as so interwoven as to be practically one and the same contact with Florida. Florida’s interest was, therefore, characterized by Justice Douglas as significant, if not more so, than that of Delaware. The privity of the trustee with the decedent’s interest made the trustee’s interest identical, for all practical purposes, with that of the decedent; he was in essence a mere custodian rather than a person involved individually and personally. Stated Douglas: "The question in cases of this kind is whether the procedure is fair and just, considering the interests of the parties."

An analysis of these three cases indicate several vital facts. Characterization by the Court in opposition to the state court’s characterization may turn the decision; thus, in effect, a state

58 357 U.S. at 256.
59 Id. at 259.
60 Id. at 256.
61 357 U.S. at 262.
62 Id. at 263.
court's characterization is limited by constitutional construction. May not characterization be used by either a state court or the United States Supreme Court as a choice of law in disguise, as well as a means for choice of jurisdiction, much as public policy itself may be used as a disguise for choice of law effects. If this is true, may we not assume that choice of law by characterization may be a means of arriving at bases of jurisdiction as well as choice of jurisdiction used to arrive at what a court may think the proper choice of law? In any event, may we not assume that characterization is one of the major elements in some Conflict-of-Laws decisions? May we not further assume that a policy decision by a state court is thus limited by a greater policy decision by the Court by means of characterization as a basis for formulating jurisdiction?

Also, may we not assume that a convenient or inconvenient forum is a vital element in jurisdictional findings? May we not equally suppose that a policy decision by a state court via convenient or inconvenient forum, in turn, may be checked by a contrary constitutional construction by the Court either by first


64 See and compare, Paulsen & Sovern, "Public Policy" in the Conflict of Laws, 56 Colum. L. Rev. 969 (1956).


66 Cf., Home Ins. Co. v. Dick, supra note 63. See also and compare, International Shoe Co. v. Washington, 326 U.S. 310 (1945). "Cold print" may not always reflect what or how the Justices of the Court arrive at their decisions. As Mr. Justice Black stated in Hanson v. Denckla, 357 U.S. 235, 258-259 (1958): "True, the question whether the law of a State can be applied to a transaction is different from the question whether the courts of that State have jurisdiction to enter a judgment, but the two are often closely related and to a substantial degree depend upon similar considerations."

67 Cf., Hanson v. Denckla, supra note 66, at 258-259—Mr. Justice Black's dissent.

arriving at a jurisdiction-or-no for the state court to act or by a choice-of-law-or-no for the state court's action via its own policy determinant? Might not, therefore, the doctrine of convenient forum by a means, when used by the Court, to negate through constitutional construction a public policy of a state? Justice Black observed that many of the factors of finding proper jurisdiction were similar to those used in finding choice of law even though the two are different.  

Few would doubt, after reading these cases, that jurisdiction, as well as choice of law, depends very greatly upon what the Court thinks are vital interests and vital contacts of the forum with the transaction. It might seem, therefore, that any attempted use by an insignificantly interested and little contact forum of its public policy for jurisdictional (or choice of law) bases which undercuts the least common denominator of the "Equation"—Order versus Liberty in the federal-state relationship—will be seriously restricted by the Court in constitutional construction. True enough, the Court, viewing facts of a case subjectively, may divide in its five-to-four decisions, but that is a human factor that we are unable, at present, it seems, to rectify. That the Court's right to deny a forum the right to act inequitably, unfairly, unjustly, and discriminatorily in applying its public policy, when the contacts and interests of the forum are insignificant, few, if any, would deny.  

If our analyses of the Hanson, McGee, and International Shoe cases, supra, are correct, where do they leave us in regard to constitutional limitations on the unfair, unreasonable, and arbitrary use by an insignificantly connected forum, with little or no interests in the agreement, of its public policy (or the public policy of some other state, as seen by the forum, although similarly situated in connections and interests as the forum) to negate parties' stipulated place law which has reasonable connections with, and vital interests in, an essential element of the contract?

69 Cf., Hanson v. Denckla, supra note 66, at 258-259.
70 I have used detail in McGee v. International Life Ins. Co., supra note 68; International Shoe Co. v. Washington, supra note 66; Hanson v. Denckla, supra note 66, for the purpose of bringing out in detail just such matters as indicated in this paragraph.
71 For instance, observe Hanson v. Denckla, supra note 66.
Although the cases immediately above were concerned primarily with jurisdictional rather than with the choice of law aspects, it seems that since some members of the Court\(^{73}\) (possibly all of them) view the factors in finding jurisdiction similar, in many respects, to those of finding choice of law, that the Court would not be adverse to parties' intended place law as long as the place had reasonable connections with, and vital interests in, an essential element of the transaction as viewed by the Court, while the forum had insignificant contacts and interests. One possible observation might occur. May not a forum with vital interests in and contacts with an essential element of the transaction, as seen by the Court, use its public policy (or the public policy of some other state which the forum believes to have vital interests in and contacts with an essential element of the transaction) to negate parties' stipulated intent place law if the two are in conflict? In essence, therefore, may not the public policy of the forum be used freely in the forum as long as the forum's vital contacts and interests with an essential element of the transaction fairly and equitably balance with similar contacts and interests of any other state connected with the agreement?

Let us turn to substantive due process of law\(^{74}\) for a few moments to see if there is any change in our analyses.

In *Home Insurance Company v. Dick*,\(^{75}\) a technical domiciliary of Texas, Dick, brought action in a Texas forum against a Mexican insurance company to recover on a fire insurance policy for the loss of a boat. Jurisdiction was asserted in an *in rem* proceeding through garnishment by means of ancillary writs issued against The Home Insurance Company and Franklin Fire Insurance Company, which reinsured, by agreements with the Mexican corporation, parts of the risk which it had assumed. Those garnished were New York corporations; service was obtained upon


\(^{74}\) Historically, there has always been a dispute as to the meaning of "due process of law." Does it relate to procedure only or does it have a more expansive base going back to what has been denominated as "fundamental rights," which may be considered larger than a mere formal legal procedure? Can we trace it to natural law concepts? See, Mott, *Due Process of Law* iv, 1-3, 5-7, 10, 159, 161, 180-183, 254-255, 274, 278-279, 296, 590, 592, 593-594, 603-604 (1926); see also, Taylor, *Due Process of Law and the Equal Protection of the Laws* viii, ix, xii, 5, 7, 8, 12-17, 19, 30, 35, 42-43 (1917).

\(^{75}\) 281 U.S. 397 (1930).
them through their local agents in Texas pursuant to statutes of that state which required the appointment of local representatives by foreign corporations seeking business permits within the state.

The action in Texas was solely between Dick and the garnishees, as the defendant (Mexican corporation) had never been admitted to do business in Texas and had never done any business there; also, the defendant, Mexican company, had never authorized anyone in Texas to receive service of process for it or enter any appearance in a Texas court. The Mexican corporation was cited by order of publication under Texas statutes (public policy); attorneys for the Mexican corporation were appointed for it by the trial court and they appeared unauthorized by the corporation on its behalf. The attorneys filed an answer which denied any liability. No contention existed that any in personam jurisdiction existed over the Mexican corporation. Dick was attempting to garnishee the two New York reinsurers for sums of money they might owe to the Mexican corporation by virtue of the policy of reinsurance and the subsequent loss of the insured boat.

The defense of the garnishees was, in essence, jurisdictional.\(^7\) (This action was not begun for more than a year after the date of the loss.) Said the Court (speaking through Mr. Justice Brandeis):

The policy provided: “It is understood and agreed that no judicial suit or demand shall be entered before any tribunal for the collection of any claim under this policy, unless such suits or demands are filed within one year counted as from the date on which such damage occurs.” This provision was in accord with the Mexican law to which the policy was expressly made subject [stipulation for Mexican law to control]. It was issued by the Mexican company to one Bonner, of Tampico, Mexico, and was there duly assigned to Dick prior to the loss. It covered the vessel only in certain Mexican waters. The premium was paid in Mexico; and the loss was “payable in the City of Mexico in current funds of the United States of Mexico, or their equivalent elsewhere.” At the time the policy was issued, when it was assigned to him, and until after the loss, Dick actually resided in Mexico, although his permanent residence [domicile] was in Texas. The contracts of reinsurance were effected by correspondence between the Mexican company in Mexico and the New York companies in New York. Nothing thereunder was to be done, or was in fact done, in Texas.\(^7\)

\(^7\) May we not say that either a lack of jurisdiction or a limitation of jurisdiction involved in the due-process-of-law concept in this case amounts to a jurisdictional issue?  
\(^7\) 281 U.S. at 403-404.
Continued the Court:

In the trial court, the garnishees contended that since the insurance contract was made and was to be performed in Mexico, and the one year provision was valid by its laws, Dick's failure to sue within one year after accrual of the alleged cause of action was a complete defense to the suit on the policy; that this failure also relieved the garnishees of any obligation as reinsurers, the same defense being open to them, . . . . To this defense, Dick demurred, on the ground that Article 5545 of the Texas Revised Civil Statutes (1925) provides: "No person, firm, corporation, association or combination of whatsoever kind shall enter into any stipulation, contract, or agreement, by reason whereof the time in which to sue thereon is limited to a shorter period than two years. And no stipulation, contract, or agreement for any shorter limitation in which to sue shall ever be valid in this State."  

Did the Texas law (public policy) violate due process of law? We must observe at once the importance of characterization. Dick characterized the assigned errors before the Court as pertaining to local law so that his argument ran that while a provision which required notice of loss within a fixed time is substantive because it is a condition precedent to the existence of the cause of suit, a provision for liability only in case action is commenced within a year is not substantive since it relates only to the remedy after accrual of the cause of action; that while the validity, interpretation and performance of the substantive parts of an agreement are determined by the law of the place where it was made and was to be performed (a means of arriving, in many instances, at the intent of the parties as to the law to control the agreement), matters which relate only to adjective or remedial law are undoubtedly governed by the law of the forum; and, that even if the court of Texas erred (Texas held for Dick) in sustaining the statute applicable to this agreement, the error was one of state law or of the interpretation of the agreement, and should not be reviewable in the Supreme Court.

The Court did not favor Dick's contention and, though it stated it did not care how the question might be characterized, by its characterization it determined the outcome of the case. For the Court characterized the issue as one of substance and so

78 Id. at 404-405.
79 Id. at 406.
80 Id. at 406-407.
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governed by Mexican law—the law with the only significant contacts with and vital interests in the transaction and the one stipulated for control of the agreement by the parties to the contract.

Said the Court:

However characterized, it is an express term in the contract of the parties by which the right of the insured and the correlative obligation of the insurer are defined. If effect is given to the clause, Dick cannot recover from the Mexican corporation and the garnishees cannot be compelled to pay. If, on the other hand, the statute is applied to the contract, it admittedly abrogates a contractual right and imposes liability, although the parties have agreed that there should be none.81

Then the Court found that the Texas law (public policy) as applied by Texas courts

... deprives the garnishees of property without due process of law. A State may, of course, prohibit and declare invalid the making of certain contracts within its borders. Ordinarily, it may prohibit performance within its borders, even of contracts validly made elsewhere, if they are required to be performed within the State and their performance would violate its laws [public policy]. But, in the case at bar, nothing in any way relating to the policy sued on, or to the contracts of reinsurance, was ever done or required to be done in Texas. All acts relating to the making of the policy were done in Mexico. All in relation to the making of the contracts of re-insurance were done there [Mexico] or in New York. And, likewise, all things in regard to performance were to be done outside of Texas. Neither Texas laws nor Texas courts were invoked for any purpose, except by Dick in the bringing of this suit. The fact that Dick's permanent residence was in Texas [domicile in Texas] is without significance. At all times here material, he was physically present and acting in Mexico. Texas was, therefore, without power [jurisdiction] to affect the terms of contracts so made. Its attempts to impose a greater obligation than that agreed upon and to seize property in payment of the imposed obligation violates the guaranty against deprivation of property without due process of law. Compañía General de Tabacos v. Collector of Internal Revenue, 275 U.S. 87; Aetna Life Ins. Co. v. Dunken, 266 U.S. 389; New York Life Ins. Co. v. Dodge, 246 U.S. 357. Compare Modern Woodmen of America v. Mixer, 267 U.S. 544, 551.82

Apparently, the Court thought that from the cases cited as authority the same equitable principles of vital interests and important contacts applied equally to due process considerations as to full faith and credit. The least common denominator factors of constitutional construction—i.e., reasonableness, non-discrimina-

81 Ibid.
82 Id. at 407-408.
tion, and equity—are self-evident in the Court's decision. It would appear, therefore, looking backward from the *International Shoe* case to the *Dick* case, that the same fairness demanded by the requirement that the forum have vital interests and important contacts in order for it to have procedural due process jurisdiction is similarly required for substantive due process jurisdiction.

Next, the Court in the *Dick* case placed the due process constitutional limitation on improper use by the forum of its public policy indirectly (if not directly) behind a reasonably connected place law, stipulated-intent theory of the parties, when the place law stipulated has vital interest in and contacts with the transaction. Said the Court:

The cases relied upon, in which it was held that a State may lengthen its statute of limitations, are not in point . . . [citing cases]. In those cases, the parties had not stipulated a time limit for the enforcement of their obligations. It is true that a State may extend the time within which suit may be brought in its courts, if, in doing so, it violates no agreement of the parties. . . . When, however, the parties have expressly agreed upon a time limit on their obligation, a statute [public policy of forum] which invalidates the agreement and directs enforcement of the contract after the time has expired increases their obligation and imposes a burden not contracted for.

To paraphrase the Court above, Texas had no significant contacts (as subjectively seen by the Court) with the transaction; it had no vital interest in the agreement; and to use Texas public policy in such a case would be an inequity; further, it would be unreasonable and discriminatory; it would upset the equation of Order versus Liberty had it been a state-to-state Conflict-of-Laws transaction and impinge on national policies as enunciated in the Constitution. Although full faith and credit does not apply to foreign nations' contract contacts, they do apply to due process requirements. Therefore, with insignificant interests and contacts,

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85 *Id.* at 408-409.
86 Note 8 *supra*.
87 Texas, with no vital interests and contacts with the transaction, would be acting arbitrarily, unreasonably, unjustly, discriminatorily, and inequitably, if permitted to apply its public policy to negate the parties' agreement and stipulated place law.
88 The concept of securing fundamental "rights" to citizens and others before the courts of the realm was a tradition of the common law and possibly owed its origin to theories of natural law. See Mott, *op. cit. supra* note 74, and Taylor, *op. cit. supra* note 74.
forum states will not be permitted to impinge on national policies of federal-state relationship in either a Conflict-of-Laws intra-Union contract or one involving a foreign nation and a state of the Union. In attempting to balance legal duties and obligations between parties to a Conflict-of-Laws agreement, the larger interest of the nation (under Constitutional construction) in fairness, justice, equity, non-discrimination and reasonableness must not be trespassed upon by forums with insignificant contacts and interests with the agreement. There must be law and order in the forum, but the law and order of an insignificant-interest-and-contact forum must be supervised by national constitutional concepts of law and order based upon fairness—a vital factor in the least common denominator of a federal-state relationship.

The Court, in conclusion, demolished the forum public-policy argument in cases involving insignificant forum contacts and interests with the transaction by stating:

Third, Dick urges that Article 5545 or the Texas law [public policy] is a declaration of its public policy; and that a State may properly refuse to recognize foreign rights which violates its declared policy. Doubtless, a State may prohibit the enjoyment by persons within its borders of rights acquired elsewhere which violates its laws or public policy [note the use of the conjunction “OR” in last statement]; and, under some circumstances, it may refuse to aid in the enforcement of such rights. Bothwell v. Buckbee, Mears Co., 275 U.S. 274, 277-9; Union Trust Co. v. Grosman, 245 U.S. 412; compare Fauntleroy v. Lum, 210 U.S. 230. But the Mexican corporation never was in Texas; and neither it nor the garnishees invoked the aid of the Texas courts or the Texas laws. The Mexican corporation was not before the court. The garnishees were brought in by compulsory process. Neither has asked favors. They ask only to be left alone. . . . It [the State] may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them.89

A few words in analysis may be made. Unless the Court had correctly characterized the issue at the start, the case might have brought forth different results. Indirectly, the Court, by its decision, was stating that an improper, inadequate, inequitable, unreasonable, unfair, and discriminatory characterization by a state court of issues before it, when important contacts and vital interests are lacking in the forum, is limited by the federal Constitution. Indirectly, if not directly, the peripheral bases of jurisdic-

tion (substantive due process here, although procedural due process in regard to bases of jurisdiction seem much the same) in the later cases *Shoe*,90 *McGee*,91 and *Hanson*,92 were written between the lines in *Dick*, either in what the Court said or what might be fairly implied. If jurisdiction is based upon some form of power, and power, in turn, upon just and equitable interests and contacts of the forum with the transaction, then a re-reading of *Dick* may lead us into *Shoe, McGee, and Hanson*. Even though the public policy of a forum with vital interests and contacts with the agreement, or that of some other state as seen by the forum as having similar interests and contacts, may be used in not only jurisdictional aspects, but choice-of-law aspects93 as well, the Court always has at hand constitutional limitations94 on public policy usage unless there are real and substantial interests and contacts95 that provide more of an equitably balanced equation than any other foreign state factually connected. In the *Dick* case, to have permitted Texas policy to override Mexican policy would have brought forth an imbalance in the equation of Order versus Liberty in a federal-state relationship.

Although *Clay v. Sun Insurance Office, Ltd.*96 was remanded to the Florida state courts in order to ascertain the meaning of a Florida statute (public policy), it would appear that the same constitutional construction premise that underlies *Dick*,97 may be found here as well. A citizen and resident of Illinois when the contract of insurance was made in Illinois moved to Florida with the insured goods. He became a Florida citizen (not a mere technical domiciliary as in *Dick*) and resided there when the goods in Florida were lost. The insurance company was licensed to do business in both Florida and Illinois. The policy of insurance covered "all risks" of loss or damage to certain personal property having no fixed situs outside Florida; the policy was world-wide

93 Unquestionably, had Texas in Home Ins. Co. v. Dick, *supra* note 89, had important contacts with the case the decision would have been quite different. Cf., Clay v. Sun Ins. Office, Ltd., 363 U.S. 207 (1960).
94 See Leflar, Conflict of Laws 242-244 (Student ed. 1959).
96 *Supra* note 93.
in coverage. After more than twelve months from the discovery of the losses, the plaintiff sued respondent in a Florida Federal District Court basing jurisdiction upon diversity of citizenship. The District Court awarded judgment for plaintiff upon the premise that under Florida law (public policy) the losses were not excluded from "all risks" coverage if such losses were caused by the deliberate acts of plaintiff's wife and, further, that the suit was not barred by a provision in the insurance that suit on any claim for loss had to be brought within twelve months of discovery of the loss, even though it would appear the court felt that a Florida statute would forbid enforcement of such a clause while it was apparently valid in Illinois. The Court of Appeals reversed, finding that Florida could not under the due-process clause apply its statute (public policy) to the "suits clause" of the Illinois contract where such clause was valid. The Supreme Court of the United States (strongly dissented to by able Justices) held that the Court of Appeals should not have passed on the constitutional question until first passing on the two local law issues, and even then not unless its decision on those local issues made a decision necessary on the constitutional question.

Justice Frankfurter delivered the majority opinion of the Court. This opinion cited, with what appears to be apparent approval, the Dick case. Also cited, with what may have been apparent approval, was Hartford Accident & Indemnity Co. v. Delta & Pine Land Company, in which the Court had held

... that Mississippi could not constitutionally apply its own law [public policy] to invalidate a contract clause limiting the insurer's liability on a surety bond against defalcations by the insured's employee "in any position, anywhere," to losses of which notice was given within fifteen months after the termination of coverage. The contract was made in Tennessee where the insured had offices and the insurer was licensed to do business. Mississippi's claim was struck down although the contract covered an ambulatory risk, the default giving rise to the claim actually occurred in Mississippi, the insurer was under license doing business there, and the insured was incorporated there.

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98 265 F.2d 522 (5th Cir. 1959).
99 363 U.S. at 218.
100 Id. at 210, citing Home Ins. Co. v. Dick, 281 U.S. 397 (1930).
101 Id. at 210.
102 292 U.S. 143 (1934).
Further, the Court in the Clay case observed *Watson v. Employers Liability Assurance Corp., Ltd.*,104 where the Court,

... sustained Louisiana's application, in a suit by a citizen, of its own "direct action" statute although thereby it invalidated an express provision against direct liability of the insurer in a contract negotiated and paid for within Illinois and Massachusetts, in both of which the clause was valid. The contract insured Toni, an Illinois corporation distributing its products nationally, against liabilities arising from the use of the product. The insurer was a British corporation licensed to do business in several States, including Massachusetts, Illinois and Louisiana. Toni had no contact with Louisiana and could not be served there. The Louisiana plaintiff had sustained her injury in Louisiana. The Court found Louisiana's contact with the subject justified its application of the statute to make an insurer doing business in Louisiana amenable to suit by a locally injured citizen.105

Even though the majority opinion in the case at bar admitted that the "... relevant factors of the present case [Clay] are not identical either with Dick, or Delta & Pine, or Watson and not one of them can fairly be deemed controlling here ...",106 it would appear (in spite of the remand to Florida) that there were sufficient contacts in the Clay case with Florida for the application by Florida of its law. In any event, it would appear from the significant Florida contacts and interests with the transaction that the application of Florida public policy would not be unfair, inequitable, unreasonable, or discriminatory—the apparent factors of the least common denominator of constitutional construction in such matters.

In my opinion, the "Abstention Doctrine"107 should not have been used by the majority in the Clay case; rather, the opinion of the minority,108 written by Justice Black, concurred109 in by Justice Douglas (he also wrote a separate opinion)110 and Chief Justice Warren,111 seems more in line with what an "Activist Court"112 should do. The minority would not have awaited a

105 Clay v. Sun Ins. Office, Ltd., supra note 103, at 210-211.
106 Id. at 211.
109 Id. at 227-228.
110 Ibid.
111 Id. at 213.
112 Compare Mendelson, Justices Black and Frankfurter: Conflict in the Court 118.
decision by the Florida state courts on local issues before deciding the constitutional issue. From what Justice Black said, as well as from what may reasonably be inferred, it appears that he felt that Florida had a reasonable and sufficient contact (as well as vital interest) with the transaction to decide the question by its laws which would not infringe constitutional limitations on state powers. To Justice Douglas, the use of Florida choice of law rule would neither violate the "due process" nor the "full faith and credit" clauses of the Constitution, since Florida not only had a vital contact with, but vital interests in, the transaction.

Justice Black quoted with approval from *Pacific Employers Insurance Co. v. Industrial Accident Comm’n,* a statement by Justice Stone (later Chief Justice Stone) that:

> [T]he conclusion is unavoidable that full faith and credit does not require one state to subordinate for its own statute [public policy], applicable to persons and events within it, the conflicting statute of another state, even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events.

Justice Black could not find it within constitutional mandate for the court of one state (which had vital contacts and interests with the transaction) to subordinate its public policy to the public policy of another state which also may have major contacts and interests with the transaction. He cited *Griffin v. McCoach;* *Klaxon Co. v. Stentor Electric Mfg. Co.;* *Pink v. A.A.A. Highway Express;* and *Hoopeston Canning Co. v. Cullen,* as authorities for his views. He readily admitted that fraternal benefit associating, such as in *Order of United Commercial Travelers v. Wolfe,* seemed to admit of an exception to views of balancing state interests in a multistate factual situation wherein each state might usually (when each had significant interests and contacts) use in its own courts its own public policy. But he thought that the nature of the

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114 *Id.* at 502, cited in 365 U.S. at 218.
115 313 U.S. 498 (1941).
116 313 U.S. 487 (1941).
117 314 U.S. 201 (1941).
118 318 U.S. 313 (1945).
society accounted for this exception. In other words, once the association is characterized as a benefit society, Mr. Justice Black thought that by the very nature of the society an exception might exist as to the applicable law and jurisdictional bases for action so that the use of public policy by the forum to attain (when it is also the place of birth) the objective of more certainty in the law might be justified. Thus, in fraternal benefit associations, constitutional limitations on the forum’s public policy usage seem, (when the forum is at least the home of the society) in the least, abbreviated, if not eliminated.

It may be doubted if this type of association comes under any exception to the general rule. A view may be advanced that as the Court observes today’s needs and wants in the social unit in which we live in time and space, it feels that it is still a necessity to buttress “Order” and “Certainty” in law in the equation of Order versus Liberty so that the ends of the social unit will be met in fraternal benefit societies. Any legal equation should be based on the ultimate goals of society—its needs and wants in time and space. By-laws and constitutions of a fraternal benefit society that regulate membership, etc., may be made more certain if controlled as to legal requirements by the state laws of its charter. Once the Court subjectively views the needs of society as diminished in regards to fraternal benefit associations, it seems that even its “self-styled exception” may disappear.

Justice Black, in distinguishing the Dick case from the Clay case, stated that:

In the Dick case the Court’s opinion carefully pointed out that the decision in that case might have been different had the activities relating to the contract there held binding in Texas been carried on in that State [Texas]. And in the Delta & Pine Land Co. case, we pointed out that the Court had considered that the Mississippi activities in connection with the policy sued on there were found

120 See Sovereign Camp v. Bolin, 305 U.S. 66 (1938); and note 63, supra.
121 Note 26 supra, leads me into this assumption. Our Supreme Court is an able one, but in dealing with complex problems of today, it may find itself perplexed in decisional explanations.
122 Compare, Sovereign Camp v. Bolin, supra note 120.
123 Ibid.
124 See note 26, supra.
to be so “slight” and so “casual” that Mississippi could not apply its own law.\textsuperscript{127}

It seems not unreasonable to state by inference from what Mr. Justice Black said\textsuperscript{128} that the minority (possibly, even the majority, had the issues been in this case) might not have been unfavorable to the usage of a stipulated law by the parties to control the agreement had the parties stipulated for a law with reasonable and most substantial connections with the vital elements of the transaction, as long as the place law stipulated for also had vital interests in the agreement. It should be observed, though, that Justice Black’s opinion in the \textit{Clay} case indicates that he would apparently characterize contractual limitations much as any remedial statute of limitations, and so might validate the forum’s use of its own public policy even at the expense of parties’ stipulated law. Possibly, we may reconcile these apparently conflicting views, at least, as to the case at bar, by stating that since Florida had most vital contacts and interests in the transaction (as I see it), that had the parties stipulated for that law to govern their transaction it would have undoubtedly been honored by the minority of the Court (a minority today may be the majority tomorrow\textsuperscript{129}). In any event, as viewed by a strong minority of the Court, the choice of Florida law to govern the agreement apparently would not have been in conflict with the least common denominator of constitutional construction under the Due Process Clause of the Fourteenth Amendment. The “Equation” would appear to have remained in balance. Justice, equity, reasonableness, fairness, and non-discrimination as factors in the least common denominator would not, it seems, have been prejudiced by the choice of Florida public policy to control the case. One further observation seems pertinent. When the Court apparently finds the major interests and contacts in balance of the several states connected with the transaction, it seems reasonable that the forum should be permitted to use its own public policy, for to do otherwise would be most inequitable and unjust to the forum. In such an event, the discrimination would run against the forum with apparently no valid reason behind it. It would

\textsuperscript{127} Id. at 220.
\textsuperscript{128} Since Mr. Justice Frankfurter's departure from the Bench, it is most difficult to surmise what a new majority would do under similar circumstances.
\textsuperscript{129} With the gradual shifting of Court membership brought about by age or health, new majorities and new minorities are certain to occur.
seem that equities must balance equities in any equation of life, even in constitutional construction.

In *New York Life Insurance Company v. Dodge*, an early attempt was made by the Court to control a choice of law by means of the due process clause. The insured, Mr. Dodge, was a resident of Missouri. He made application in that state to the New York Life Insurance Company for an insurance policy on his life. It appears that the Company was chartered in New York, in which state it also had its main office. The Company approved the insurance application of Dodge and delivered to him in Missouri the policy naming Mrs. Dodge as beneficiary. The agreement contained the following provisions regarding the ability of the insured to obtain any future loans from the Company on the policy:

Cash loans can be obtained by the insured on the sole security of this policy on demand at any time after this policy has been in force two full years. Application for any loan must be made to the Home Office and the loan will be subject to the terms of the company's loan agreement. Any indebtedness to the company will be deducted in any settlement of this policy.

Later, the insured took advantage of these agreement provisions; and, after the policy had been in being two years, he borrowed annually from the Company. It seems that the procedure for making these loans was that the insured was required to file an application for the loan and sign an agreement in Missouri upon which the Missouri local office of the Company forwarded all application forms and agreement papers, together with a pledge of the policy of insurance, to the New York main office of the Company. If the Company approved, it then drew a check for the proceeds on a local New York bank and mailed the check to the insured at his home in Missouri. The loan contract provided that "principal and interest are payable at said Home Office, and that this contract is made under and pursuant to the laws of the State of New York, the place of said contract being said Home Office of said Company."

Mr. Dodge borrowed over a period of several years. He then missed payment of the premiums on the insurance policy. The

130 246 U.S. 357 (1918).
131 *Id.* at 368-369.
132 *Id.* at 371.
Company, as permitted by New York law, then applied the cash surrender value of the insurance policy to the payment of the insured's indebtedness. Thus, the cash surrender value of the insurance policy was exhausted and the policy was cancelled. After this cancellation, the insured died. His wife, the beneficiary, sued the Company in Missouri and claimed the full amount of the policy less the unpaid premiums and loans. She alleged that under Missouri law the company was not permitted to subtract the full amount of the insured's indebtedness from the cash surrender value of the insurance policy.

Under the Missouri law, it appears that there was a requirement that after the payment of three annual premiums, three quarters of the new value of the insurance policy, minus any indebtedness to the Company on account only of past premium payments, should be used to buy insurance for the face amount of the insurance policy. Did the Missouri statute apply or the New York law? If the Missouri law applied, then it appears that the policy would still have been in force at the death of the insured; the contrary would be the effect if New York law applied. Missouri favored the beneficiary.

The Court, upon appeal, reversed the Missouri courts. It appears that the Court viewed the loan agreement as separate and distinct from the policy; and, since it was made in New York, it was a New York contract and controlled by that law. Even though Missouri did have substantial contacts and interests in the transaction, New York interests and contacts were viewed as greater since the loan agreement was a separate contract. The parties had also stipulated for New York law governance of the loan arrangements. Justice McReynolds, speaking for the Court, thought that the insurance policy itself was a Missouri agreement and subject to that law; however, the loan arrangements were separate agreements; and, since the policy did not mandatorily require the Company to make the loans, the agreements for such were separate and governed by New York law which was apparently the place of greater contacts and interests. To do otherwise, reasoned Justice McReynolds, would violate the insured's freedom of contract, for Dodge could make a contract outside of Missouri even though he was a resident therein. What part the stipulation for New York
law to control the loan agreement had in the decision we can only surmise. At least, it indicated the parties looked to New York law for certainty in control of the transaction. If there was freedom of contract on the part of the insured, the case seems logical. Otherwise, there would be a taking by the Missouri courts of property without due process of law.

In *Mutual Life Insurance Company v. Liebing*, the Court, under somewhat similar facts to *Dodge*, found that the insurance policy read: "'... the company will ... loan amounts within the limits of the cash surrender value ...'" although in *Dodge* the provision was that "'... cash loans can be obtained.'" The Court seemed to think that this difference in wording would make a difference in decisional results between the two cases. Missouri, in *Liebing*, was permitted to use its own law to regulate the loan agreement terms. Possibly, we may say that *Liebing* met the normal expectations of the parties to the agreement.

Certainly, few, if any, would disagree with the ruling of the Court in *New York Life Insurance Co. v. Head*. The insured, Mr. Head, was a citizen of New Mexico. While he was temporarily in Missouri, he applied for an insurance policy with a New York insurance company. Again, somewhat like the loan arrangement in *Dodge*, the application in *Head* stipulated that the insurance policy, if and when issued in New York, should be considered as a New York agreement. Although the insurance agreement was delivered in Missouri to a friend of Mr. Head, and he in turn delivered it to Head upon his next visit to Missouri, Mr. Head then returned to New Mexico and transferred the policy to his daughter. The daughter in New Mexico borrowed from the Company against the cash surrender value of the policy of insurance. Under somewhat similar facts to *Dodge*, there was default in payment of the policy premium and the entire cash surrender value was to pay off the indebtedness; then the policy was cancelled. Upon a suit in Missouri by the daughter of Head, the beneficiary in the policy, there was an attempt to use the Missouri law which

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183 259 U.S. 209 (1922).
184 Id. at 209.
185 246 U.S. at 368.
186 234 U.S. 149 (1914).
187 Supra note 130.
permitted only that part of the indebtedness due for past premiums be deducted from the policy cash surrender value before the purchase of policy paid-up insurance based upon any differential left of the cash surrender value. When the Missouri court applied the Missouri law (similar here to *Dodge*), the Court reversed. Missouri had no contacts or interests worthy of mention with the policy or any of the loan arrangements thereunder.

Again, what part the stipulated law had upon the transaction we have no way of knowing, except by surmise. Certainly, in any event, the law of Missouri had not sufficient contacts with the transaction for its use.

I believe these cases add to our constitutional premise rather than diminish it in any respect. Fairness demanded the decision in each case.\(^{138}\) If there is freedom of contract in a Conflict-of-Laws agreement, then it is primarily the parties' contract that is being enforced and not that of a state. After all, what state should be permitted to use its public policy to decide a case in validity of Conflict-of-Laws agreements except the state law stipulated for by the parties which has reasonable and important contacts with an essential element of the transaction? Of course, the Court has a most difficult task to determine the principles of most vital interests, most important contacts, and freedom of the parties from fear or restraint of one over the other to the transaction. This, in some respects, requires a subjective appraisement by the Court after analyzing each factual situation in a Conflict-of-Laws agreement. As long as the Court attempts to deal fairly and without discrimination with the parties' agreements so that their normal and reasonable expectations will be met, there should be no complaints.

(Part II of the article, dealing with Full Faith and Credit, will appear in the Fall 1964 issue).

\(^{138}\) Compare with "A Premise of Constitutional Construction," *supra* at note 13; observe note 4, *supra*. 
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