

UNCONSTITUTIONAL DISCRIMINATION IN THE CONFLICT
OF LAWS: PRIVILEGES AND IMMUNITIES

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I. THE PROBLEM

PARADOXICALLY, a significant virtue—or apparent virtue—of the law of conflict of laws is a by-product of the worst features of the system. When universal choice-of-law rules are employed to determine “what law governs,” problems are created that did not exist before, and the real problems are “resolved” without regard to the purposes (or even the content) of the laws involved and the interests of the respective states in the effectuation of their policies.¹ Precisely because of this indifference to legislative purpose and state policy, the system appears as one of cool and dispassionate impartiality. All persons are treated alike; the alien is placed upon an equal footing with the citizen. If the validity of a contract is determined by the law of the place of contracting; if the consequences of a tort are determined by the law of the place of harm; if matters of procedure are determined by the law of the forum—then problems of invidious discrimination apparently cannot arise. Even when the factor determining choice of law is domicile—which in the United States is synonymous, for American citizens, with state citizenship—the serene impartiality of the system is unruffled. The law of the domicile is called for whether it be the law of the forum or of a foreign state, and it has apparently never occurred to anyone to suggest seriously that it is invidious thus to treat persons differently because they have their homes in different states.²

On the other hand, when, employing an alternative method of analyzing conflict-of-laws problems, we inquire into the policies expressed in laws, and into the extent to which a state may reasonably assert an interest in the application

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1. See Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958); Currie, *Survival of Actions; Adjudication versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205 (1958); Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171; Currie & Lieberman, *Purchase-Money Mortgages and State Lines: A Study in Conflict-of-Laws Method*, 1960 DUKE L.J. 1, 41-55.

2. “But the [privileges-and-immunities] clause has nothing to do with the distinctions founded on domicile.” *Lemmon v. People*, 20 N.Y. 562, 603 (1860).

of its policy to cases having foreign aspects, we quickly encounter problems of discrimination. The alternative method, rejecting universal rules for choice of law, seeks to determine the applicability of laws to cases having foreign elements by the processes of construction and interpretation. Frequently it is clear that the purpose of a law is to protect, or confer a benefit upon, one of the parties to a transaction. It is equally clear that the benefit or protection is not intended for all men everywhere, but only for those who by virtue of their relationship to the state are within the legitimate scope of its governmental concern. If the policy of such laws is to be effectuated, they must be applied in such a way as to protect the intended beneficiaries. To apply them for the protection of others, with whose welfare the state has no concern, may in some situations constitute wise altruism, serving the long-term interests of the state; in other situations such an application may be simply irrational, advancing no governmental interest of any state; and in still other situations such application may constitute intermeddling so officious and unjustified as to amount to a denial of due process of law, or of full faith and credit to the laws of a sister state.

It is of the essence of this approach to problems in the conflict of laws that we determine the intended beneficiaries of the law and, in general, insist upon its application for their benefit. Yet the moment a state announces that the benefits of its laws will be reserved exclusively, or even primarily, for its own citizens or residents, problems of discrimination arise. Differential treatment of the citizen and the foreigner may be objectionable on ethical grounds; it may be bad policy if the long-term interests of the state are taken into account; it may also violate the privileges-and-immunities clause³ or the equal-protection clause⁴ of the Constitution. Yet differential treatment of some sort is essential if laws are to be rationally administered and if the state is to maintain a decent respect for the legitimate spheres of responsibility of other states.

It is the purpose of this paper to explore the extent to which the process of construction or interpretation of domestic law in such a way as to advance domestic interests in conflict-of-laws cases is limited by the constitutional prohibitions against discrimination. In particular we shall be concerned with the paradoxical border area in which the prohibitions against discrimination seem at cross purposes with the command of the due-process and full-faith-and-credit clauses, that each state abstain from interference in the affairs of the others. This paper will be primarily concerned with the privileges-and-immunities clause, the equal-protection clause being reserved for separate treatment.

It is appropriate to add a word about the attitude with which we approach the problem. In case of doubt we shall adopt for purposes of the discussion that construction of the privileges-and-immunities clause (and later of the equal-protection clause) which will most fully accomplish the constitutional

3. U.S. CONST. art. IV, § 2.

4. U.S. CONST. amend. XIV, § 1.

purpose to make this a single nation and to eradicate discrimination and the disabilities of alienage. It happens that we espouse a conflict-of-laws method which brings these troublesome problems to light. We do not, however, approach the problem defensively, in fear that the problems associated with discrimination will vitiate the method. We have no wish to minimize the difficulty of the problems, nor to obviate any of them by a narrow reading of the great constitutional guaranties of fairness and equality. A characteristic of the method is inquiry into how a state would resolve conflict-of-laws problems if its sole objective were to effectuate its own policies and advance its own interests. This inquiry is made not because we value selfishness and provincialism but because it contributes to clear analysis of the problems of conflict of laws. It allows us to measure the extent to which states do not act in furtherance of their own interests, and to seek an explanation for their failure to do so in various situations. The explanation may sometimes be that the courts are simply bemused by an arbitrary system of choice-of-law rules which ignores state interests; it may sometimes be that an enlightened spirit of altruism has dictated the avoidance of discrimination, or that simplicity has been preferred to complexity in law administration; or it may sometimes be that the desire to advance domestic interests is restrained by the constitutional prohibitions against discrimination. The aim of the method is not to promote provincialism but to promote the intelligent treatment of problems in the conflict of laws. The pursuit of domestic interests must yield whenever it comes into conflict with the constitutional prohibitions against discrimination; it may also be made to yield when it comes into conflict with a deliberately reasoned policy of making the benefits of domestic law available to all persons—where that can be done without intrusion upon the concerns of other states. Whenever we make the statement that a state should apply its protective laws when the person claiming the benefit of the protective policy is a citizen, or resident, of the state, we should like to be understood as adding that it should apply those laws also for the protection of such other persons as are entitled under the Constitution to parity of treatment with local citizens, and such others as the state may voluntarily and deliberately decide to accord parity of treatment—so long as such altruism does not amount to officious interference in the affairs of other states. In short, while this method rejects the system of choice-of-law rules, with its indifference to state policies and interests and its apparent freedom from problems of discrimination, and counsels primary emphasis on the furtherance of state interests, proponents of the method need not be embarrassed by the fact that the Constitution imposes restraints upon the pursuit of state interests. Rather they should welcome the restraints against discrimination that are made possible by the existence of a federal union.

The fact that these problems come immediately into view when conflicts problems are approached in this way does not mean that they are generated by the method. Indeed, their prompt appearance is ground for an inference that they have been present from the beginning, obscured and suppressed by the traditional conflict-of-laws system. If we may at all reasonably speak of laws

as embodying governmental policies, and of the human and rational tendency of a community to apply the policies expressed in its laws in such a way as to maximize the interests of the community, then the conditions that give rise to problems of discrimination are present at all times. One would expect to find, then, that the system of conflict-of-laws law has not succeeded in solving such problems by suppressing and ignoring them. If the system worked perfectly, and if the factors that purportedly regulate the incidence of laws were as meaningful as they are supposed to be, no problems of discrimination would arise; but the system does not work and cannot be made to work, and one of the reasons why this is so is that the conditions that give rise to problems of discrimination exist notwithstanding the system's neglect of them, and that the problems cannot be wholly ignored or suppressed.

The point is readily illustrated by two standard casebook cases on the Statute of Frauds. We are told that the requirement of a writing

. . . may be a requirement of procedure or a requirement of validity, or both. If, for instance, the statute of frauds of the place of contracting is interpreted as meaning that no evidence of an oral contract will be received by the court, it is a procedural statute, and inapplicable in the courts of any other state. . . . If, however, the statute of frauds of the place of contracting is interpreted as making satisfaction of the statute essential to the binding character of the promise, no action can be maintained on an oral promise there made in that or any other state. . . .⁵

We are not told how the court is to determine whether the statute in question is substantive or procedural; perhaps the assumption is that the characterization will be performed according to the hallowed literalism of *Leroux v. Brown*.⁶ At any rate, once the statute has been characterized, the task is done. The incidence of the statute has been determined. To put the matter in a different way, the state whose law must govern has been ascertained.⁷ If it be true that for profound and mysterious reasons—perhaps associated with The Nature of Things, or “the first principles of legal thinking”⁸—the law of the place of contracting governs the validity of the contract; and that the problem

5. RESTATEMENT, CONFLICT OF LAWS § 334, comment *b* (1934). See also *id.*, § 598, comment *a*; *id.*, § 602, comment *a*.

6. C. P. 801, 138 Eng. Rep. 1119 (1852).

7. The reader may be puzzled by this form of statement, shifting the discussion as it does from the question of how the statute should be characterized to the question of which state's law should govern. The statement implies that the court has first characterized the *problem* before it as one pertaining to substance or procedure, from which it follows that the law of the place of contracting or the law of the forum is applicable as the case may be. Apparently the question still remains: *What* law of the place of contracting? (To which the answer is, the *substantive* law.). Or *what* law of the forum? (To which the answer is, the *procedural* law.). Hence it becomes necessary to determine whether the statute of the place of contracting is substantive, and so on. We have no intention of defending this one of the several mysteries of the system; that would involve a kind of esoteric, scholastic disputation for which we have no taste. See ROBERTSON, CHARACTERIZATION IN THE CONFLICT OF LAWS 118-34, 253-59 (1940).

8. *Mutual Life Ins. Co. v. Liebong*, 259 U.S. 209, 214 (1922) (Holmes, J.).

presented to the court by a plea of the Statute of Frauds is a problem relating to validity; and that the statute of the place of making relates to validity; and if the court then consistently applies that statute to all contracts, and only contracts, "made" within the state—then it is impossible to conceive of a problem of discrimination. Cases are determined completely without reference to the connections between the parties and the states involved. The law is no respecter of persons. If the result is that one citizen is treated differently from his neighbor, the justification is obvious: he is treated differently only because a different law necessarily governs. What could be more reasonable than that?

Consider, however, what happens when a court which has not been mesmerized by the system approaches the problem in a pragmatic way. The Supreme Court of Delaware said in *Lams v. F. H. Smith Co.*:

The Delaware Statute of Frauds . . . is primarily for the benefit of the citizens of Delaware. It was the agreements or contracts of Delawareans which were mainly sought to be protected from the future uncertainties of oral testimony and the Legislature was not merely laying down a rule of evidence for the Courts. If the necessity of writing be procedural then while the lack of writing would prevent the enforcement of the contracts in the Courts of Delaware yet the Delaware citizen would still be liable to be harassed upon the contract and to be faced by oral testimony if sued in the Courts of another State, the statute of which had been held to be substantive. On the other hand, if the necessity of writing be construed as one of the formalities of the contract, then the absence of the writing would make the contract . . . unenforceable in the Courts of Delaware,⁹ and, under principles of comity and conflict of laws, unenforceable outside of the State and insure to the citizens for whose benefit the Act was passed the full measure of protection.

Having in mind the clear intent of the Legislature to require contracts, coming within the statute, to be executed with certain formalities and believing that the purpose of the Statute was not only the prevention of perjuries but the deeper purpose of protection of its citizens from the effect of such perjured testimony, we believe that the greatest measure of protection should be afforded to its citizens and so hold that the statute refers to the substance or formality with which the contract must be executed.¹⁰

Expediency? Opportunism? Manipulation of the system of conflict of laws for the purpose of achieving a result desired on independent grounds? *Quod erat demonstrandum*. The purpose of the statute was to protect persons alleged to have undertaken promissory obligations—not all such persons everywhere, but only those with whose welfare Delaware was concerned. The court therefore determined to apply the statute in a way which it thought would to the maximum extent possible secure its protection for domestic defendants; protection for foreign defendants was not a consideration. If a forthright declaration that the statute would be applied for the protection of local defendants,

9. This would be true only if the contract were made in that state; the court apparently assumed that most contracts of Delaware citizens are made in Delaware.

10. 36 Del. 477, 482-83, 487, 178 Atl. 651, 653, 655 (1935).

irrespective of the place of contracting, would have raised problems of discrimination against citizens of other states, so should this attempt to approximate the desired result by indirection. Moreover, it is no longer possible to explain to the local citizen who has been held liable while his neighbor has been protected that the circumstance that his contract was made in another state necessitates the application of that state's law; nothing could be plainer than that the applicable law has been determined not by fundamental principles but simply according to considerations of expediency. By resorting to the technique of indirection and approximation the court deprived certain Delaware citizens—those contracting outside the state—of the protection of the law that was designed for their benefit. The place of contracting obviously does not have the significance attributed to it by the system, since it can be deemed controlling or not according to the court's estimate of the effect upon domestic policy; hence it may be seriously questioned whether the classification is a reasonable one, and whether the local citizen contracting abroad has been afforded equal protection of the laws.

The reason for employing the technique of indirection and approximation is twofold. In the first place, the court no doubt felt compelled to resort to the concepts of the conflict-of-laws system; the available alternatives were assumed to be limited by the system. In the second place, the court probably felt that constitutional problems, especially problems relating to discrimination, would thus be avoided. It is instructive to analyze the decision in terms of the extent to which it will approximate the legislative purpose to protect local defendants and of its success in avoiding constitutional problems.

The opinion of the court treats three elements as important in determining how to apply the statute in conflicts cases so as to achieve the legislative purpose: the place of contracting; the residence (or citizenship) of the defendant; and the place where the action is brought. Let us assume that only two states

TABLE I

Case Number	Place of contracting	Residence of defendant	Forum	Result
1	New York	Delaware	Delaware	Delaware defendant not protected
2	New York	Delaware	New York	Delaware defendant not protected
3	New York	New York	Delaware	New York defendant not protected
4	Delaware	New York	Delaware	New York defendant protected
5	Delaware	Delaware	New York	Delaware defendant protected
6	Delaware	New York	New York	New York defendant protected

are involved, Delaware and New York, and that New York's statute of frauds is satisfied but Delaware's is not. On these assumptions there are eight possible combinations of the three factors, of which one is wholly domestic and one wholly foreign to Delaware, leaving six mixed cases. Table I shows these mixed cases and the result in each of the court's determination to treat the statute as substantive, *assuming* that the New York courts will, as the Delaware court supposed, accept its characterization of the Delaware statute and faithfully follow the rules of the system.

Although the purpose is to protect Delaware defendants, no protection is afforded in two of the three cases in which Delaware defendants appear. Although there is no purpose to protect New York defendants, protection is afforded in two of the three cases in which New York defendants appear. The cases are not, of course, equally probable; none, however, is impossible. A factor that bears heavily on the probability of any one of the cases is the feasibility of suit in the state named as forum; but the court did not make the forum a factor controlling the incidence of the statute.¹¹ The extent to which the decision will effectuate the protective policy depends, therefore, entirely upon the correctness of the court's assumption that it is probable that contracts by Delawareans will be made in Delaware. When the other party is a resident of another state, however, there is no a priori basis for such an assumption. Delaware defendants will be given the protection, and New York defendants will be denied it, according to a factor determined by chance. The effectiveness of the strategy is therefore open to serious question.

The court did not mention the residence of the plaintiff as a factor to be taken into account, but if we are to see the whole picture in terms of discrimination and other constitutional problems we should include such a factor. In each of the eight possible cases the plaintiff may be a resident of Delaware or of New York; of the resulting 16 possible cases, fourteen are mixed. If the reader is interested in constructing for himself a table along the lines of Table I he will find that the court's decision, on the same assumptions, produces the following results:

1. The Delaware defendant is protected against the New York plaintiff in two cases, and not so protected in two.
2. The Delaware defendant is protected against the Delaware plaintiff in one case and not so protected in two.¹²

11. Although the quotation in the text at note 9 *supra* may suggest an inclination to hold the statute *both* procedural and substantive, that is not the holding. The court sustained a demurrer to a plea invoking the Delaware Statute of Frauds. 36 Del. at 478, 487, 178 Atl. at 651, 655. A holding that the statute is both procedural and substantive would protect the Delaware defendant in all cases except Case 2 and would protect the New York defendant in all cases.

12. The lack of symmetry here and in Item 4 is occasioned by omission of the wholly domestic and wholly foreign cases. If we were dealing with the entire array we would say that the Delaware defendant is protected against the Delaware plaintiff in two cases; similarly, the New York defendant would not be protected against the New York plaintiff in two. See generally Latty, *Pseudo-Foreign Corporations*, 65 YALE L.J. 137 (1955).

3. The New York defendant is protected against the Delaware plaintiff in two cases, and not so protected in two.

4. The New York defendant is protected against the New York plaintiff in two cases, and not so protected in one.

A number of observations may be made concerning these results. First, even if it be assumed that reserving the benefits of the statute for citizens of Delaware and denying them to citizens of New York would amount to a denial of the privileges and immunities of state citizenship, it would be almost impossible to denounce the court's decision on that ground, since its scheme to make the statute operate in that way is so defective. So far as one can judge a priori, the scheme will protect Delaware defendants about half of the time and New York defendants about half of the time. Hence the court failed to effectuate the legislative purpose that it had so clearly defined. Only to the extent that the court's assumptions about the probabilities are correct will the scheme approximate the desired result; but, to the extent that the assumptions are correct, the problem of differential treatment of residents and nonresidents is presented. In the case before the court the result was to deny the protection of the statute to a Delaware corporation, the contract having been made in New York (Case 1, Table I). The residence of the plaintiff does not appear.

Second, the Delaware court has presumed to protect the New York defendant from the New York plaintiff in two cases. In each the contract is made in Delaware; the difference relates to the forum. In thus intruding itself into a relationship with which it has no concern, defeating the expectations of the New York plaintiff, contrary to New York policy, without advancing any interest of its own, Delaware violates the due-process clause¹³ or the full-faith-and-credit clause,¹⁴ or both.¹⁵

Third, the Delaware court has denied the Delaware plaintiff the right to recover against the New York defendant in two cases. Why should it do so, when no New York policy protects the New York defendant? The decision advances the policy of neither state. Not only so; but in two other cases, indistinguishable except for the fact that the contract is made in New York instead of Delaware, the Delaware plaintiff is permitted to succeed against the New York defendant. Since the place of making has been shown to lack significance, may not the Delaware plaintiffs in the first two cases complain of a denial of equal protection?

Fourth, the Delaware defendant whose protection was the object of the statute is protected in three cases and not protected in four. In two of the four cases in which he is denied protection the plaintiff is a New York resident. The result is to subordinate the policy of Delaware to that of New York—a judicial curb on legislative policy which is not required by the Constitution,¹⁶

13. U.S. CONST. amend. XIV, § 1.

14. U.S. CONST. art. IV, § 1.

15. See Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9 (1958).

16. See Currie, *supra* note 15.

and hence a rather obvious failure of the court to discharge its duty to give the legislative policy full effect within constitutional limits.

Fifth, in the two other cases in which the Delaware defendant is denied protection the plaintiff is also a Delawarean. Delaware alone is concerned. No policy of any other state is involved, whether the action is brought in Delaware or New York.¹⁷ The sole ground for treating this case differently from the ordinary domestic case for which the statute was primarily intended is that the contract was made in New York. How would such a case arise in real life? Two Delaware businessmen negotiating on a train in New York? Or meeting at lunch in New York City for convenience? A resident of Delaware, about to graduate from Columbia Law School, accepting by telephone an offer of employment from a Delaware law firm? When the plaintiff is a New Yorker, denial of the protection of the statute to the Delaware defendant may perhaps be defended against attack based on the equal-protection clause by the argument that avoidance of conflict with the policy of a sister state justifies the classification (though Delaware does not consistently avoid such conflicts, but asserts its own policy in opposition to that of New York when the contract is made in Delaware) ; but here, where no conflicting policy of the other state is involved, is not the treatment of some Delaware defendants differently from others simply arbitrary?¹⁸ The point is not merely that the circumstance of contracting in a foreign state is especially fortuitous when both parties are residents of Delaware, but, again, that the opinion of the court itself treats the place of making as significant only in so far as making it the controlling factor will advance the policy of Delaware.

The second case, *Emery v. Burbank*,¹⁹ is especially interesting because it is one in which Holmes, so often a rigid conceptualist in matters of conflict of laws, employed a predominantly pragmatic approach. The action was upon an oral agreement, allegedly made in Maine by the defendant's testatrix, to the

17. Our assumption is that the New York statute is satisfied, so that even if it is "procedural," New York would not interpose it.

18. Here, as at several other points in this paper, we oversimplify the problem by speaking of the parties as individuals. To explore fully the complication introduced by the variety of ways in which a corporation may be related to a state would unduly extend the present study. If two essentially New York business enterprises are incorporated in Delaware for convenience, a contract entered into between them in New York would clearly be a matter of concern to New York, while Delaware's interest might be regarded as nominal only. Congress recently dealt with this type of problem in the context of diversity jurisdiction by treating a corporation as a citizen not only of the state of incorporation but also of the state where it has its principal place of business. Act of June 25, 1958, PL 85-554, § 2, 72 Stat. 415, 28 U.S.C. § 1332 (1958). A similar solution might be worked out for some conflict of laws problems by legislation or by analogy. Perhaps we might go further in conflicts cases and deny any interest to the state in which a foreign enterprise is incorporated for convenience, although that seems rather a matter for congressional legislation. For purposes of this paper we shall assume that a corporation is to be treated as domiciled in the state of incorporation, with all the benefits and burdens that such domicile entails.

19. 163 Mass. 326, 39 N.E. 1026 (1895).

effect that, if the plaintiff would leave Maine and take care of the testatrix, she would leave the plaintiff all her property at her death. The trial court ruled that the action could not be maintained because of a Massachusetts statute providing: "No agreement to make a will of either real or personal estate, and no agreement to give a legacy, or make a devise by will, shall be binding, unless such agreement is in writing signed by the party whose executor, or administrator is sought to be charged, or by some person by such party duly authorized."²⁰ Although a literal reading of the statute would indicate that it was addressed to the validity of the contract, although the contract itself was required to be in writing (a "note or memorandum thereof" would not suffice),²¹ and although the statute expressly provided against any effect on contracts made prior to its passage,²² Holmes, writing for the Supreme Judicial Court, affirmed:

But the statute evidently embodies a fundamental policy. The ground, of course, is the prevention of fraud and perjury, which are deemed likely to be practiced without this safeguard. The nature of the contract is such that it naturally would be performed or sued upon at the domicile of the promisor. If the policy of Massachusetts makes void an oral contract of this sort made within the State, the same policy forbids that Massachusetts testators should be sued here upon such contracts without written evidence, wherever they are made.

If we are right in our understanding of the policy established by the Legislature, it is our duty to carry it out so far as we can do so without coming into conflict with paramount principles.²³

In our view, the statute, whatever it expresses, implies a rule of procedure broad enough to cover this case.

Thus the Massachusetts court's estimate of the probabilities, in this different type of case, was different from the Delaware court's estimate; and accordingly the characterization of the statute needed to effectuate the policy was different. Most actions for breach of contracts by Massachusetts decedents to make a will were likely to be brought in Massachusetts: thus to treat the statute as procedural would protect Massachusetts testators (or those interested in their estates) in the great majority of the cases. Especially in 1895, there was an objective basis for this estimate, since in the typical case the estate, or the bulk of the estate, of a decedent was likely to be administered at his domicile, which was the only place where the personal representative could be sued. Thus characterization of the statute as procedural probably did tend to approximate effectuation of Massachusetts policy. In addition, Holmes declared himself prepared to go even farther in protecting Massachusetts residents, and yet to stop short of imposing the Massachusetts policy where it would not serve her interests. He very pointedly suggested that the statute

20. Mass. Acts and Resolves 1888, ch. 372, § 1.

21. 163 Mass. at 328, 39 N.E. at 1027.

22. Mass. Acts and Resolves 1888, ch. 372, § 2; 163 Mass. at 328, 39 N.E. at 1027.

23. 163 Mass. at 328-29, 39 N.E. at 1027.

might well be construed as both procedural and substantive²⁴ (which would at least announce to another state, wherein an ancillary administration of the estate of a Massachusetts decedent might be pending, that Massachusetts desired that an oral contract made in Massachusetts be treated as void). And it was unnecessary to consider "whether . . . if, by some unusual chance, a suit should happen to be brought here against an ancillary administrator upon a contract made in another State by one of its inhabitants, the contract would have to be in writing."²⁵

Thus it is fair to say that Holmes's scheme tended substantially to effectuate Massachusetts policy, and contemplated that the policy would not be intruded where Massachusetts had no interest. There is present nevertheless the assumption that the policy must be effectuated through employment of the concepts of the system, and that the alternatives are limited thereby; one must not quite say forthrightly that the statute will always be applied in such a way as to protect Massachusetts residents to the full extent of the power of the state to do so. The solution must be stated in terms of substance or procedure, or both. As a result there remains one situation in which the Massachusetts resident will not be protected: the contract is made in Maine and there is ancillary administration in Maine. One may inquire whether failure to extend the protection in this case comports with equal protection of the laws.²⁶ A possible answer is that in such a case protection is withheld from the Massachusetts resident by Maine, not by Massachusetts, so that there can be no assertion that Massachusetts has dealt unequally with her residents; yet Holmes, like the Delaware court, assumed that the construction given by the court to a statute of its own state would control the decision of another court respecting its application.

If it is true that the Holmes scheme would substantially accomplish the purpose of protecting Massachusetts residents while withholding the benefits of the statute from others, then, despite the fact that the principle is formulated in terms of substance and procedure, the case raises precisely the kind of problem under the privileges-and-immunities clause that is the subject of this paper.

The Holmes treatment raises still another constitutional problem. The inference to be drawn from the statement of facts in *Emery v. Burbank* is that, at the time the contract was made, the plaintiff was a resident of Maine and the testatrix a resident of Massachusetts. Suppose, however, that at that time both were residents of Maine, and that the testatrix had moved to Massachusetts after the contract had been partly performed.²⁷ Holmes faced this possi-

24. *Id.* at 328, 39 N.E. at 1027.

25. *Id.* at 329, 39 N.E. at 1027.

26. At this point we shall not deal with the problem of standing to raise the equal-protection challenge. A similar problem is discussed below in connection with *Chambers v. Baltimore & O.R.R.*, 207 U.S. 142 (1907) (privileges-and-immunities clause). See text at note 262 *infra*.

27. We have no intention of considering the argument that in such a case the contract,

bility and accepted, though not without some regret, the consequences of the position he had taken:

We do not draw the conclusion that . . . the validity of all such contracts, wherever sued on, must depend on the law of the domicil. That would leave many such contracts in a state of indeterminate validity until the testator's death, as he may change his domicile so long as he can travel. But the consideration shows that the final domicil is more concerned in the policy to be insisted on than any other jurisdiction, and justifies it in framing its rules accordingly. There would be no question to be argued if the law were in terms a rule of evidence. It is equally open for a state to declare, upon the same considerations which dictate a rule of evidence, that a contract must have certain form if it is to be enforced against its inhabitants in its courts.²⁸

In other words, by construing the statute as procedural the court gave it the effect of destroying rights under a contract made under such circumstances that Massachusetts at the time it was made had no interest whatever in protecting the promisor. The problem raised by such a decision is substantially, if not precisely, the same as that raised by an attempt to apply the same statute retroactively to wholly domestic cases: impairment of the obligation of the contract.²⁹ To the extent that the state may reasonably make such a statute retroactive, it may apply it to cases in which it had no interest at the time of the transaction; beyond this, its application to such cases does precisely the same damage that is caused by unintended, unjustified, or unreasonable retroactivity. If it is recognized that retroactive application of the statute is unconstitutional, the evil of applying it in such a conflicts situation ought not to be disguised by labeling the statute as "a rule of evidence."³⁰ Moreover, even if this is assumed to be a case in which the state might legitimately adopt a policy for the protection of all persons residing in the state at the time of the act's passage, irrespective of when or where the alleged agreement was made, it is worthy of note that Massachusetts declared no such policy, but expressly limited the statute to prospective operation.³¹

The constitutional problems that come into view when problems of conflict of laws are approached in terms of analysis of governmental policies and interests are not, therefore, problems that are merely generated by the method.

on the assumption that it was unilateral, would be "made" in Massachusetts upon completion of performance by the plaintiff. Cf. RESTATEMENT, CONTRACTS §§ 45, 74 (1932).

28. 163 Mass. at 329-30, 39 N.E. at 1027.

29. "No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . ." U.S. CONST. art. I, § 10; see Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9 (1958); Currie & Lieberman, *supra* note 1.

30. It seems possible that the theory of vested rights in conflict of laws originated because of cases such as this, in which rights once settled are unsettled by a change of circumstances or of law after the transaction. It is difficult to understand, however, how the proponents of that theory managed to transplant it to the type of case in which two states have a legitimate interest in the matter at the time of the transaction.

31. See note 22, *supra*.

They exist irrespective of the method employed, though they are obscured by the traditional method. Indeed, the traditional method generates constitutional problems that would in all probability not arise if problems of "choice of law" were regarded simply as problems of the construction and interpretation of laws, without reliance upon a mystical system purporting to shortcut ordinary legal methods. But for that system—and specifically the felt compulsion to frame decisions in terms of the system's concepts—it is unlikely that the Delaware court would think of imposing its Statute of Frauds upon a transaction between two New Yorkers, thereby raising a problem of due process and full faith and credit, or of withholding the protection of the statute in a transaction between two citizens of Delaware casually present in another state, thereby raising a problem of equal protection. And but for that system and its concepts it is difficult to believe that Holmes could have brought himself even to contemplate, much less accept, the conclusion that rights acquired under a contract valid by the law of the state in which both parties resided at the time of contracting are destroyed, upon the promisor's removal to Massachusetts, by a law intended to protect Massachusetts residents and not intended to have retroactive effect.

It is an understatement to say that the problems of discrimination in the conflict of laws have been obscured by the system, with the result that little attention has been given to them by courts or legal writers. So subtly do the concepts of the system obscure realities that in 1903 the Illinois legislature was able to enact a statute designed to protect residents of Illinois, in general, against liability for the wrongful deaths of residents of other states—arbitrarily discriminating, to that end, against certain Illinois residents—and for half a century courts and legal writers did not understand the legislative purpose.³² In this investigation we shall have to do the best we can with the limited materials that are available.

II. THE PRIVILEGES AND IMMUNITIES OF STATE CITIZENSHIP

1. *The character of the privileges and immunities secured.* The privileges-and-immunities clause of article IV,³³ an abridged version of a clause of similar purport in the Articles of Confederation,³⁴ is not among the more definitively

32. Ill. Laws 217-18 (1903) (now ILL. REV. STAT. ch. 70, § 2 (1957)). The statute was held violative of the full-faith-and-credit clause in *First Nat'l Bank v. United Air Lines*, 342 U.S. 396 (1952), but a more intelligible basis for its invalidity is furnished by the equal-protection clause. See Currie, *The Constitution and the "Transitory" Cause of Action*, 73 HARV. L. REV. 36 (1959).

33. "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2. The clause should not be confused with the provision of the fourteenth amendment that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . ." U.S. CONST. amend. XIV, § 1; see note 38 *infra*.

34. The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of these states, paupers, vagabonds and fugitives from Justice excepted, shall be entitled to all privileges

glossed provisions of the Constitution.³⁵ Judicial interpretation of the clause got off to a bad start when Mr. Justice Bushrod Washington, riding circuit in 1825, felt called upon to expound his reasons for believing that it did not prevent New Jersey from denying to nonresidents the privilege of taking oysters from the waters of the state.³⁶

The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which

and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any state, to any other state of which the Owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any state, on the property of the united states, or either of them.

ARTICLES OF CONFEDERATION art. IV.

35. See generally CORWIN, *THE CONSTITUTION OF THE UNITED STATES OF AMERICA—ANALYSIS AND INTERPRETATION* 686-93 (1953). The meager constitutional history of the provision is found in 2 FARRAND, *RECORDS OF THE FEDERAL CONVENTION* 135, 173-74, 187, 443, 456, 577, 601, 637, 662, (1911); 3 *id.* at 112, 445-46; 4 *id.* at 61. Little can be gleaned from these materials except that the framers deliberately omitted the language of the Articles relating to the "removal of property imported into any State, to any other State of which the owner is an inhabitant." Note 34 *supra*. Apparently the purpose of that provision was to guarantee the right of a slaveholder to remove his human chattels from a free state. Charles Pinckney, of South Carolina, wished to retain some such provision, 2 FARRAND, *op. cit. supra* at 443, but the clause was adopted without it. The only concession to his point of view was the provision of article IV relating to fugitive slaves. See *Lemmon v. People*, 20 N.Y. 562 (1860).

From a different source one may infer that the principal object of the framers in modifying the language of the clause in the Articles was to prevent a minority of states having liberal naturalization policies from conferring upon aliens the rights of citizenship in all the states. The key move in the correction of this objectionable practice was the grant to Congress of the power to establish a uniform rule of naturalization. U.S. CONST. art. I, § 8. But the privileges-and-immunities clause of the Articles required amendment also, since it bestowed the privileges of citizenship not only upon citizens of the other states but also upon their "free inhabitants," and in one place upon "the people" of each state. See note 34 *supra*. By providing for a uniform rule of naturalization and by limiting the privileges-and-immunities clause to citizens, the framers made it impossible for one state to control the policies of the others regarding aliens. See *THE FEDERALIST*, No. 42 (Madison); 3 STORY, *COMMENTARIES ON THE CONSTITUTION* 673-74 (1833). Left unsolved was the problem of one state's conferring citizenship upon native-born Negroes, thus enabling them to claim the rights of citizenship in slave states. In the course of the debates on the Missouri Compromise, Charles Pinckney, admitting authorship of the privileges-and-immunities clause, stated that, while he could not recall the exact purpose of the framers, the idea of Negro citizenship was so remote that it could not have entered into consideration. ANNALS OF CONG. 1129, 1134 (1821), FARRAND, *op. cit. supra* at 445-46; see *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 417-19 (1856).

36. *Corfield v. Coryell*, 6 Fed. Cas. 546 (No. 3230) (C.C.E.D. Pa. 1823).

compose this Union, from the time of their becoming free, independent, and sovereign.³⁷

A gentle critic has commented that "The vagaries and vagueness of thought and expression in this statement are obvious."³⁸ One may add that the statement was wholly unnecessary to the decision, since, after disposing of this and other constitutional questions, the court entered judgment for the defendant for the sufficient reason that the owner of the condemned vessel could not maintain the possessory action of trespass for a seizure occurring while it was in the possession of a bailee.³⁹ Moreover, the disquisition on "fundamental" rights was not called for in the discussion of any question of privileges and immunities presented by the facts of the case. It would have been sufficient to say, as Mr. Justice Washington did at a later point, that since the right to fish in the public waters of the state was "a right of property, vested . . . in the state, for the use of the citizens thereof, it would . . . be going quite too far to construe the grant of privileges and immunities of citizens, as amounting to a grant of a cotenancy in the common property of the state, to the citizens of all the other states."⁴⁰

Nevertheless, Washington's sonorous dictum at once became and for many years remained the leading exposition of the clause,⁴¹ although some judges and commentators noted cautiously that the meaning must be "determined in each case upon a view of the particular rights asserted and denied therein."⁴² The comprehensive language of the clause—"all privileges and immunities of citizens"—was limited to "fundamental" privileges; as the Supreme Court said, "no privileges are secured by it, except those which belong to citizenship."⁴³ Not until 1898 did the Court give the clause a sufficiently broad construction to make it a potentially significant influence upon the disposition of ordinary conflict-of-laws cases.

In that year the Court decided *Blake v. McClung*,⁴⁴ striking down, in so far as citizens of other states were concerned, a Tennessee statute giving priority in the distribution of local assets of an insolvent foreign corporation to creditors resident in Tennessee. Mr. Justice Washington had compiled a list of the

37. *Id.* at 551.

38. McGovney, *Privileges or Immunities Clause, Fourteenth Amendment*, 4 IOWA L. BULL. 219, 228 (1918), reprinted in 2 ASSOCIATION OF AM. LAW SCHOOLS, SELECTED ESSAYS ON CONSTITUTIONAL LAW 402, 410 (1938).

39. 6 Fed. Cas. at 555.

40. *Id.* at 552. The property concept, apparently persuasive at the time, was much impaired by *Toomer v. Witsell*, 334 U.S. 385 (1948), discussed at notes 57, 94 *infra*.

41. See 3 STORY, COMMENTARIES ON THE CONSTITUTION 675 n.1 (1833); McGovney, *supra* note 38, at 229; *Ward v. Maryland*, 79 U.S. (12 Wall.) 418 (1870); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 75-77 (1872).

42. *Conner v. Elliott*, 59 U.S. (18 How.) 591, 593 (1855); *McCready v. Virginia*, 94 U.S. 391, 395 (1876); see COOLEY, PRINCIPLES OF CONSTITUTIONAL LAW 188 (1880).

43. *Conner v. Elliott*, 59 U.S. (18 How.) 591, 593 (1855).

44. 172 U.S. 239 (1898).

privileges and immunities of citizenship that are "fundamental."⁴⁶ In it he made no reference to the right to share ratably with other creditors of the same class in the assets of an insolvent debtor, nor to any right of a closely similar character. True, the list did not purport to be complete; but it is difficult to conceive of such a right as one which is, in its nature, fundamental, and which has, at all times, been enjoyed by the citizens of all free governments.⁴⁶ It is still more difficult to conceive of it as a right which is distinctive because it "pertains to citizenship."⁴⁷ Perhaps for these reasons, Mr. Justice Harlan, speaking for the Court, moved his point of reference a step backward in time: the right impaired was the right to do business, to trade with the corporation: "But the enjoyment of these rights is materially obstructed by the statute in question; for that statute, by its necessary operation, excludes citizens of other States from transacting business with that corporation upon terms of equality with citizens of Tennessee."⁴⁸ This brought the case within the penumbra of one of Mr. Justice Washington's items: "The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise. . . ."⁴⁹ But without question some of the original breadth of the clause had been restored. The rights secured were not merely those which are "fundamental," or which inhere in citizenship as such; they include some ordinary legal rights established for the people of the state in general; selfish and provincial discrimination is prohibited. So clear was this enlargement of the scope of the clause that Mr. Justice Harlan felt called upon to add a caveat: "We must not be understood as saying that a citizen of one State is entitled to enjoy in another State every privilege that may be given in the latter to its own citizens."⁵⁰ It is significant that the dissenting justices did not challenge this enlarged conception of the character of the privileges and immunities secured by the clause; they objected only (1) that the classification was not in terms of citizenship but of residence, and (2) that the statute was a legitimate exercise of the power of the state to regulate the terms upon which foreign corporations might be admitted to do business in the state.⁵¹

After *Blake v. McClung* it was reasonable for Professor McGovney to offer the following paraphrase of the clause as a reasonably accurate rendition of its meaning in the light of judicial interpretation:

Every right, privilege or immunity created by any State in behalf of its own citizens shall be equally extended to the citizens of other States if

45. *Corfield v. Coryell*, 6 Fed. Cas. 546, 551-52 (No. 3230) (C.C.E.D. Pa. 1823).

46. Cf. text at note 37 *supra*.

47. Cf. text at note 43 *supra*.

48. 172 U.S. at 253.

49. 6 Fed. Cas. at 552; cf. THE FEDERALIST, No. 42 (Madison) ("[W]hat was meant [in the Articles of Confederation] by superadding to 'all privileges and immunities of free citizens,' 'all the privileges of trade and commerce,' cannot easily be determined.").

50. 172 U.S. at 256. (Emphasis in the original.)

51. 172 U.S. at 262-69.

withholding it would hinder free social and economic intercourse between the citizens of the several States as one nation.⁵²

Apart from *Blake v. McClung*, however, there are relatively few square holdings by the Supreme Court defining and protecting the privileges secured by the clause.⁵³ These may be summarized briefly:

(a) A Maryland statute levying upon nonresident traders a license tax twice as great as the maximum tax payable by residents was held void as applied to a citizen of New Jersey.⁵⁴

(b) A Tennessee statute imposing a higher privilege tax on construction enterprises having their chief offices outside the state than on those having their chief offices within the state was held invalid as applied to a citizen of Alabama.⁵⁵

52. McGovney, *supra* note 38, at 219-20. (Original emphasis omitted.)

Cf. *Hague v. CIO*, 307 U.S. 496, 511 (1939) (opinion of Roberts and Black, JJ.):

At one time it was thought that this section recognized a group of rights which, according to the jurisprudence of the day, were classed as 'natural rights'; and that the purpose of the section was to create rights of citizens of the United States by guaranteeing the citizens of every State the recognition of this group of rights by every other State. Such was the view of Justice Washington.

While this description of the civil rights of the citizens of the States has been quoted with approval, it has come to be the settled view that Article IV, § 2, does not import that a citizen of one State carries with him into another fundamental privileges and immunities which come to him necessarily by the mere fact of his citizenship in the State first mentioned, but, on the contrary, that in any State every citizen of any other State is to have the same privileges and immunities which the citizens of that State enjoy. The section, in effect, prevents a State from discriminating against citizens of other States in favor of its own."

53. For decisions of state and lower federal courts, see Meyers, *The Privileges and Immunities of Citizens in the Several States* (pts. 1-2), 1 MICH. L. REV. 286, 364 (1903); Note, 28 COLUM. L. REV. 347 (1928).

54. *Ward v. Maryland*, 79 U.S. (12 Wall.) 418 (1870). The question of validity in terms of the commerce clause was expressly left open. *Id.* at 429.

[T]he defendant might lawfully sell, or offer or expose for sale, within the district described in the indictment, any goods which the permanent residents of the State might sell, or offer or expose for sale in that district, without being subjected to any higher tax or excise than that exacted by law of such permanent residents.

Id. at 430.

55. *Chalker v. Birmingham & N.W. Ry.*, 249 U.S. 522 (1919).

As the chief office of an individual is commonly in the State of which he is a citizen, Tennessee citizens engaged in constructing railroads in that State will ordinarily have their chief offices therein, while citizens of other States so engaged will not. Practically, therefore, the statute under consideration would produce discrimination against citizens of other States by imposing higher charges against them than citizens of Tennessee are required to pay.

Id. at 527. The Court's willingness to detect discrimination may have been influenced by the unusual way in which the question of validity arose: the contractor had been denied the right to recover \$9,403.80, to which the jury had held he was entitled on the basis of

(c) A New York statute taxing the income of nonresidents from sources within the state, but not allowing nonresidents the exemptions allowed residents, was held invalid as applied to citizens of New Jersey and Connecticut.⁵⁶

(d) A South Carolina statute imposing on nonresidents higher license fees than on residents for commercial shrimp fishing in the three-mile maritime belt off the South Carolina coast was held invalid as applied to citizens of Georgia.⁵⁷

Perhaps the best advertised of the privileges and immunities of citizenship is the right to travel freely among the states. The Supreme Court has vindicated this right of "ingress and egress," but never in terms of article IV. In *Crandall v. Nevada*⁵⁸ a tax upon every person leaving the state was held in conflict with the implied right of a citizen to travel in connection with the affairs of the national government; and in *Edwards v. California*⁵⁹ a statute making it a criminal offense to bring an indigent nonresident into the state was held in conflict with the commerce clause. Four members of the Court

quantum meruit, on the ground that, not having paid the tax, he was guilty of a misdemeanor, so that the defense of illegality prevailed. *Wright v. Jackson Constr. Co.*, 138 Tenn. 145 (1917), *rev'd and remanded*, 249 U.S. 522 (1919).

56. *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920). Although the Court refers only to "residents" of those states, the complaint alleged both residence and citizenship. Record p. 24, *Travis v. Yale & Towne Mfg. Co.*, *supra*. The employer, who was required to withhold the tax, was conceded standing to raise the constitutional question; only by thus aggregating the amounts withheld was the requirement of jurisdictional amount satisfied. 252 U.S. at 74-75.

57. *Toomer v. Witsell*, 334 U.S. 385 (1948). *McCready v. Virginia*, 94 U.S. 391 (1876), discussed at note 64 *infra*, was distinguished on the ground that it concerned oysters, which are not, like shrimp, migratory, "free-swimming" fish, and that it involved inland waters rather than the marginal sea. 334 U.S. at 401. Nevertheless, the "ownership" theory of *McCready* (and of *Corfield v. Coryell*, *supra* note 40) seems much discredited. See 334 U.S. at 401-02.

In *Mullaney v. Anderson*, 342 U.S. 415 (1952), the Court similarly invalidated a statute of Alaska imposing a higher license tax on nonresident commercial fishermen than on residents. In response to the argument that Alaska was not a state, the Court, assuming for the sake of argument that Congress might relieve a territory of some of the obligations imposed by the Constitution upon the states, held that Congress had indicated no intention of giving Alaska power to discriminate in ways forbidden to the states. *Id.* at 419-20. Thus the Court considerably impaired the authority of *Haavik v. Alaska Packers Ass'n*, 263 U.S. 510 (1924).

For completeness mention may be made of a case having (it is to be hoped) purely historical interest. Virginia enforced an act of the Confederacy confiscating a debt owed by a Virginian to a citizen of Pennsylvania. The Court said: "And the constitutional provision securing to the citizens of each State the privileges and immunities of citizens in the several States could not have a more fitting application than in condemning as utterly void the act under consideration here, which Virginia enforced as a law of the Commonwealth. . . ." *Williams v. Bruffy*, 96 U.S. 176, 184 (1877).

58. 73 U.S. (6 Wall.) 35 (1867).

59. 314 U.S. 160 (1941).

concurred in the result on the ground that the privilege infringed was one of national citizenship, protected by the fourteenth amendment.⁶⁰

The cases holding various rights and privileges not within the protection of article IV are more numerous:⁶¹

(a) Louisiana validly restricted community rights in local property to resident married women and women married in the state.⁶²

(b) Wisconsin validly provided that during the absence of the defendant from the state the statute of limitations should not run against the plaintiff, if he were a resident of the state, but should run in such circumstances against nonresident plaintiffs.⁶³

(c) Virginia validly restricted to its own citizens the right to plant oysters in the tidal rivers of the state.⁶⁴

(d) Arkansas validly provided for personal service on resident landowners, and service by publication on nonresident owners, in proceedings to collect taxes assessed by a levee district.⁶⁵

(e) South Carolina validly restricted the right to carry on the insurance brokerage business to residents of the state.⁶⁶

60. 314 U.S. at 177, 181. See generally Meyers, *Federal Privileges and Immunities: Application to Ingress and Egress*, 29 CORN. L.Q. 489 (1944); Roback, *Legal Barriers to Interstate Migration* (pts. 1-2), 28 CORN. L.Q. 286, 483 (1943); Note, 55 HARV. L. REV. 873 (1942); Note, 53 HARV. L. REV. 1013, 1032-42 (1940). Elaborate dicta concerning the privilege of ingress and egress in relation to the privileges-and-immunities clause of article IV are found in *United States v. Wheeler*, 254 U.S. 281, 293-99 (1920). For further discussion of the "privileges or immunities" clause of the fourteenth amendment and its relation to the "privileges and immunities" clause of article IV, see *Colgate v. Harvey*, 296 U.S. 404 (1935), overruled in *Madden v. Kentucky*, 309 U.S. 83 (1940).

61. Some cases, which might be classified as denying the protection of the clause to the asserted privilege, seem to hold that no discrimination was established rather than that the privilege is not a protected one. *Downham v. Alexandria Council*, 77 U.S. (10 Wall.) 173 (1869); *Travellers' Ins. Co. v. Connecticut*, 185 U.S. 364 (1902); *Maxwell v. Bugbee*, 250 U.S. 525 (1919); *Shaffer v. Carter*, 252 U.S. 37 (1920).

Notwithstanding the language of Mr. Justice Washington in *Corfield v. Coryell*, 6 Fed. Cas. 546, 552 (No. 3230) (C.C.E.D. Pa. 1823), a citizen of one state rather obviously is not automatically entitled to vote in another. *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 174 (1874) (dictum). Mr. Justice Washington must have had in mind the right of a citizen of one state to become a citizen of another and thereafter enjoy the franchise subject to nondiscriminatory regulations.

62. *Conner v. Elliott*, 59 U.S. (18 How.) 591 (1855).

63. *Chemung Canal Bank v. Lowery*, 93 U.S. 72 (1876). The Court did not notice the point, urged by counsel, that the plaintiff, being a corporation, was not within the protection of the clause. See note 73 *infra*.

64. *McCreedy v. Virginia*, 94 U.S. 391 (1876). The authority of the case is impaired by *Toomer v. Witsell*, note 57 *supra*.

65. *Ballard v. Hunter*, 204 U.S. 241 (1907). The protesting defendants, citizens of Georgia and Florida, claimed "the privileges and immunities of citizens of . . . Arkansas," *id.* at 250, but the Court spoke only of "rights secured to them by the Constitution of the United States," *id.* at 254; *cf. Hess v. Pawloski*, 274 U.S. 352 (1927); Note, 28 COLUM. L. REV. 347, 349 (1928).

66. *La Tourette v. McMaster*, 248 U.S. 465 (1919).

(f) Minnesota validly provided that its "borrowing" statute, barring suit on a cause of action arising outside the state when it is barred by the law of the state in which the cause of action arose, should not apply where the plaintiff was a citizen of Minnesota who had owned the cause of action since its inception.⁶⁷

(g) Oregon validly restricted nonresident married women to dower in lands of which the husband died seized, while giving resident married women dower in all lands of which the husband was seized at any time during the marriage.⁶⁸

(h) Alaska validly imposed a license tax solely upon nonresident commercial fishermen.⁶⁹

(i) New York validly denied to nonresidents the right to sue foreign corporations, doing business within the state, on causes of action arising from foreign torts.⁷⁰

2. *The persons protected and the governments restrained.* The clause is directed against action by the state as distinguished from action by private persons.⁷¹ It affords no protection against action by the state of which the person claiming the privilege is a citizen.⁷² Corporations are not citizens within the protection of the clause.⁷³

Aliens are, of course, not within the protection of the clause, but certain privileges secured by the clause to citizens of other states are secured to aliens by virtue of the equal-protection clause and the federal power over immigration.⁷⁴ Apparently no case has determined whether a citizen of the United States, not a citizen of any state, is within the protection of the clause.⁷⁵

As we have seen, the decisions of the Court have been inconclusive as to whether the clause restrains action by territorial governments, but at the least the Court will not infer a congressional intention to relieve such governments of the obligations imposed upon the states in the absence of positive language

67. *Canadian No. Ry. v. Eggen*, 252 U.S. 553 (1920).

68. *Ferry v. Spokane, P. & S. Ry.*, 258 U.S. 314 (1922).

69. *Haavik v. Alaska Packers Ass'n*, 263 U.S. 510 (1924). The case is discredited by *Toomer v. Witsell* and *Mullaney v. Anderson*, *supra* note 57.

70. *Douglas v. New York, N.H. & H.R.R.*, 279 U.S. 377 (1929). The right of access to courts, generally stated, is another of the much-heralded privileges secured by the clause. See generally Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1929); Comment, 37 YALE L.J. 983 (1928); Note, 41 HARV. L. REV. 387 (1928); Note, 8 MINN. L. REV. 47 (1923); Note, 17 HARV. L. REV. 54 (1903); Annot., 32 A.L.R. 6 (1924).

71. *United States v. Harris*, 106 U.S. 629, 643 (1882).

72. *Bradwell v. Illinois*, 83 U.S. 130 (1872).

73. *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868); *Blake v. McClung*, 172 U.S. 239 (1898). A Massachusetts trust is treated in the same way. *Hemphill v. Orloff*, 277 U.S. 537 (1928).

74. *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948); act of May 31, 1870, ch. 114, 16 Stat. 140, 144, 42 U.S.C. § 1981 (1958).

75. Cf. *Hammerstein v. Lyne*, 200 Fed. 165 (W.D. Mo. 1912). There is a negative dictum in *Estate of Johnson*, 139 Cal. 532, 535 (1903).

to that effect.⁷⁶ Only one case seems to have arisen involving alleged discrimination against nonresidents by the District of Columbia, and the Court, finding the classification reasonable, had no occasion to decide whether any provision of the Constitution proscribes discriminatory legislation by Congress.⁷⁷

3. *Classification in terms of residents and nonresidents rather than in terms of citizens and noncitizens.* In *Blake v. McClung*⁷⁸ the argument was made that there could be no question of violation of the privileges-and-immunities clause because the Tennessee statute discriminating in favor of local creditors was couched in terms of residence rather than citizenship. In one sense this was a strange argument: discriminatory statutes are typically drafted in terms of residence; of the cases in which the Court had previously considered the privileges-and-immunities clause only one involved a statute discriminating in terms of citizenship, and there the statute was upheld.⁷⁹ In the earlier cases the Court had simply assumed that discrimination against nonresidents was tantamount to discrimination against citizens of other states. In another sense the argument had a force deserving more consideration than it received at the hands of the Court. As Mr. Justice Brewer pointed out in dissent, residence and citizenship are not synonymous;⁸⁰ a citizen of Ohio, or a subject of Great Britain, residing in Tennessee, would be given the same priority as a resident citizen of Tennessee, while a citizen of Tennessee residing in Ohio or Great Britain would be treated like other nonresident creditors.

Mr. Justice Harlan, speaking for the majority, hardly did justice to this argument. First he confusingly discussed a different question: whether the complaining creditors had established that they were citizens of other states, and so had standing to raise the constitutional question. Although the record was not all that might be desired in this regard, he concluded that they had. He then proceeded to construe the Tennessee statute, concluding that the words "residents of this State" referred to "those whose residence in Tennessee was such as indicated that their permanent home or habitation was there, without any present intention of removing therefrom, and having the intention, when absent from that State, to return thereto; such residence as appertained to or inhered in citizenship."⁸¹ While it is true that the Tennessee legislature might have used the word "residence" in the sense of domicile, the appropriate procedure would have been to leave that question of construction to the state

76. *Mullaney v. Anderson*, 342 U.S. 415 (1952).

77. *District of Columbia v. Brooke*, 214 U.S. 138 (1909); cf. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

78. 172 U.S. 239 (1898).

79. *McCready v. Virginia*, 94 U.S. 391 (1876). In *Corfield v. Coryell*, *supra* note 35, the discrimination was in terms of "inhabitants." In *Ward v. Maryland*, *supra* note 54, it was in terms of "permanent residence." Among the cases decided after *Blake v. McClung*, *supra* note 78, again only one, *Canadian No. Ry. v. Eggen*, 252 U.S. 553 (1920), involved a statute discriminating in favor of local "citizens." There, also, the statute was upheld. See text at note 97 *infra*.

80. 172 U.S. at 263; see *Steigleder v. McQuesten*, 198 U.S. 141, 143 (1905).

81. 172 U.S. at 247.

court, and not for the Supreme Court to volunteer its own construction—especially one that would render the statute unconstitutional.⁸² Finally Mr. Justice Harlan distorted the argument, fabricating and then ridiculing the proposition that the statute was intended to disfavor only those creditors who resided in, without being citizens of, other states.

It is difficult to understand why Mr. Justice Harlan, ordinarily one of the more clear-headed and articulate of judges, should have taken a position so confused and evasive. The only explanation that readily suggests itself is that, while he knew instinctively that the statute was fatally discriminatory, he had not thoroughly thought out the reasons why the vice could not be cured by substituting residence for citizenship as the basis for classification.

The question that Mr. Justice Harlan did not answer at all was whether the statute would survive attack under the privileges-and-immunities clause if it were construed by the Tennessee court as distinguishing between residents and nonresidents, and not between citizens and noncitizens, with strict adherence to the distinction that had been formulated by the federal courts in diversity cases. In all probability this question should be answered negatively, for two reasons: (1) In the typical state the overwhelming majority of residents are also citizens; residents who are aliens, or citizens of other states, are the exception rather than the rule; and so the general tendency and effect of the statute was to accomplish a discrimination in favor of local citizens and against citizens of other states; and (2) even granting that the statute did not operate to discriminate against citizens of other states as such, the circumstance of residence was not significant in terms of any legislative policy other than a policy of raw discrimination; hence the classification was arbitrary. The second of these reasons is rather subtle, and difficult to formulate. It is the reason that emerges somewhat tortuously from later decisions, and its meaning and sphere of application are still obscure. It is not surprising, therefore, that Mr. Justice Harlan was unable, when the question first arose, to give a definitive exposition of his reasons for feeling that the unconstitutional discrimination was not relieved by classification in terms of residence.

The problem was next sharply presented in *La Tourette v. McMaster*.⁸³ The South Carolina Supreme Court had relied upon the distinction rejected by the Court in *Blake v. McClung*:

[A] citizen of any State of the Union who is a resident of this State and has been a licensed insurance agent of this State for at least two years may obtain a broker's license; on the other hand, a citizen of this State, who is not a resident of the State and has not been a licensed insurance agent of this State for two years, may not be licensed. No discrimination is made on account of citizenship. It rests alone on residence in the State and experience in the business.⁸⁴

82. See *Douglas v. New York, N.H. & H.R.R.*, 279 U.S. 377, 386 (1929).

83. 248 U.S. 465 (1919).

84. 104 S.C. 501, 506, 89 S.E. 398, 400 (1916), quoted in 248 U.S. at 469-70.

Superficially, the opinion of the Supreme Court seems to rest upon this distinction:

The court thus distinguishes between citizens and residents and decides that it is the purpose of the statute to do so and, by doing so, it avoids discrimination. In other words, it is the effect of the statute that its requirement applies as well to citizens of the State of South Carolina as to citizens of other States, residence and citizenship being different things.⁸⁵

But the distinction, on its face, is disingenuous and specious. If it were possible to escape the constitutional restraint by the simple device of substituting residence for citizenship as the basis of classification, the clause would be rendered nearly meaningless in practical effect. And the fact is that both the South Carolina court and the Supreme Court pointed to considerations providing a more substantial basis for upholding the statute. The licensing provision was part of a comprehensive scheme of regulation whereby the insurance brokerage business was to be carried out under the supervision of the insurance commissioner. According to arguments accepted by both courts, the program could be carried out most effectively if the subjects of regulation were residents of the state. The classification, therefore, had "practical justifications"—nonresidents were not excluded simply because they were foreigners who were not to be allowed to compete with local businessmen, but because only resident brokers could be effectively policed. This, at any rate, the legislature could have found, and the Court's acceptance of such a finding is in accordance with normal practice in constitutional cases. The circumstance of residence had no such significance, independent of simple discrimination, in *Blake v. McClung*.

If one is inclined to believe that this interpretation attributes too much sophistication to the decision in *La Tourette*, and that the Court in that case actually accepted the disingenuous argument that a classification in terms of residence ipso facto avoids the constitutional restraint, it is instructive to note that at the same term, just three months later, the Court struck down a statute which discriminated in terms of the location of the chief office of the enterprise taxed—a classification less likely, it seems, than one in terms of residence to approximate discrimination in favor of local citizens.⁸⁶ If a classification in terms of residence escapes the prohibition of the clause, one in terms of a factor less closely associated with citizenship should do so a fortiori. In the Court's view, the practical effect of the statute would be to discriminate against citizens of other states. Again, the factor determining the classification had no significance except in respect of discrimination: "We can find no adequate basis for taxing individuals according to the location of their chief offices—the classification, we think, is arbitrary and unreasonable."⁸⁷

85. 248 U.S. at 470.

86. *Chalker v. Birmingham & N.W. Ry.*, 249 U.S. 522 (1919).

87. *Id.* at 527.

In the following term, however, the Court again gave evidence that it was impressed by the argument that a classification in terms of residence escapes the constitutional restraint. A statute providing that the graduated inheritance tax applicable to New Jersey property of nonresident decedents should be computed with reference to the total value of the estate was found not to involve any discrimination, but rather a sincere attempt to achieve approximate equality. Having thus disposed of the point, the Court noted that it was unnecessary to decide whether the decision might not be rested on a much narrower ground, and added:

The alleged discrimination, here complained of, so far as privileges and immunities of citizenship are concerned, is not strictly applicable to this statute because the difference in the method of taxation rests upon residence and not upon citizenship. *La Tourette v. McMaster*.⁸⁸

Nevertheless, only four months later the Court struck down a New York income tax law although it discriminated only in terms of residence:

Of course the terms "resident" and "citizen" are not synonymous, and in some cases the distinction is important (*La Tourette v. McMaster* . . .); but a general taxing scheme such as the one under consideration, if it discriminates against all non-residents, has the necessary effect of including in the discrimination those who are citizens of other States; and, if there be no reasonable ground for the diversity of treatment, it abridges the privileges and immunities to which such citizens are entitled.⁸⁹

Rather clearly, the South Carolina statute in *La Tourette* also had the "necessary effect of including in the discrimination those [nonresidents] who are citizens of other States"; hence the only meaningful distinction is that in the one case there was a reasonable basis for the classification while in the other there was none.⁹⁰

Again in *Douglas v. New York, N.H. & H.R.R.*⁹¹ the Court, speaking this time through Mr. Justice Holmes, seemed to accept the specious argument that a classification in terms of residence deflects the force of the prohibition against discrimination, but at the same time pointed out that the statute in question had a purpose other than merely to discriminate against foreigners, and that residence was a factor relevant to that purpose. In the quotation that

88. *Maxwell v. Bugbee*, 250 U.S. 525, 538-39 (1919).

89. *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 78-79 (1920).

90. In *Haavik v. Alaska Packers Ass'n*, 263 U.S. 510 (1924), the Court again sustained a discrimination couched in terms of residence, holding that "citizens of every State are treated alike." *Id.* at 515. The classification was deemed "not wholly arbitrary or unreasonable," since preference was given to those who had acquired residence in Alaska, and Alaska might legitimately encourage those upon whose efforts the future development of the Territory depended. *Ibid.* But any state might similarly argue in defense of raw discrimination that its growth depends upon the encouragement of local entrepreneurs. The *Haavik* case has been in effect overruled by *Mullaney v. Anderson*, 342 U.S. 415 (1952).

91. 279 U.S. 377 (1929).

follows the two ideas are strangely mixed; we have emphasized the language relating to the "practical justifications" of the classification:

Construed as it has been, and we believe will be construed, the statute applies to citizens of New York as well as to others and puts them on the same footing. There is no discrimination between citizens as such, and none between non-residents with regard to these foreign causes of action. *A distinction of privileges according to residence may be based upon rational considerations* and has been upheld by this Court, emphasizing the difference between citizenship and residence, in *La Tourette v. McMaster*. . . . It is true that in *Blake v. McClung* . . . 'residents' was taken to mean citizens in a Tennessee statute of a wholly different scope, but whatever else may be said of the argument in that opinion (compare p. 262, *ibid.*) it cannot prevail over the later decision in *La Tourette v. McMaster*, and the plain intimations of the New York cases to which we have referred. *There are manifest reasons for preferring residents in access to often overcrowded Courts, both in convenience and in the fact that broadly speaking it is they who pay for maintaining the Courts concerned.*⁹²

In *Toomer v. Witsell*⁹³ the state did not even contend that since the statute was couched in terms of residence it was outside the scope of the privileges-and-immunities clause; instead it tried unsuccessfully to show that residence was a factor relevant to a nondiscriminatory policy. The Court agreed that the distinction between residence and citizenship would be without force "in this case,"⁹⁴ and Mr. Chief Justice Vinson formulated the clearest statement thus far of the "reasonable classification" principle:

Like many other constitutional provisions, the privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them. The inquiry must also, of course, be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures.⁹⁵

The idea that the clause does not reach discrimination couched in terms of residence has puzzled commentators from the beginning.⁹⁶ The time has come, we believe, for the flat rejection of that idea. The constitutionality of a law

92. *Id.* at 387.

93. 334 U.S. 385 (1948).

94. *Id.* at 397.

95. *Id.* at 396.

96. See Meyers, *supra* note 53, at 364, 382-83; Note, 17 HARV. L. REV. 54 (1903); Note, 28 COLUM. L. REV. 347 (1928); Note, 8 MINN. L. REV. 47 (1923); Note, 1 MINN. L. REV. 365 (1917); Note, 2 N.Y.U.L. REV. 6 (1925); Note, 41 HARV. L. REV. 387 (1928); Comment, 37 YALE L.J. 983 (1928); Blair, *supra* note 70.

treating local people differently from the people of other states is not saved by the draftsman's choice of the word "resident" instead of the word "citizen," nor by the technical concepts which keep the category "residents" from being precisely congruent with the category "citizens." It is saved only if the classification is reasonable, and is relevant to a policy other than one of parochial and hostile discrimination against the outlander. It may be that residence is a factor that can be reasonably related to legitimate policy more often than can citizenship; but it is not true that citizenship can never be so related. This is demonstrated by the fact that, at the time when the Court was most preoccupied with the distinction between residence and citizenship, it sustained a statute discriminating in terms in favor of local "citizens."⁹⁷ It did so because the classification was reasonable. Similarly, the decision in the *Douglas* case⁹⁸ would probably not have been different if the classification had been in terms of citizenship instead of residence. The Court might with equal propriety have said, "There are manifest reasons for preferring *citizens* in access to often overcrowded Courts, both in convenience and in the fact that broadly speaking it is they who pay for maintaining the Courts concerned."⁹⁹ If the result in *La Tourette* would have been different if the classification had been framed in terms of citizenship, that is only because it would be difficult to argue plausibly that citizenship, as distinguished from residence, was relevant to the efficiency of the regulatory scheme.

A further consideration supports this position. The degree of incongruence that exists, for purposes of federal jurisdiction, between the categories of residents and of citizens is, in the context of problems of discrimination, reduced to the vanishing point by other constitutional provisions. The advantages which a state confers through its laws upon its "citizens" must, in general, also be conferred upon resident aliens and resident citizens of other states, by virtue of the equal protection clause and the supremacy clause.¹⁰⁰ Thus—subject, always, to the rule permitting reasonable classification—a statute conferring a privilege of a protected character upon "citizens" of the state must be read as extending the same privilege to all those entitled to equal protection of the laws—that is, to all residents, at least. Hence the lack of congruence between the categories of "citizens" and "residents" in the enacting state tends to disappear. The fact that the disparity between the categories continues to exist in other states is quite immaterial, since only a *citizen* of another state has standing to invoke the privileges and immunities clause, whether the classification is in terms of residence or citizenship.

Since the test of constitutionality is the reasonableness of the classification, the interesting conclusion is that the clause is to be administered according to

97. *Canadian No. Ry. v. Eggen*, 252 U.S. 553 (1920). *La Tourette*, *Chalker*, *Maxwell*, and *Travis* were all decided in 1919-1920; see notes 83, 86, 88-90 *supra*.

98. *Douglas v. New York, N.H. & H.R.R.*, *supra* note 91.

99. *Cf. id.* at 387, quoted in text at note 92 *supra*.

100. *Truax v. Raich*, 239 U.S. 33 (1915); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948).

the same standards that govern the administration of the equal-protection clause: a state is prohibited from denying the equal protection of the laws not only to all persons "within its jurisdiction" but also to all citizens of other states. Or, to state the same proposition with more regard for historical sequence, the protection against discriminatory treatment that article IV gave to citizens of other states was extended by the fourteenth amendment to all persons within the jurisdiction of the state. The charming simplicity of this interpretation is considerably disturbed, however, by the fact that citizenship itself may constitute a legitimate basis for classification.¹⁰¹

III. CONSTITUTIONAL LIMITS ON STATE POWER AS A BASIS FOR CLASSIFICATION

As all students of the conflict of laws know, when California applied its workmen's compensation law to an injury suffered in Alaska by a nonresident employee, the judgment was attacked as a denial of due process and a refusal of full faith and credit to the laws of Alaska.¹⁰² Less well known is the fact that earlier, when the California statute provided for compensating out-of-state injuries only if the injured employee was a resident of California, the statute was attacked as a denial to citizens of other states of the privileges and immunities of citizens of California.¹⁰³ These incongruous contentions illustrate well the dilemma that confronts one who would explore the effect of constitutional restraints upon discrimination in conflict-of-laws cases. Surely compliance with one constitutional mandate ought not to entail violation of another; yet, as these contentions demonstrate,¹⁰⁴ the boundary between the obligation of a state to respect the authority of other states and its obligation to treat citizens of other states with impartiality has not been surveyed and established.

101. The suggested interpretation may also be subject to qualification according to the character of the right or privilege asserted; *i.e.*, there probably are privileges which may be denied to citizens of other states but not to persons "within the jurisdiction" of the enacting state. This, however, seems no more than a manifestation of the paradoxical fact that classifications in terms of citizenship may be deemed reasonable in spite of the apparent purpose of the privileges-and-immunities clause to outlaw them. Similarly, classifications disfavoring aliens may survive attack based on the equal-protection clause if the fact of alienage is reasonably related to legitimate policy. *Ohio ex rel. Clarke v. Deckebach*, 274 U.S. 392 (1927); *cf. Heim v. McCall*, 239 U.S. 175 (1915).

102. *Alaska Packers Ass'n v. Industrial Acc. Comm'n*, 294 U.S. 532 (1935).

103. *Quong Ham Wah Co. v. Industrial Acc. Comm'n*, 184 Cal. 26, 192 Pac. 1021 (1920), *writ of error dismissed*, 255 U.S. 445 (1921).

104. Ironically, both contentions were made by the same employer. *Quong Ham Wah Company* was the "contractor" that performed the hiring function for Alaska Packers Association; in the first case it was treated as the employer and was held primarily liable. *Record*, pp. 3, 11, *Quong Ham Wah Co. v. Industrial Acc. Comm'n*, 255 U.S. 445 (1921); *Brief of Plaintiff in Error*, pp. 1-2, *id.*; *cf. Brief of Defendant in Error*, p. 1, *id.* In the second case it was stipulated that Alaska Packers Association was the employer, and *Quong Ham Wah* was dismissed as defendant. *Record*, pp. 57, 65, *Alaska Packers Ass'n*, 294 U.S. 532 (1935).

The earlier attack on the statute, predicated on the privileges-and-immunities clause, succeeded. The later attack, mounted after the statute had been broadened to include nonresidents, and predicated on the due-process and full-faith-and-credit clauses, failed. Thus the conflict between constitutional mandates that we have suggested as a possibility did not occur. It might very well have occurred, however, if the facts in the second case, *Alaska Packers Ass'n v. Industrial Acc. Comm'n*,¹⁰⁵ had been a little less unusual than they were. The employee had been hired in San Francisco for short-term, seasonal employment in Alaska, at the conclusion of which he was to be returned to California, where his wages were to be paid. Under these "special circumstances," presenting the danger that he might become a public charge or a burden upon private interests in California, the Court found that California had "as great an interest in affording adequate protection to this class of its population as to employees injured within the state."¹⁰⁶ It is probable that if the employee had not been a member of California's migrant labor force, but simply a citizen of a sister state, and if the contract had called for return transportation to his home rather than to California, the decision would have been different.¹⁰⁷ In that event the due process and full-faith-and-credit clauses would have invalidated the application which, according to the Supreme Court of California, the privileges-and-immunities clause required.

Any such result is so obviously intolerable that one or the other of the constitutional interpretations must be rejected. No doubt there are some who would be glad to use such a contretemps as an argument for rejecting the view that the due-process and full-faith-and-credit clauses significantly limit the power of a state to apply its own law in conflicts cases.¹⁰⁸ The effect of those clauses, however, has recently been investigated, and we are persuaded that they do impose a significant, though limited, restraint upon a state's choice of law. In general, a state violates one or both of them when it applies its law in a situation in which it has no legitimate interest in the application of its governmental policies.¹⁰⁹ We therefore propose to direct this inquiry primarily to the California court's interpretation of the privileges-and-immunities clause, considering at the same time the extent to which analysis of the problem in this context requires qualification or extension of the conclusions previously reached concerning due process and full faith and credit.

At the outset it is necessary to notice a peculiarity of the problem as it is presented in the context of workmen's compensation. In any discussion of

105. Note 102 *supra*.

106. 294 U.S. at 543.

107. Cf. *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145 (1932); *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930); *New York Life Ins. Co. v. Head*, 234 U.S. 149 (1914). See also Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9 (1958).

108. See 1 EHRENZWEIG, *CONFLICT OF LAWS* 12 (1959); Currie, *Book Review*, 73 HARV. L. REV. 801 (1959).

109. See Currie, *supra* note 107.

unconstitutional discrimination in the conflict of laws it is desirable to distinguish between the obligation of a state to provide a forum and its obligation to afford the benefits of its laws. When the full-faith-and-credit clause requires a state to provide a forum it is because of the respect due to the laws of a sister state, and it follows that the laws of the sister state must also be applied to measure the rights of the parties.¹¹⁰ When the privileges-and-immunities clause requires that a citizen of another state be permitted access to the courts of the forum, however, there is no necessary implication regarding the law to be applied; whether the state must also extend to him the benefits of its laws is a separate question. The two questions cannot, as a practical matter, be separated in the typical workmen's compensation case. Especially where the law is administered by a commission rather than a court, the application of foreign law is considered impracticable, and is ordinarily not attempted; and while suit might be brought in the courts of the forum on the basis of a foreign compensation law, such a remedy is thought to be so cumbersome by comparison with the administrative remedy under the law of the forum that it is hardly to be considered a practical alternative.¹¹¹ Consequently, when we consider whether the California act is to be applied to nonresidents injured outside the state, we are in substance considering also whether the nonresident is to be given access to California tribunals; if the law of the forum is inapplicable, the consequence is not that foreign law is applied, but that the proceeding is dismissed. The result is that workmen's compensation cases provide a more favorable setting for the argument that the nonresident should be protected than cases involving choice of law alone.

In several respects the California privileges and immunities case, *Quong Ham Wah Co. v. Industrial Acc. Comm'n*,¹¹² was a remarkable decision. The California statute provided:

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 was made in this state, and any such

110. See Currie, *The Constitution and the "Transitory" Cause of Action*, 73 HARV. L. REV. 36 (1959).

111. See Note, 6 VAND. L. REV. 744 (1953); Currie, *supra* note 107, at 20 n.44. The brief for the commission, after noting the obstacles to proceedings in Alaska brought by migrant workers, added:

Such foreign laws could not be enforced in California before respondent Industrial Accident Commission, as its jurisdiction is limited to the application of the California Workmen's Compensation Act. As between the California Commission and the California courts, the Commission affords a remedy, which for speediness and inexpensiveness, is very much preferable to that afforded by the courts.

Brief for Defendant in Error, p. 13, *Quong Ham Wah Co. v. Industrial Acc. Comm'n*, 255 U.S. 445 (1921). Later the California court specifically held that the commission could not apply the Alaska act. *Alaska Packers Ass'n v. Industrial Acc. Comm'n*, 1 Cal. 2d 250, 255, 34 P.2d 716, 718-19 (1934); cf. Currie, *supra* note 110.

112. Note 103 *supra*.

employee or his dependents shall be entitled to the compensation or death benefits provided by this act.¹¹³

The injured employee, Owe Ming, was a *resident of California*.¹¹⁴ The employer raised the objection under the privileges-and-immunities clause in the hope that the section extending the coverage of the act to extraterritorial injuries would be held inoperative, thus freeing it of liability. The employer was conceded standing to raise the question despite the fact that the proceeding was by a resident rather than a citizen of another state, and despite the court's own prior decisions holding that such a challenge to the constitutionality of a statute "may not be raised by one not belonging to the class alleged to be discriminated against."¹¹⁵ The reason for making an exception to this rule was twofold: (1) if the consequence of denying parity of treatment to nonresidents was that the section was void, the exaction of compensation for an out-of-state injury to a local resident was not authorized by law, and so was a denial of due process of which the employer had standing to complain;¹¹⁶ (2) where no member of a class alleged to be discriminated against is in a position to raise the constitutional question, any person affected by its application should be able to challenge its constitutionality; only thus could the court perform its "ultimate and supreme function . . . to declare unconstitutional statutes to be void and of no effect. . . ."¹¹⁷ Whatever else may be said of the latter argument, it is difficult to understand why no member of the disfavored class was in position to raise the question. If a nonresident injured outside the state had applied for compensation and been refused, it is not at all clear why the determination should not be subject to review.¹¹⁸

The first argument lost much of its force when the court, on rehearing, reversed its holding that the consequence of the discrimination was invalidity

113. Cal. Stats. 1917, ch. 586, § 58, at 870 (now CAL. LAB. CODE § 5305); cf. CAL. LAB. CODE § 3600.5; *Storke & Sears, Reciprocal Exemption Provisions of Workmen's Compensation Acts*, 67 YALE L.J. 982 (1958).

114. Record, p. 8, *Quong Ham Wah Co. v. Industrial Acc. Comm'n*, *supra* note 103. Quong Ham Wah appears to have been a California enterprise, although its exact character does not appear. See Record, *Alaska Packers Ass'n v. Industrial Acc. Comm'n*, *supra* note 104, at 41. Alaska Packers was a California corporation qualified to do business in Alaska, having its principal office in San Francisco. *Id.* at 63. In the remainder of this paper we shall proceed on the assumption that the defendant in both cases had the characteristics of Alaska Packers, *i.e.*, was a California corporation licensed to do business in Alaska. Cf. note 104 *supra*.

115. *A. F. Estabrook Co. v. Industrial Acc. Comm'n*, 117 Cal. 767, 769, 177 Pac. 848 (1918).

116. In support of this position the court relied on *Buchanan v. Warley*, 245 U.S. 60 (1917).

117. *Quong Ham Wah Co. v. Industrial Acc. Comm'n*, *supra* note 103, at 32, 192 Pac. at 1024.

118. In the instant case, the Compensation Act does not give the commission jurisdiction over controversies arising out of injuries sustained abroad by workmen who are not residents of California. It is clear, therefore, that a nonresident would have no standing before the commission or before any court to make a claim

of the section, and held instead that the privileges-and-immunities clause was self-executing and by its own force operated to extend the benefits of the statute to citizens of other states, leaving intact its provisions as to residents.¹¹⁹ We have no quarrel with this holding, and therefore resist the temptation to discuss its interesting jurisprudential implications. While the usual consequence of unconstitutionality is nullity, in many cases of unconstitutional discrimination it is perfectly reasonable to treat the statute as remaining in effect with its benefits extended to the disfavored class.¹²⁰ Although the operation of the privileges-and-immunities clause as invalidating a statute or extending its benefits to nonresidents would seem to be a federal question of some importance if it is open to reasonable doubt, the Supreme Court dismissed the employer's appeal, which complained only of the state court's resolution of this question, as frivolous.¹²¹

Of a certainty, the right of an employee to recover from his employer compensation for injuries suffered in the course of employment as a result of accident, or his own negligence, or the negligence of a fellow servant is not a right which has "at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign."¹²² To the credit of all concerned, however, no one suggested that therefore the privileges-and-immunities clause was inapplicable. The ques-

under the act. And, not having jurisdiction over his injury, neither the commission nor the courts could entertain or adjudicate his claim for compensation nor the constitutional question involved.

Id. at 32-33, 192 Pac. at 1024. Whatever else may be said of this reasoning, it is strangely at odds with the court's holding that the effect of the privileges-and-immunities clause was to extend the benefits of the act to nonresidents injured abroad—i.e., to enlarge the "jurisdiction" of the commission to cover such cases.

119. The earlier opinion is reproduced in Record, *supra* note 104, at 15.

120. The authorities are collected in the Brief for Defendant in Error, *supra* note 104, at 24. Principal reliance was placed upon *Estate of Johnson*, 139 Cal. 532, 73 Pac. 424 (1903). *But cf.* note 241 *infra*.

121. The disposition of the appeal is understandable only if one recalls the peculiar circumstances in which the constitutional question was raised. The state court's decision sustained the employer's contention that the act violated the privileges-and-immunities clause; yet the employer was aggrieved because the award was reinstated by virtue of the holding that the effect of violation was not nullity but extension of the act's coverage. While the Supreme Court had recently been given jurisdiction to review state court decisions *in favor* of rights asserted under the Constitution, 28 U.S.C. § 1257 (1958), it probably had difficulty visualizing the employer as one having standing to complain of the state court's decision with respect to the privileges-and-immunities clause. If the employer was considered as having standing, as in *Buchanan v. Warley*, *supra* note 116, to challenge the statute under the due-process clause, the appeal must be construed as asserting that the statute was void for discrimination in spite of the California court's holding that it must be read as applying to citizens and noncitizens alike. Hence the Court regarded the appeal as a complaint that the state court had misconstrued the statute, and held that it had no jurisdiction of the appeal. 255 U.S. at 448-49.

122. *Corfield v. Coryell*, 6 Fed. Cas. 546, 551 (No. 3230) (C.C.E.D. Pa. 1823); see text at note 37 *supra*.

tion was whether the classification on the basis of residence was reasonable. The Commission argued that it was: the legislature entertained no feelings of hostility toward nonresidents, but simply sought to refrain from attempting to regulate matters not within its legitimate sphere of concern. The Commission's brief would have done credit to Brandeis himself although, as is not surprising in view of the date, its pragmatic approach is not unmixed with conceptualism. In the following two paragraphs we condense and paraphrase, with occasional direct quotations, the portion dealing with the reasonableness of the classification.¹²³

"Workmen's compensation acts are economic and sociological in character rather than juridical, and are to be construed so as to fulfill their purposes."¹²⁴ A principal purpose of workmen's compensation is to protect the community against the direct and indirect consequences of poverty to the extent that it may be caused by industrial injuries. Industrial injuries are one of the principal sources of poverty. Poverty is more than a personal misfortune; it is a social evil as well, against which the state is entitled to protect itself. The direct consequences of poverty, produced in part by industrial injury, are that the workman or his family, or both, became dependent upon friends, relatives, public institutions, or charity. The indirect consequences include lower family morale, child labor, and increased crime, prostitution, alcoholism, and delinquency. The state has an interest in compensating for extraterritorial injuries when the victim or his dependents are likely to be within the state during the period of adversity. Thus, when the victim is a resident of the state, California's interest in securing compensation is as great as when the injury occurs in the state; the place of injury is immaterial. On the other hand, California has no interest in securing compensation for nonresidents injured abroad. The New Yorker, injured while at work in Alaska, will usually return to his home in New York rather than come to California; his dependents are likely to be in New York. "Certainly there is no presumption that residents of New York or any other state, injured in Alaska, will affect the interests of California."¹²⁵ It is no part of the object of the act that California should protect New York or its citizens against the possibility that injuries in Alaska to New Yorkers will burden the people of New York. It would, in fact, be an invasion of the sovereignty of New York thus "to officiously intermeddle" in the public affairs of New York.¹²⁶ Alaska may legislate on such matters, and so may New

123. Brief for Defendant in Error, pp. 8-14, 44-57, *Quong Ham Wah Co. v. Industrial Acc. Comm'n*, 255 U.S. 455 (1921). Reference is to the brief in the Supreme Court of the United States rather than that in the state court because of its more general accessibility.

124. *Id.* at 8. This statement, as dated as a World War I photograph, is in its own negative way highly instructive. Once we come to realize that not only modern social legislation but also the bulk of the common law is "economic and sociological in character," and not merely "juridical," territorial limitations on legislative jurisdiction will yield to considerations of policy and governmental interest generally, as they have yielded in workmen's compensation.

125. *Id.* at 50.

126. *Id.* at 57.

York; but it is neither necessary nor reasonable for California to legislate concerning the employment of New Yorkers in Alaska. Surely a classification is reasonable if it does no more than confine the application of California's policy to those situations in which California has a reasonable basis for insisting on the application of its policy.

Moreover, the classification is reasonable because it does no more than confine the act to cases within California's legislative jurisdiction. If California were to attempt to apply the act to citizens of other states injured abroad this would be a denial of due process. "If the power of a state to give extraterritorial force to its workmen's compensation act is based upon its police power to protect its own citizens and welfare, then such power is also limited by the police power and cannot be extended beyond it, to cases where its citizens and welfare are in no way affected."¹²⁷ It "stands to reason"¹²⁸ that, if a state is precluded by other provisions of the Constitution from applying its laws to persons and events outside the scope of its legitimate concern, a citizen of another state may not complain that he is deprived of any right secured to him by article IV, section 2. The compensation act is not merely a regulation of contracts but of the incidents of a status; jurisdiction over the status of master and servant is conferred by the residence of the parties at the time of the injury. Power to give extraterritorial force to the act is limited to protection of California residents abroad. Since California could not give nonresidents the benefits of such protection, the privileges-and-immunities clause does not require California to "do the impossible."¹²⁹

These arguments impressed the Supreme Court of California not at all. First of all, the court construed the word "resident" to mean "citizen," because it assumed that a person injured outside the state in the course of his employment could not be a resident at that time. The assumption is obviously fallacious, but since we have concluded that nothing should turn upon whether the statute is couched in terms of citizenship or residence, we need not labor the point. Recognizing that the real issue was the reasonableness of the classification, the court first rejected the contention that, on conceptual grounds, California had no legislative jurisdiction to cover nonresidents injured abroad. The act neither regulated a status nor imposed liability as for a tort; if it purported to do either, the court would agree with counsel that California lacked jurisdiction. But the act was a regulation of contracts; at least, the liability it imposed might be termed one *quasi ex contractu*;¹³⁰ and, since the contract of employment was made in California, California had jurisdiction to regulate it. Since it had the power to impose liability for the benefit of citizens of other states as well as for its own, its failure to do so was a denial of the privileges and immunities of citizenship; the suggested basis for the classification had failed.

127. *Id.* at 50.

128. *Id.* at 46.

129. *Id.* at 53.

130. 184 Cal. at 36, 192 Pac. at 1025.

With respect to the pragmatic argument that California had no interest in applying its policy in such a case, and that the classification was therefore reasonable, the court said:

[The effect of the privileges-and-immunities clause] is not limited to those cases where its operation will not interfere with the internal policy of the state or with considerations which appear to affect the general welfare. Its mandate is absolute. . . . Respondents make the contention that the court should uphold the right of the state to require compulsory compensation for its citizens alone, inasmuch as it is only citizens or their families who are likely to become a public charge upon the state as a result of injuries sustained abroad. The argument expresses a very excellent reason for requiring compulsory compensation for citizens, but it expresses no reason at all for denying the same right to citizens of other states. . . . In none of these cases was the rule sanctioned that a *privilege* could be granted to a citizen of one state and denied to citizens of other states, for the reason that public policy did not require that the privilege be extended to the latter class of persons. Such a rule would be manifestly unsound, and altogether in conflict with the constitutional provision here in question. No consideration of public policy requires that citizens of sister states be excluded from the benefits of the act here under consideration. The fact that considerations of public policy do not affirmatively require the extension of the benefits in question to citizens of sister states as strongly as they require their extension to citizens of this state furnishes absolutely no sound reason for the exclusion of the former, and affords no reasonable basis for the discrimination.¹³¹

Thus the issue was sharply drawn as to whether the limits of governmental interest constitute a reasonable basis for classification, and as to the extent to which the due-process and full-faith-and-credit clauses limit the privileges-and-immunities clause, and vice versa. Before we address ourselves to the court's solution of the problem, however, it is necessary to refer briefly to the rather peculiar development culminating in the *Alaska Packers* case.

The injured employee in *Alaska Packers* was neither a resident of California nor a citizen of another state; he was a nonresident alien. The decision in *Quong Ham Wah* had the effect of extending the protection of the statute to citizens of other states; it did not extend that protection to aliens injured abroad; nor did any intervening legislative or judicial development require such an extension of the act. Yet in *Alaska Packers* the California Supreme Court remarked that the condition of *residence* had been "nullified" by *Quong Ham Wah*,¹³² and proceeded to affirm an award to the alien employee.¹³³ An interesting aspect of this development is that California had never asserted an interest in covering foreign injuries to aliens, unless such an assertion can be

131. 184 Cal. at 37-38, 192 Pac. at 1026.

132. 11 Cal. 2d 250, 255, 34 P.2d 716, 719 (1934).

133. The court should have known better than to make this mistake twice. On a previous occasion it had been trapped into assuming that aliens were within the protection of the privileges-and-immunities clause and had rather testily confessed error. *Estate of Johnson*, 139 Cal. 532, 534-35, 73 Pac. 424, 425-26 (1903).

inferred from this probably inadvertent interpretation of the judicial decision which said that California must cover such injuries to citizens of other states whether it had an interest in doing so or not. Yet the Supreme Court treated the decision as an affirmation of the policy of the state and of the state's interest in application of the policy to the case at bar. It is also significant that the Court found that there was a reasonable basis for applying the policy—in the special circumstances of the case. Since the injured employee was to be returned to California within a short time, California's interest in guarding against the effects of his destitution upon the community was substantially the same as it would have been if the injury had occurred within the state.

The result in *Alaska Packers* would not, of course, have been different if the employee had been a citizen of another state. If California had an interest in protecting aliens injured abroad, a fortiori it would have had an interest in protecting citizens of other states injured in the same circumstances—i.e., circumstances making it likely that the victim would become a burden to California if not compensated. Equally, we believe that if the circumstances had been different—i.e., if there had not been reason to anticipate a burden on California—the Court would have held the application of the California act to aliens injured in Alaska a denial of due process or of full faith and credit, and that this result would not have been altered if the employee had been a citizen of another state instead of an alien. It is true that, since the privileges-and-immunities clause does not extend to aliens, the Court is not confronted, in a case involving an alien employee, with the delicate problem of the interplay between that clause and other provisions of the Constitution; and it is conceivable that in a case involving a citizen of another state, absent circumstances indicating a probable burden on California, the Court might sustain the otherwise improper application of California law by reference to the privileges-and-immunities clause. We consider this possibility most unlikely, however; and in the ensuing discussion we shall speak of *Alaska Packers* as if the injured employee had been a citizen of another state, assuming that the inferences to be drawn from the decision are tenable in either case.

Returning to *Quong Ham Wah*, we may observe at the outset that the court was clearly wrong in holding that California could legitimately apply its law simply because the contract was made in the state; and this proposition is independent of any disputation as to whether the subject of regulation should be characterized as contract, quasi-contract, tort, or status. Under the Constitution, the power of a state to apply its law in conflicts situations depends not on such formalistic and adventitious "contacts," but upon whether the state has a legitimate interest in the application of its policy. In *New York Life Ins. Co. v. Head*,¹³⁴ which unambiguously involved contract, the Supreme Court denounced as a denial of due process the application of Missouri law to a contract of insurance between a nonresident and a foreign corporation, although the contract was entered into within the state. A previous decision upholding the

134. 234 U.S. 149 (1914); see Currie, *supra* note 107, at 38.

application of the same Missouri law in similar circumstances¹³⁵ was distinguished on the ground that it concerned insurance on the life of a *resident of Missouri*.¹³⁶

It does not necessarily follow, however, that the application of California law to compensate a citizen of another state injured abroad would be a denial of due process, or a refusal of full faith and credit to the laws of Alaska. In *Quong Ham Wah* the defendant employer was a California enterprise;¹³⁷ in *Head* the defendant insurance company was a New York corporation licensed to do business in Missouri. It is possible that, so far as due process and full faith and credit are concerned, a state may impose upon its own residents and its own corporations obligations which it would not be justified in imposing on non-residents and foreign corporations.¹³⁸ This important possibility will be considered in due course. We mention it here to avoid any implication that the *Head* case necessarily invalidates the broad conception of *Quong Ham Wah* as to the applicability of the California compensation act.

At this point matters will be clarified if we state a firm position on one principle: if it is established that a state, by applying its law, will violate the due-process clause or the full-faith-and-credit clause, its failure so to apply its law cannot be a violation of the privileges-and-immunities clause. This is surely a noncontroversial statement. It may be conceded that one might with equal logic, as an abstract matter, state the proposition conversely: if a state must, by virtue of the privileges-and-immunities clause, apply its law for the benefit of citizens of other states, that application cannot violate the due-process clause or the full-faith-and-credit clause. But the operation of the due-process and full-faith-and-credit clauses is much more clearly defined than that of the privileges-and-immunities clause; if we are to have a reasonably ascertainable baseline for the discussion, this is the preferable way to proceed.

It is clear that in the *Head* case the Supreme Court entertained no apprehension that withholding the benefits of Missouri law from nonresidents pursuant to the command of the due-process clause would entail any unconstitutional discrimination. It is also clear that the problem was called to the attention of the Court. The Missouri Supreme Court had emphasized the legislature's altruistic purpose to extend the benefit of the law to "all persons whether citizens, inhabitants, transients, visitors or sojourners,"¹³⁹ and counsel for the plaintiff had argued in the Supreme Court the point of unconstitutional dis-

135. *New York Life Ins. Co. v. Cravens*, 178 U.S. 389 (1900).

136. 234 U.S. at 162.

137. See note 114 *supra*. The facts of *Quong Ham Wah* do not present a constitutional problem. The problem was presented by the facts of a hypothetical case posed by the court: a case in which a citizen of another state, hired in California, is injured in Alaska. It is this hypothetical case to which the comment in this part of the text is addressed.

138. In the *Head* case the Court rejected the argument that application of Missouri's nonforfeiture statute to contracts made with nonresidents could be sustained on the basis of the state's power to condition the right of the foreign corporation to do business in the state. 234 U.S. at 161, 163-64.

139. *Head v. New York Life Ins. Co.*, 241 Mo. 403, 416, 147 S.W. 827, 831 (1912).

crimination, though without specifically invoking article IV.¹⁴⁰ The Court did not deem the argument worthy of notice.¹⁴¹

The obvious need not be elaborated. The constitutional limits of a state's power constitute a reasonable basis for classification. It has previously been suggested that, in general, a state passes these limits when it applies its law to a situation in which it has no legitimate interest in the furtherance of its legal policies.¹⁴² If that proposition were unqualifiedly true our principal problem would be solved: the limits of governmental interest are also a reasonable basis for classification. California would not be required to extend the benefits of its compensation law to citizens of other states injured abroad, where there are no special circumstances indicating that the injured employee may become a burden, because California would have no power thus to extend the applicability of the law. A neat dichotomy is suggested: where governmental interests end, there ends also the obligation to afford equal treatment to citizens of other states; but within the area of governmental interest equal treatment must be afforded. Neat dichotomies are rare, however, in the troublesome areas of constitutional law, and are to be viewed with distrust.¹⁴³ There are two obstacles to such a solution here: (1) the proposition that a state violates the due-process clause or the full-faith-and-credit clause when it applies its law to a situation in which it has no interest in the application of its legal policy cannot be assumed, even by its advocates, to be true beyond possibility of qualification; and (2) it is not safe to assume that the constitutional restraints on discrimination contained in the privileges-and-immunities and equal-protection clauses require a state to exercise the full range of its power.¹⁴⁴

The specific problem that gives rise to doubts on the first score may be illustrated by reference to *Schmidt v. Driscoll Hotel*.¹⁴⁵ A Minnesota statute provided that the unlawful sale of liquor should render the seller liable to any per-

140. 234 U.S. at 152.

141. In *Quong Ham Wah* the Commission relied primarily on *Brown-Forman Co. v. Kentucky*, 217 U.S. 563 (1910), holding that a license tax could not be attacked as discriminatory on the ground that it did not extend to subjects beyond the taxing power of the state. Brief for Defendant in Error, *supra* note 104, at 45-46.

142. See text at note 109 *supra*.

143. Compare the problem of whether there can be a judgment which is consistent with due process and yet not entitled to full faith and credit. See Currie, *Full Faith and Credit to Foreign Land Decrees*, 21 U. CHI. L. REV. 620, 666-67 (1954).

144. As we have seen, neither the California legislature nor the California courts had ever asserted an interest in compensating aliens, or citizens of other states, injured abroad. See text following note 133 *supra*. California did not foresee the adverse effect upon the local community of such injuries in the "special circumstances" of seasonal employment of migratory laborers. Its failure to do so, although its interest in compensating the employee in such circumstances was later recognized, was surely not a denial of equal protection of the laws (as the California court seemed to suggest in holding that the state had jurisdiction to regulate all contracts entered into within its borders, see text at note 130 *supra*) since a state has never been required to deal exhaustively with the problem under consideration. *Silver v. Silver*, 280 U.S. 117, 123 (1929).

145. 249 Minn. 376, 82 N.W.2d 365 (1957).

son injured by the intoxication of the consumer. A Minnesota enterprise sold liquor in violation of law to one who, in consequence of his intoxication, overturned a car in which a resident of Minnesota was a passenger. The accident occurred in Wisconsin, which had no such statute. Very sensibly, the Minnesota court applied its own law and imposed liability, rejecting the rule that the law of the place of the wrong determines liability in tort.¹⁴⁶ The court emphasized that all parties were residents of Minnesota, and referred to "the interest of Minnesota"¹⁴⁷ in providing a remedy: "The consequential harm to plaintiff, a Minnesota citizen, accordingly should be compensated for under [the statute] which furnishes him a remedy against defendant for its wrongful acts. . . . [O]ur determination . . . will better afford Minnesota citizens the protection which the Civil Damage Act intended for them."¹⁴⁸

Suppose, now, that in a similar case the victim is a citizen of Wisconsin, run down on the streets of that state by a driver who has become intoxicated in a Minnesota bar. In adopting the Civil Damage Act, the Minnesota legislature weighed the interests of one group of its citizens (the liquor dealers) against the interests of another (the victims of the liquor trade), and decided that the former should be subordinated to the latter. Minnesota's short-term selfish interests would not be served by penalizing its liquor dealers for the benefit of citizens of other states, injured in other states. But the Minnesota courts might reason: Why should we be so selfish and provincial? The legislature has decided that our liquor industry should bear its social costs. The industry can adjust itself to that responsibility by insurance or otherwise. The increased cost attributable to liability for injuries to nonresidents outside the state would be moderate. Why should we not adhere to the principle that the industry should bear its social costs, irrespective of where the injury occurs and who the victim is?

Would a decision in favor of the Wisconsin citizen, based on such reasoning, be a denial of due process of law? It is difficult to believe that any court would so hold. It is true that Minnesota has no "interest" in the application of its law in the usual sense: i.e., this is not a situation in which the application of Minnesota law is required for effectuation of the legislative policy, expressed in the

146. RESTATEMENT, CONFLICT OF LAWS § 378 (1934).

147. 249 Minn. at 380, 82 N.W.2d at 368.

148. *Id.* at 380-81, 382, 82 N.W.2d at 368-69. The court also spoke of Minnesota's interest in "admonishing" the local dealer who had violated its statutes, and cited *Gordon v. Parker*, 83 F. Supp. 40 (D. Mass. 1949), to emphasize the state's interest in deterring wrongful conduct within its borders. Without in any way doubting the legitimacy of such an interest, we should like to leave it out of consideration for present purposes. The case is referred to merely for purposes of illustration; a hypothetical case would serve nearly as well; and the illustrative case for the purpose in hand should be one in which such an interest is not asserted. Such a hypothetical case is not unrealistic. The Illinois Dramshop Act, ILL. REV. STAT. ch. 43, § 135 (1957), imposes absolute liability on the seller of intoxicants, notwithstanding the legality of the sale. Such a statute hardly expresses a policy of regulating conduct within the state. But the Illinois courts hold that it does not apply to injuries suffered outside the state. *Eldridge v. Don Beachcomber, Inc.*, 342 Ill. App. 151, 95 N.E.2d 512 (1950).

Civil Damage Act, which is one for the protection of Minnesota people. The California Industrial Accident Commission's argument, that the imposition of liability is justified by the police power to safeguard local interests, and that where local interests end the power also ends,¹⁴⁹ seems unduly restrictive. It is not lightly to be assumed that the Constitution prohibits a state from adopting a humane and altruistic policy. Moreover, such a policy might well serve the selfish interests of the state if those interests are evaluated from a long-range point of view. In general, withholding the benefits of local laws from citizens of other states will invite retaliation, to the detriment of local citizens; retaliation will lead to reciprocity—a cumbersome device for ameliorating the effects of provincialism. Surely a state, especially a member of a federal union, might reasonably decide to avoid this painful cycle and begin by adopting a cosmopolitan attitude, in the hope, if not the confidence, that other states will do the same.

A state may be said, then, to have an "interest" in the application of its law in such a situation; but this interest is quite different from that which a state has in applying its law to a situation in which application is required for effectuation of the immediate policy of the law in question. In order to distinguish between them we shall refer to the one here under discussion as an "altruistic interest," the unqualified term "interest" being understood to mean that there is a reasonable basis for the application of the law in order to effectuate the specific policy that it embodies. The proposition that a state violates the due-process clause when it applies its law in a situation in which it has no interest in doing so—*i.e.*, when such application is not reasonably necessary for effectuation of the specific policy embodied in the law—must be qualified: an "altruistic interest" in the application of the law may be an adequate defense against attack based on the due-process clause.

The next question is whether, if Minnesota may apply its Civil Damage Act for the benefit of a citizen of Wisconsin injured in Wisconsin, it must do so by reason of the privileges-and-immunities clause. A similar question may be asked concerning application of the California workmen's compensation act to citizens of other states injured outside California. On the one hand, there is force in the argument of the California commission, that a state may reasonably draw the line of classification where its interests end. On the other hand, there is persuasiveness in the argument that the very purpose of the federal union, and specifically of the privileges-and-immunities clause, was to avoid the "painful cycle" of provincialism, retaliation, and reciprocity to which such classifications may lead, and that each state must therefore extend to citizens of other states the benefits that it provides for its own. It is difficult to choose between these arguments as they stand. Both are essentially assertions, and both are rather general. It may be that, upon closer examination of the problem in its various manifestations, we shall find that there are additional factors to be taken into account; that a solution appropriate to one type of situation is in-

149. See text at note 127 *supra*.

appropriate to another; and that the truth lies somewhere between the extremes that have been suggested.

IV. ALTRUISM VERSUS OFFICIOUS INTERMEDDLING

A state court has described the California court's ruling on the privileges-and-immunities clause in *Quong Ham Wah* as obiter dictum;¹⁵⁰ but, however gratuitously, the decision did have the effect of extending the coverage of the act. One state court has endorsed the reasoning of the case. Like the California court, it did so in a context in which the issue of discrimination was not squarely presented;¹⁵¹ unlike the California court, it did not extend the act to cover nonresident employees, but construed it as not covering residents injured elsewhere, thus avoiding a square holding on the constitutional question. The employer was an Indiana corporation; the employee was a "freehold resident" of Indiana, temporarily living in Illinois; the contract of employment was regarded as having been made outside Indiana, and was to be performed in Arkansas, where injury and death occurred. The Indiana court reversed an award to the widow and son, holding that since the contract was neither made nor to be performed in Indiana the compensation act of the forum was inapplicable, notwithstanding that the employee was a resident and the employer a domestic corporation:

To give a controlling influence to the fact that the employee was a resident of this state . . . so as to allow compensation in this case, when compensation would be denied if such employee had been a resident of Illinois, would be granting rights and privileges to a citizen of this state which would not, under the same facts, be granted citizens of other states.¹⁵²

The California court's ruling was also approved by Paxton Blair in a well-known article;¹⁵³ and this approval is noteworthy because in general Blair adopted a restrictive view of the privileges-and-immunities clause, his thesis being that there was no constitutional obstacle to increased employment of the doctrine of *forum non conveniens*. His reasons for approving the decision, however, are not persuasive; they are somewhat unclear, and in the end amount

150. *Tedars v. Savannah River Veneer Co.*, 202 S.C. 363, 374, 25 S.E.2d 235, 239 (1942).

151. *Bement Oil Corp. v. Cubbison*, 84 Ind. App. 22, 149 N.E. 919 (1925). Massachusetts also appears to have accepted the *Quong Ham Wah* reasoning, though largely in support of its construction of the local act. In *Gould's Case*, 215 Mass. 480, 102 N.E. 693 (1913), the act was held inapplicable to extraterritorial injuries. A 1927 amendment, Mass. Stat. ch. 309, § 3 (1927), provided for compensation for such injuries without limiting coverage to resident employees. In *McLaughlin's Case*, 274 Mass. 217, 219, 221, 174 N.E. 338, 339-40 (1931), the court upheld the act as amended against attack based on the full-faith-and-credit clause, twice citing *Quong Ham Wah*, though without discussing the privileges-and-immunities problem. The injured employee was a resident of Massachusetts.

152. 84 Ind. App. at 25, 149 N.E. at 920.

153. Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1, 16-18 (1929).

to an assertion that a state has jurisdiction to apply its compensation act whenever the contract is made in the state, and that this jurisdiction must be exercised without distinction between residents and nonresidents.¹⁵⁴

In other states the courts have rejected the ruling of *Quong Ham Wah*.

In *Liggett & Meyers Tobacco Co. v. Goslin*¹⁵⁵ the employee was a resident of Maryland; the employer was a New Jersey corporation¹⁵⁶ having a Maryland office; the contract was made in Delaware; and the injury occurred in Delaware. The Maryland act provided for payment of compensation to all employees of a certain class "who are citizens or residents of this State, employed by a person, firm or corporation having a place of business within this State, whether the injury for which compensation is asked was sustained within this State or elsewhere."¹⁵⁷ The Maryland court construed the act as not extending to the case at bar. Such a construction would be "illogical and impossible," because "the State would have been powerless to enforce any such provisions."¹⁵⁸ The act extended to injuries to residents abroad only if the contract of employment was made in Maryland.¹⁵⁹ In a portion of the opinion preceding the announcement of this construction the court had addressed itself to a challenge based on the privileges-and-immunities clause; its decision that that clause did not prevent application of the act to residents injured abroad must be understood as referring to the act as construed, *i.e.*, as requiring also that the contract of employment be made in the state. The reasons for rejecting the *Quong Ham Wah* position were: (1) that the distinction drawn was in terms of residence rather than citizenship; and (2) that the state had no power to apply its law to nonresidents injured abroad (even, apparently, though the contract was made in the state).

A Michigan statute similar to that of California was construed as not restricting coverage of out-of-state injuries to resident employees; a provision apparently limiting jurisdiction of the commission to cases involving residents was held inoperative because it conflicted with other sections of the act.¹⁶⁰ The court did not, therefore, reach the question whether coverage for nonresidents was required by the privileges-and-immunities clause. Later, when the act had been amended to make its coverage compulsory rather than optional, the same provision was construed as depriving the commission of jurisdiction to make an award to a nonresident employee where the contract of employment was made in Texas and the injury occurred in Tennessee.¹⁶¹ Although the court

154. *Ibid.* The *Head* case, *supra* note 134, is at war with this conception.

155. 163 Md. 74, 160 Atl. 804 (1932).

156. MOODY'S INDUSTRIAL MANUAL 2271 (1959).

157. MD. CODE ANN. art. 101, § 21(44) (1957). The statute was identical at the time of the decision.

158. 163 Md. at 83, 160 Atl. at 809.

159. *Ibid.* Note that on this construction the similarity between the Maryland act and the California act is increased.

160. *Roberts v. I.X.L. Glass Corp.*, 259 Mich. 644, 244 N.W. 188 (1932).

161. *Daniels v. Trailer Transport Co.*, 327 Mich. 525, 42 N.W.2d 828 (1950). The employer's "home office" was in Michigan. *Roberts v. I.X.L. Glass Corp.*, *supra* note 157, was not cited.

was presumably aware that such a construction raised a problem of unconstitutional discrimination,¹⁶² it did not discuss the problem. It is not clear whether the later case overrules the earlier, so that compensation would now be denied a nonresident injured abroad even though his contract was made in Michigan. If it does, the inference is that the court has rejected the *Quong Ham Wah* solution of the discrimination problem.

The question was squarely presented for the first time in a North Carolina case. The North Carolina statute provided:

Where an accident happens while the employee is employed elsewhere than in this State which would entitle him or his dependents to compensation if it had happened in this State, the employee or his dependents shall be entitled to compensation, if the contract of employment was made in this State, if the employer's place of business is in this State, and if the residence of the employee is in this State; provided, his contract of employment was not expressly for service exclusively outside of the State. . . .¹⁶³

The injury occurred in South Carolina. The contract was made in North Carolina; the plaintiff was a citizen and resident of South Carolina. The contract called for work in both states.¹⁶⁴ The court's rejection of the argument that to withhold compensation would violate the privileges-and-immunities clause is interesting. Without relying on the formal distinction between residence and citizenship, the court said:

The apparent difficulty which the State might be under in extra-territorial extension of its laws, affecting the rights of residents of other states, and uncertainty as to the extent to which this State may be able to protect its own citizens and industries by giving its laws and the orders of the Industrial Commission such extra-territorial effect is sufficient ground to sustain the jurisdictional classification that the employee be a resident of this State, and this involves no unconditional [unconstitutional?] discrimination.¹⁶⁵

According to this approach, classification may reasonably be based not only on the limits of jurisdiction but on uncertainty regarding the demarcation of those limits.

South Carolina, with an identical statute, reached the same result in an identical fact situation.¹⁶⁶ The opinion draws upon all the prior decisions rejecting *Quong Ham Wah*, emphasizing the distinction between residence and citizenship. Its most significant passages assert the propriety of limiting the benefits of the statute to cases in which the state has an interest in its application:

162. *Quong Ham Wah* had been cited in *Roberts v. I.X.L. Glass Corp.*, *supra* note 160, at 653, 244 N.W. at 192.

163. N.C. GEN. STAT. ANN. § 97-36 (1955). The text of the statute has not been changed since the decision.

164. The character of the employer does not appear, but it did have a place of business in North Carolina.

165. *Reaves v. Earle-Chesterfield Mill Co.*, 216 N.C. 462, 465-66, 5 S.E.2d 305, 307 (1939).

166. *Tedar's v. Savannah River Veneer Co.*, 202 S.C. 363, 25 S.E.2d 235 (1942). Here it is clear that the employer was a domestic corporation.

To great extent the whole scheme of workmen's compensation is to place the economic burden of industrial accidents upon industry rather than upon the workers and their dependents, and as to the latter thereby rendered indigent, upon the State. . . . This *raison d'être* does not usually exist as to nonresidents of the State. . . . [T]he exclusion is reasonable in view of the principal purpose of the law, above alluded to, and also of the difficulties of its administration in the case of "foreign" accidents, with claimants and witnesses beyond the jurisdiction, etc.¹⁶⁷

Several states, construing compensation acts not in terms applicable to extra-territorial injuries, have held that such injuries are compensable when the injured employee is a resident.¹⁶⁸ The emphasis upon the policy and interest of the state¹⁶⁹ and the lack of any discussion of the discrimination problem suggest that the courts in these states have assumed that the benefits of such laws may constitutionally be withheld from those employees whom the state has no interest in protecting.¹⁷⁰

At this point we are prepared to state another firm position, relating in the first instance to the due-process and full-faith-and-credit clauses, and by way of corollary to the privileges-and-immunities clause. In the pursuit of its altru-

167. *Id.* at 384, 25 S.E.2d at 243. As the North Carolina court had noted earlier, *Reaves v. Earle-Chesterfield Mill Co.*, *supra* note 165, at 465, 5 S.E.2d at 307, a workmen's compensation act also operates to protect local industry against liability of the magnitude envisioned by the common law. But if injury to the nonresident employee had occurred in a state not having a compensation act, the North and South Carolina acts would not have provided a defense to a common-law action for damages. By not extending their acts to foreign injuries to nonresidents, these states refrained not only from asserting a nonexistent interest in the employee, but also from asserting a very tangible interest in protecting local industry. If the interest in limiting the liability of the employer were asserted, extension of the benefits of the act to the nonresident employee would necessarily follow (within the framework of the workmen's compensation scheme). It would be difficult to dispute the "jurisdiction" of the employer's state to produce such a result. Thus South Carolina was not necessarily drawing the line of classification where her jurisdiction to protect the employee ended, but where her interest in protecting him ended; and, in the process, the legislature circumscribed its policy of limiting the liability of local enterprise. In this light, there was surely no hostile purpose to discriminate against nonresidents. This view is not completely realistic in the context of almost universal workmen's compensation; but see text at note 177 *infra*.

168. *E.g.*, *State ex rel. Morgan v. Industrial Acc. Bd.*, 130 Mont. 272, 300 P.2d 954 (1956); *Selser v. Bragmans Bluff Lumber Co.*, 146 So. 690 (La. App. 1933).

169. Notably in *State ex rel. Morgan v. Industrial Acc. Bd.*, *supra* note 168, at 286, 300 P.2d at 962.

170. The reasoning of *Quong Ham Wah* has also been rejected in a different context. North Dakota established an unsatisfied judgments fund, accumulated by a tax on motor vehicle registrations. Only residents of the state were entitled to have their unsatisfied judgments paid out of the fund. A citizen of Illinois, injured in North Dakota, attacked the limitation as discriminatory. The court upheld the classification on the ground that the plaintiff was not a contributor to the fund (although a resident of North Dakota, not the owner of a motor vehicle registered in the state, could presumably recover). The court observed that it was unnecessary to decide the constitutional issue that would be presented if the nonresident applicant were a contributor to the fund. *Benson v. Schneider*, 68 N.W.2d 665 (N.D. 1955).

istic interests, a state must stop short of trenching upon the interests of other states; therefore, the privileges-and-immunities clause does not require a state to extend the benefits of its laws to nonresidents where the state has no interest in so doing, and where so doing would interfere with the policy of a state having a direct interest in the matter.

It is one thing for a state to be generous to nonresidents at the expense of its own residents and enterprises; it is quite another to be generous to nonresidents at the expense of other nonresidents, or even of residents, or local enterprises, whose activities bring them within the protection of another state's policy. Thus in *Schmidt v. Driscoll Hotel*,¹⁷¹ if the injured plaintiff had been a citizen of Wisconsin, Minnesota might constitutionally have held its own enterprise liable; but if the seller were a Wisconsin corporation doing business in Minnesota, application of the Minnesota law to compensate a nonresident injured outside the state might impair, without adequate justification, the interest of Wisconsin in allowing its business enterprises to operate free of such liability.¹⁷²

By these standards, the decision in *Quong Ham Wah* was erroneous.¹⁷³ If a citizen of New York is hired in California to work in Alaska, and is injured in Alaska, in the absence of "special circumstances" indicating that he may be returned to California, the application of California's compensation act will be an intrusion into the affairs of New York or Alaska, or both. And this is so although the employer, as in *Quong Ham Wah*, is a California corporation qualified to do business in Alaska. Alaska has an interest in regulating the liability of foreign corporations doing business in the state for injuries to employees occurring there. New York has an interest in providing compensation for its residents injured in Alaska. California has no comparable interest. At most, California can assert an altruistic interest in extending the benefits of its

171. Discussed in text at note 145 *supra*.

172. A reminder is in order that we are here excluding from consideration Minnesota's interest in penalizing unlawful conduct in the state, see note 148 *supra*—an interest that would fully justify the application of Minnesota law, *cf.* *Gordon v. Parker*, 83 F. Supp. 40 (D. Mass. 1949). Even so, we recognize that it is difficult to accept the statement in the text. It is easier to make and accept the statement that the privileges-and-immunities clause does not *require* Minnesota to apply its law in such a situation; and it is the operation of that clause with which we are here primarily concerned. The question is *why* the application of Minnesota law would not be required in such a case if it is required when the defendant is a Minnesota resident or enterprise; and the answer appears to be that in this case Minnesota not only has no interest in protecting the plaintiff but would, or at least might, intrude upon the interest of another state by applying its law and policy. The subject is further considered in the text at note 220 *infra*.

173. As always in discussing *Quong Ham Wah*, we encounter here difficulties of statement. In retrospect, after *Alaska Packers*, note 102, *supra*, we know that because of the special circumstances of the hiring California had a specific interest in protecting the nonresident injured in Alaska. But the holding in *Quong Ham Wah* was directed broadly to the hypothetical case of a nonresident injured abroad, with no reference to any special circumstances indicating that he was likely to become a burden to California. It is the holding as applied to this hypothetical case that is regarded as erroneous.

laws to nonresidents where the burden is borne by California enterprise; but that interest must yield when it conflicts with a direct interest on the part of another state.

In *New York Life Ins. Co. v. Head*¹⁷⁴ the defendant insurer was a foreign corporation licensed to do business in Missouri, and the contract was made in Missouri; yet Missouri's attempt to extend the benefits of its laws to the non-resident insured was an interference with the interests of the state of incorporation, and so was properly stricken down. It follows, of course, that Missouri was not required by the privileges-and-immunities clause to extend the benefit of its laws to nonresidents in such a situation. Whether it would be required to do so if the insurer were a domestic corporation, and if no other state's interests were involved, is a question we do not attempt to answer at this point.

It remains to be seen whether the application of the California compensation act in the generalized *Quong Ham Wah* situation would in fact intrude upon the interests of other states. So far as the state of the injured employee's residence (New York) is concerned, it is difficult too see how its interests could be adversely affected by making an award to the employee, unless the award were in an amount less than that provided for by the law of New York, and had the effect of preventing further compensation under that law.¹⁷⁵ But a judgment refusing compensation on the merits, so as to bar the compensation proceeding in New York, would be a rather serious interference with the interest of that state. With respect to the state of injury (Alaska), its interests would be affected adversely not only by a preclusive denial of compensation, or an award less than that provided by Alaska, but also by an award in excess of that provided for by Alaska law. Workmen's compensation laws in all the states are basically similar, so that in many cases the degree of intrusion in the latter case might be slight; yet relatively minor differences have led to hard-fought litigation,¹⁷⁶ and major differences are sometimes encountered.¹⁷⁷ The California court, however, is hardly in position to decide whether its intrusions upon the interests of Alaska are unimportant or not.¹⁷⁸ Moreover, the Alaska

174. Discussed in text at note 134 *supra*.

175. Compare *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943), with *Industrial Comm'n of Wisconsin v. McCartin*, 330 U.S. 622 (1947).

176. See note 175 *supra*.

177. See *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145 (1932); *Carroll v. Lanza*, 349 U.S. 408 (1955); cf. *Hahn v. Ross Island Sand & Gravel Co.*, 358 U.S. 272 (1959).

178. A facile way to make the point that California should not intrude would be to emphasize the "exclusive remedy" provisions of the Alaska act. Such provisions have been heavily emphasized by the Supreme Court not only in the cases involving compensation awards, note 175 *supra*, but in the cases on due process and full faith and credit to public acts, see Currie, *The Constitution and the Choice of Law*, 26 U. CHI. L. REV. 9, 19-30 (1958). But we believe that such provisions are intended primarily to exclude common-law remedies, and have been given undue importance in the conflicts situation; moreover, the interest of the foreign state may exist, and if so is entitled to due respect, even in the absence of a provision purporting to make the remedy exclusive.

act may be interpreted by the courts of that state as localizing the cause of action: *i.e.*, as intended to have the effect of limiting the injured employee to a proceeding in a tribunal of Alaska, and not elsewhere.¹⁷⁹ If that is so, although the state of the employee's residence need not observe the limitation, having an interest of its own in providing a forum, California should observe it, having no comparable interest.¹⁸⁰

These conclusions suggest a further qualification of the governmental-interest analysis. One of the prime theses of that method of approach to conflict-of-laws problems is that no court, state or federal, is in position to "weigh" and choose between truly conflicting interests of different states.¹⁸¹ It has previously been conceded that a state's basis for asserting an interest in the application of its policy may be so attenuated as to justify its disregard for constitutional purposes.¹⁸² And it is clear that the courts of a state may properly take into account the possibility of conflict with the interests of other states in determining what domestic policy is and how far domestic interests extend.¹⁸³ Here we add that the "altruistic interest" of a state—its interest in extending the benefits of its laws to all persons without distinction—must yield to the specific interest of another state in effectuating the policy expressed in its law. The "altruistic interest" is of a quite different order from the interest of a state in effectuating the specific policies declared in its laws; the subordination of the former to the latter does not seem to us to involve the exercise of legislative discretion in the same sense as does the choice between conflicting state interests of a coordinate and specific character.¹⁸⁴

V. GOVERNMENTAL INTEREST AS A BASIS FOR CLASSIFICATION

In one of the earliest of the Supreme Court's decisions under the privileges-and-immunities clause, *Conner v. Elliott*,¹⁸⁵ the Court held that community

179. *Cf. Tennessee Coal, Iron & R.R. Co. v. George*, 233 U.S. 354 (1914); *Atchison, T. & S.F. Ry. v. Sowers*, 213 U.S. 55 (1909).

180. See Currie, *The Constitution and the "Transitory" Cause of Action*, 73 HARV. L. REV. 36, 76-82 (1959). It may be well to repeat that the discussion in the text is not applicable to the actual fact situation in *Quong Ham Wah*, where the plaintiff was a resident of California, nor to that in *Alaska Packers*, where, though the employee was an alien, he was to be returned to California. In those situations California had an interest in the application of its law, and in providing a forum. The latter interest is emphasized by the difficulties confronting the employee if his remedy were to seek compensation in Alaska. Brief for Appellees, pp. 21, 26, 31-32, *Alaska Packers Ass'n v. Industrial Acc. Comm'n*, 294 U.S. 532 (1935).

181. Currie, *supra* note 178, at 77-84.

182. *Id.* at 45, n.156.

183. See Currie, *The Silver Oar and All That: A Study of the Romero Case*, 27 U. CHI. L. REV. 1, 65-75 (1959).

184. The question whether state policies relating to judicial administration should be treated as belonging to an order inferior to that of "substantive" policies was considered and answered in the negative in Currie, *supra* note 180, at 43.

185. 59 U.S. (18 How.) 591 (1855).

property rights were not "privileges of citizenship" within the protection of the clause. Mrs. Conner, a native of Louisiana, was married in Mississippi to a citizen of Mississippi, and the couple resided in Mississippi for the duration of the marriage. In the course of the marriage Mr. Conner acquired real estate in Louisiana, and on his death the widow applied for distribution in accordance with Louisiana's system of community property. Her application was refused because the Louisiana code was specific as to the applicability of the community property law to mixed cases: it applied only (1) where the marriage was contracted in the state or (2) as to after-acquired property, where persons married elsewhere became residents of Louisiana.

The Court's holding that the right, to be protected, must be one that "belong[s] to citizenship,"¹⁸⁶ and that ordinary legal rights such as those in issue are not of that class, seems much impaired by *Blake v. McClung*.¹⁸⁷ But the Court seems to have been attempting to say more than this. The Louisiana law was regarded as a regulation of the incidents of contract:

And, in obedience to that principle of universal jurisprudence, which requires a contract to be governed by the law of the place where it is made and to be performed, the law of Louisiana undertakes to control these incidents of a contract of marriage made within the State by persons domiciled there; but leaves such contracts, made elsewhere, to be governed by the laws of the places where they may be entered into. In this, there is no departure from any sound principle, and there can be no just cause of complaint.¹⁸⁸

The application of Louisiana's law to persons married elsewhere and coming to Louisiana to live was upheld on the ground that the state thus properly regulated the incidents of contracts performed within its borders:

The laws of Louisiana affix certain incidents to a contract of marriage there made, or there wholly or partly executed, not because those who enter into such contracts are citizens of the State, but because they there make or perform the contract. And they refuse to affix these incidents to such contracts, made and executed elsewhere, not because the married persons are not citizens of Louisiana, but because their contract being made and performed under the laws of some other State or country, it is deemed proper not to interfere, by Louisiana laws, with the relations of married persons out of that State.¹⁸⁹

This reasoning has several interesting aspects. It suggests, for one thing, that Louisiana was doing no more than confining its regulation within the limits of its jurisdiction; yet the situs of land within a state has always provided a comparatively safe peg on which to hang the applicability of the law of the state, and traditional conflicts theory concedes jurisdiction—even, it seems, exclusive jurisdiction—in matters of marital property to the state where

186. *Id.* at 593.

187. 172 U.S. 239 (1898).

188. 59 U.S. (18 How.) at 593.

189. *Id.* at 594.

the land is.¹⁹⁰ It is difficult to believe that in 1855 the Court would have denied the jurisdiction of the state of the situs to determine the interests in land of nonresidents and parties to foreign marriages. The decision probably cannot be explained, therefore, on the ground that Louisiana stopped only after exercising its power to the fullest. That being so, the Court's emphasis on the circumstance that Louisiana was drawing no invidious and hostile line between its residents and residents of other states may suggest that a state does not violate the privileges-and-immunities clause when it limits the application of its laws to cases in which it believes it has an interest in applying its policy.

Community property law is a complex and recondite subject; it is not easy to determine what governmental policy is expressed by such laws, nor the circumstances in which a state may reasonably assert an interest in the application of its policy.¹⁹¹ We shall not attempt any such determination offhand, in a general paper such as this. Yet we may venture this suggestion: there was no dichotomy comprising (a) married women who were residents (or citizens) of Louisiana and (b) married women who were nonresidents of Louisiana. The categories established were: (a) married women residing in Louisiana (with respect only to property acquired during residence there), together with all women married in Louisiana; and (b) all other married women. The distinction, therefore, was not one between residents and nonresidents as such; community property rights were not generally conferred on resident married women. The classification followed a different line, and the question is whether it was a reasonable one. We have no way of knowing what the legislature's actual reason was for drawing the line in this way. Conceivably, however, it may have wished to impose the rule of community property only in those situations in which, in the judgment of the legislature, both parties were most likely to be aware of its probable applicability, so that they would have the maximum opportunity to avail themselves of the privilege of adopting a different rule for themselves by agreement. A Mississippi man marrying a Louisiana woman in Mississippi is not very likely to contemplate the problem of community property, especially with respect to property which he does not then own, but may acquire in the future, in Louisiana; still less is he likely to think of the matter when he acquires property in Louisiana years later. On the other hand, when persons are married in a community property state, or later move to one, it is more likely that they will be alerted to the problem and make their adjustment to it. In this view, the decision does not support the proposition that a classification coterminous with state interests is *ipso facto* valid.

190. RESTATEMENT, CONFLICT OF LAWS § 238 (1934). Moreover, the Court's assumption that the state of contracting has unquestionable jurisdiction to regulate the incidents of a contract is belied by the *Head* case, *supra* note 134.

191. Indeed, it may be questioned whether such laws embody governmental policy, in the sense in which that concept is encountered in other laws, since the Louisiana statute expressly permitted the parties to a Louisiana marriage to stipulate out of the community system. 59 U.S. (18 How.) at 592.

In *Ferry v. Spokane, P. & S. Ry.*¹⁹² the Court upheld the Oregon statute giving nonresident married women dower only in lands of which the husband died seized, while giving residents dower in all lands of which the husband was seized at any time during the marriage. The opinion of Mr. Justice McKenna is confused and misleading.¹⁹³ Without so much as citing *Blake v. McClung*,¹⁹⁴ he declared that "dower is not a privilege or immunity of citizenship, either state or federal. . . ."¹⁹⁵ He next observed that a number of states had upheld similar statutes. Dower was simply an incident of the marital contract or relation; it was entirely subject to state regulation, and might be given or withheld altogether by the legislature. "[T]he legislature having this power to give or withhold dower, it follows that it has the power to declare the manner in which the dower right may be barred, or the grounds upon which it may be forfeited, and, if so, it has the right to provide that it may be barred by the wife's nonresidence in the state."¹⁹⁶ And, as if to silence all disagreement: "[T]he right of dower in real property is determined by the laws of the state in which the property is situated."¹⁹⁷

All this is unsatisfactory, especially since it was addressed indiscriminately to the points raised under the privileges-and-immunities clause of article IV, the privileges-or-immunities clause of the fourteenth amendment, and the equal-protection clause. Obviously, the statement that the law of the situs determines whether dower exists gives no answer to the question whether the situs state has unconstitutionally discriminated in its provisions for dower. Just as obviously, the power to withhold dower altogether does not justify granting it to some and arbitrarily withholding it from others. Thus a provision excluding resident widows from the privilege on grounds of race would almost certainly offend the equal-protection clause.

Actually, these divagations were quite unnecessary to the decision. There was, as Mr. Justice McKenna noted twice in the course of his opinion, a perfectly sound basis for the classification. Especially in the western states, the requirement that a nonresident wife, whose existence might not even be known to the purchaser, join in her husband's conveyances in order to bar dower, had created great inconvenience in land transactions and great uncertainty as to titles:

The cases recognize that the limitation of the dower right is to remove an impediment to the transfer of real estate and to assure titles against absent and probably unknown wives. And such is the purpose of the Oregon statute, and the means of executing the purpose appropriate, and a proper exercise of classification.¹⁹⁸

192. 258 U.S. 314 (1922).

193. Cf. Currie, *supra* note 143, at 648.

194. 172 U.S. 239 (1898), discussed in text at note 44 *supra*.

195. 258 U.S. 314, 318.

196. *Id.* at 321.

197. *Id.* at 320, quoting from *Thomas v. Woods*, 173 Fed. 585, 593 (1909).

198. *Id.* at 319. The next sentence was, "It satisfies, therefore, the constitutional requirement of the equal protection of the laws; and we proceed to the inquiry whether the

If we may read into this opinion somewhat more than can realistically be attributed to its author, it does not directly support the proposition that a classification is reasonable merely because it limits state policy to the extent of state interests. We may assume that in general the policy embodied in provisions for dower is to benefit the widow. If it consulted its own interests alone, therefore, Oregon might have restricted all dower privileges to residents. This it did not do, but extended dower in lands of which the husband died seized—with respect to which there was no such conveyancing problem—to residents and nonresidents alike, including aliens. This circumstance serves to show that the purpose of excluding nonresidents from dower in other lands was not invidious and hostile; it serves also to show that the case is not authority for the proposition that a line of classification drawn where state interests end is reasonable. More was present here to justify the classification: the purpose of Oregon to facilitate land transfer and secure the stability of titles.¹⁹⁹

The same cannot be said for similar statutes construed by the state courts to mean that the required residence must exist at the time of the husband's death rather than at the time of the conveyance.²⁰⁰ On that construction, the purpose of the classification cannot be intelligibly explained as one to facilitate land transfers and protect innocent purchasers. The Michigan Supreme Court recognized, indeed, that only a construction referring residence to the time of conveyance made sense, and that the language that the court construed as compelling a different construction was used by mistake, or because of legislative whimsy.²⁰¹ Alternatively, it may be suggested that the legislature limited the benefits of its dower policy to those widows whom it had an interest in protecting—*i.e.*, those who were residents at the time of the husband's death. In that view, these state court decisions, upholding the statutes against attacks based on the privileges-and-immunities clause, may be taken as supporting the proposition that the limits of state interest, without more, are a reasonable basis for classification. The decisions do not give adequate consideration to the constitutional problem, however, and are of little value as precedents.

In an earlier study, focused on the well-known Massachusetts case of *Miliken v. Pratt*,²⁰² one of the authors discussed the anomalous results produced by reference to the law of the place of contracting in order to determine the capacity of married women to contract.²⁰³ A plea was made for the interpre-

statute is otherwise valid." *Ibid.* Thus the quotation in the text may be regarded as inapplicable to the objection under the privileges-and-immunities clause. Apparently Mr. Justice McKenna felt that he had disposed of that objection by the assertion that dower was not a privilege of citizenship. We regard this portion of the opinion, however, as the only portion capable of sustaining the ruling under the privileges-and-immunities clause.

199. See also *Buffington v. Grosvenor*, 46 Kan. 730, 27 Pac. 137 (1891).

200. *Pratt v. Tefft*, 14 Mich. 191 (1866); *Bennett v. Harms*, 51 Wis. 251, 8 N.W. 222 (1881).

201. *Pratt v. Tefft*, *supra* note 200, at 198, 201.

202. 125 Mass. 374, 28 Am. Rep. 241 (1878).

203. Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958).

tation of laws incapacitating married women in the light of the policy of such laws and of the interest of the state in applying them in a given situation. Thus a state having a policy of protecting married women against liability has an interest in applying the policy for the protection of resident married women, irrespective of where the contract is made or who the creditor is. But if the married woman is a nonresident such a state has no interest in protecting her; and if the promisee is a resident, the state's selfish interests would dictate that he be allowed to recover against the foreign married woman. In support of such a result, it may be pointed out that if the state of the married woman's residence does not impose such an incapacity, to apply the protective law of the forum would not advance the interests of any state, and would defeat the interest of the forum in the security of transactions.²⁰⁴

If it is unqualifiedly true that a classification in terms of residence is reasonable when the line is drawn where the interest of the state in applying its policy ends, such a result would not offend the privileges-and-immunities clause. The earlier study, however, reached a different conclusion. To hold the protective policy inapplicable to cases in which the creditor is a local resident and the married woman a foreigner

. . . denies to foreign married women an immunity enjoyed by local married women, for no reason except that they are foreign. Not only does such discrimination offend the sense of fairness; in all probability it is unconstitutional, applied to citizens of other states of the Union, as an infringement of the privileges-and-immunities clause of Article IV, Section 2. . . . In [certain] . . . cases, the fact of residence has some significance, apart from the largely coincident fact of citizenship, tending to make the classification a reasonable one. . . . We may concede that there is no such redeeming significance in the circumstance of residence in the case we are discussing. . . . The truth is that [the suggested limitation of the applicability of the law seeks] . . . advancement of the selfish interests of [the state having the protective policy] . . . without regard to other considerations.²⁰⁵

Doubts have been suggested as to the necessity of this limitation upon the analysis of conflict-of-laws problems in terms of governmental interests. There is appeal in the proposition, persuasively urged by counsel for the California Industrial Accident Commission in the *Quong Ham Wah* case,²⁰⁶ that a classification coterminous with state interests is reasonable. After full reconsidera-

204. *Id.* at 238. The question may be raised: Under what law would such a result be reached? There is no apparent basis for applying the law of the married woman's residence; and the law of the forum "incapacitates married women." The answer is that it would be reached by applying the law of the forum, more discriminately interpreted. Certainly it would be possible to draft the law of the forum in such a way as to make it clear that the general principle is that written promises, voluntarily made for a valuable consideration, will be enforced; and that the rule concerning married women's contracts is a narrowly defined exception for the benefit of resident married women. And even if it is not so explicit, the law can be construed as if it were drafted in this way.

205. *Id.* at 255.

206. See text at note 125 *supra*.

tion, however, we adhere to the view earlier stated: to deny the protection of the law concerning married women's contracts to residents of other states as such, where the creditor is a local resident, is a denial of the privileges and immunities of citizenship. Certainly there is here no such independent ground for distinguishing between resident and nonresident married women as there was in the dower case.²⁰⁷ Such doubt as persists we resolve in favor of a broad interpretation of the constitutional policy against discrimination, in accordance with the intention stated in Part I.

We adhere also to the intermediate solution suggested in the earlier study: while the protective policy is not to be withheld from foreign married women merely because they are foreign, it should not be indiscriminately extended to all foreign married women:

The essential objective . . . is not graspingly to promote the interests of local creditors at the expense of foreign debtors. It is simply to avoid the anomaly of defeating the reasonable expectations of local creditors without advancing any interest of the foreign state. This objective can be attained if the immunity conferred by the act is extended to the nonresident married woman who enjoys a similar immunity under the law of the state of her residence, but withheld from those who have been emancipated by their home states. . . .

This is clearly not a denial of the privileges and immunities of citizenship. All married women are divided into two classes on a reasonable basis: those who are protected by the laws of their home states, and those who are not.²⁰⁸

This kind of solution is available, however, only in a limited number of type cases.²⁰⁹ Such a solution is not possible unless it can be reasonably maintained that the state has *two* relevant policies, *e.g.*, a general policy of security of transactions and an exceptional policy of protecting local married women. In another problem-situation that has been analyzed from the point of view of governmental interests—survival of personal-injury claims against the estates of deceased tortfeasors—no such dual policy can be discerned, and no such intermediate solution seems defensible.²¹⁰ The rule of abatement on death of the tortfeasor can most intelligibly be interpreted as expressing a policy for the

207. *Ferry v. Spokane, P. & S. Ry.*, *supra* note 192.

208. *Currie, supra* note 203, at 256-57. In fact, as applied by the courts of a state having such a protective policy, such a rule would operate precisely as would a choice-of-law rule referring questions of capacity to the domiciliary law. The difference between this proposal and such a choice-of-law rule is that we would not expect the state of the creditor's residence, if it has no such protective policy, to apply the protective law of the married woman's domicile.

209. The concept of "similarity" of the protection accorded by the state of the married woman's residence may involve difficulties of administration. Perhaps a better formulation would be that the forum in the case supposed should apply the law of the married woman's domicile, or of the forum, in such a way as to produce the least interference with freedom of contract, *i.e.*, to give the lesser degree of protection.

210. See *Currie, Survival of Actions: Adjudication versus Automation in the Conflict of Laws*, 10 *STAN. L. REV.* 205 (1958).

benefit of those interested in the estate of the deceased; the living are not to be mulcted for the wrongs of the dead.²¹¹ When a state legislature abrogates that common-law rule, allowing suit against the personal representative, it adopts instead a policy for the benefit of the victim, and primarily of those victims within the sphere of its own governmental concern: residents of the state, and others injured within the state. Can it be said that the state retains a general policy of protecting estates against liability for the wrongs of the deceased, subject to an exception in favor of local victims? Such a proposition is implausible.²¹² To withhold from citizens of other states, injured outside the state, the right to sue the personal representative in local courts, while granting the right to residents similarly injured, would rather clearly be a denial of the privileges and immunities of citizenship, and this though the classification were in terms of residence rather than citizenship.²¹³ To extend the privilege to nonresidents injured outside the state only if their home states give them similar "protection" would be "not so much a differential treatment in good faith of persons differently situated as a mere attempt to preclude recovery by as many foreigners as possible."²¹⁴

It may be that such intermediate solutions, based upon classifying persons according to the laws of their home states, are appropriate only when the policy in question is one of protective incapacity. At any rate, we are not aware of any situation not involving capacity in which such a classification could be plausibly defended, with one possible exception. A North Carolina statute prohibits deficiency judgments on purchase-money mortgages.²¹⁵ Rather clearly, the policy of the statute is to protect purchasers against what is considered an improvident agreement by casting upon the seller-mortgagee the risk of inadequacy of the security.²¹⁶ It should therefore be consistently applied (by North Carolina courts) to protect North Carolina purchasers, irrespective of where the mortgaged property is situated, or where the contract is made, or where the seller resides. It should not be applied when neither party is connected with the state. Should it be applied where the mortgagee is a resident of North Carolina and the mortgagor a nonresident? To apply it would deprive the mortgagee of the benefit of a bargain which is not generally condemned as unfair; and, if the state of the mortgagor's residence has no similar policy, to give him the benefit of the statute would not advance the interest of any state. Nevertheless, his claim to the protection of the privileges-and-immunities clause could be opposed only by a rather unconvincing assertion that the state may draw the line of classification where its interests end—unless the

211. *Id.* at 220-21.

212. *Id.* at 225, 231-32.

213. *Cf.* *Muir v. Kessinger*, 35 F. Supp. 116 (E.D. Wash. 1940) (where, however, the forum state retained the common-law rule of abatement).

214. *Currie*, *supra* note 210, at 232.

215. N.C. GEN. STAT. ANN. § 45-21.38 (1950). See *Bullington v. Angel*, 220 N.C. 18, 16 S.E.2d 411 (1941).

216. See *Currie & Lieberman, Purchase-Money Mortgages and State Lines: A Study in Conflict-of-Laws Method* 1960 DUKE L.J. I.

classification takes into account the law of the mortgagor's residence, as suggested in the case of married women's contracts. But it would be difficult to maintain that North Carolina adheres to a general policy of contract enforcement, subject to a limited exception in favor of a weak and susceptible segment of its citizenry. Despite the fact that the effect of the statute may be likened to that of the disability imposed upon infants,²¹⁷ the protected class potentially embraces the whole population of the state. An immunity so broadly bestowed should probably be extended to citizens of other states, especially since it would be difficult to argue plausibly that North Carolina retains any policy for the protection of the mortgagee.²¹⁸

It is instructive to return at this point to the problem of the Statute of Frauds, discussed in Part I.²¹⁹ There we saw that the Delaware court's election to treat the Delaware statute as substantive, construing it as applicable to all contracts made in Delaware, and thus, hopefully, securing the maximum protection for Delaware citizens, would have the effect, given the court's assumptions, of protecting the foreign defendant against the Delaware plaintiff in two of the possible cases and not protecting him in two; or, to limit the discussion to action by the Delaware courts, the foreign defendant would be protected against the domestic plaintiff in one of the cases and not in the other. This is a purposeless and haphazard arrangement, poorly serving the declared purpose of the statute; if the selfish interests of Delaware were really to be advanced, protection to the foreign defendant would be denied in both cases. But would such a denial offend the privileges-and-immunities clause? Rather clearly it would if the classification were simply in terms of nonresidence, without reference to the law of the defendant's residence. Could the constitutional objection be met by giving the New York defendant the benefit of the New York statute or the Delaware statute, whichever affords the lesser protection, as suggested in the case of married women's contracts? An argument can be made here, as there, that the dominant policy of Delaware is to vindicate the expectations of promisees, and that the protective policy is a limited exception for local defendants. But the argument does not carry, in this context, the conviction that it carries when the protective policy is directed toward special categories of persons who are thought to be unable to protect themselves; here the protected category is residents of the state in general. Moreover, such an intermediate solution for this type of problem would introduce a degree of complexity into the administration of the statute: in every case of a Delaware plaintiff against a foreign defendant it would be necessary to refer to the foreign statute, whereas simply treating the foreign defendant as if he were a local resident would permit the simple application of the law of the forum as a matter of course in such cases. No harm is done if as a result the New York defendant is given greater protection than that afforded him by the law of his

217. *Id.* at 19.

218. *Cf.* Currie, *supra* note 203, at 258.

219. See the discussion of *Lams v. F. H. Smith Co.*, 36 Del. 477, 178 Atl. 651 (1935), in text at notes 12-18 *supra*.

home state. It is true that no policy of New York is thereby advanced; but on the other hand it would be difficult to spell out a legal policy on the part of Delaware of protecting the resident plaintiff when the domestic statute has not been satisfied. At all events, here again we resolve doubts in favor of the constitutional policy against discrimination; the New York defendant in this situation should be given the same "privileges and immunities" that are enjoyed by residents of Delaware under the Statute of Frauds, and this whether the rejected classification be conceived in terms of citizenship or of residence.

A consequence of this conclusion is that we cannot say that a classification coterminous with the state's interests will necessarily withstand attack based on the privileges-and-immunities clause. There may be situations in which such a classification is a complete defense; but on the basis of the situations that have been considered it appears that, when the law of a state provides benefits for its residents generally, the same benefits should be extended to citizens of other states unless there is some substantial reason, in addition to the fact that the governmental interests of the state do not require extension of the benefit to foreigners, for limiting the benefit to residents.

This in turn means that Minnesota, having decided to apply its Civil Damage Act for the protection of a resident injured outside the state, must similarly hold the local defendant liable for out-of-state injuries to citizens of other states, provided it can do so without trespassing upon the interests of other states.²²⁰ Consideration of a similar case may lead to clarification and development of the analysis. A statute of Missouri, that most altruistic of states, provided:

In all suits upon policies of insurance upon life hereafter issued by any company doing business in this state, it shall be no defense that the insured committed suicide, unless it shall be shown to the satisfaction of the court or jury trying the cause, that the insured contemplated suicide at the time he made his application for the policy, and any stipulation in the policy to the contrary shall be void.²²¹

Twenty years after its enactment the statute was amended, for reasons that have not been discovered, by adding the phrase, "to a citizen of this state," so that as amended the statute read, "In all suits upon policies of insurance upon life hereafter issued by any company doing business in this state, to a citizen of this state . . ." *etc.*²²² In 1911, the statute being in force as amended, one Lukens, a resident of Illinois, applied to the Chicago agent of the International Life Insurance Company, a Missouri corporation authorized to do business in Illinois, for a policy of life insurance which was delivered in Chicago. Within one year after delivery of the policy the insured committed suicide. The widow and beneficiary (apparently still residing in Illinois) sued the company in Missouri and, in response to a plea setting forth a contract provision ex-

220. The reference is to the case of *Schmidt v. Driscoll Hotel*, 249 Minn. 376, 82 N.W.2d 365 (1957), discussed in text in note 172 *supra*.

221. 2 Mo. Rev. Stat. ch. 119, § 5982 (1879) (now Mo. STAT. ANN. § 376.620 (1949)).

222. Mo. Rev. Stat. ch. 119, § 7896 (1899) (now Mo. STAT. ANN. § 376.620 (1949)).

cluding suicide within a year, attacked the Missouri statute as an unconstitutional withholding from citizens of other states of the privileges and immunities of citizens of Missouri. The trial court invalidated the phrase added by amendment and allowed recovery. The Supreme Court of Missouri reversed, primarily on the ground that the contract was governed by the laws of Illinois, where it was made.²²³ If the insured had been a citizen of Missouri, however, the case would have fallen squarely within the language of the statute, notwithstanding that the contract was made in Illinois. In that event, Missouri might have held the defense precluded by the statute.²²⁴ If so, must it also hold that the defense is precluded where the insured is a citizen of another state? We think not. Not only does Missouri have no interest in applying the statute for the benefit of a nonresident, but Illinois has an interest in securing freedom of contract to Missouri insurance companies licensed to do business in Illinois *with respect to contracts resulting from the transaction of business in Illinois*. That the law of the place of contracting was not, as such, decisive, was clearly settled, as the Missouri court probably knew. This statute could not have been constitutionally applied to a policy on the life of a resident of New Mexico issued by a New York company, even though the company was licensed in Missouri and even though the contract was made in Missouri.²²⁵ Yet the geographical setting of the transaction is not without constitutional significance. The "place where the contract is made," in terms of the law of offer and acceptance, is indeed irrelevant; but the result in such a case would turn upon whether or not the policy could be identified as one arising out of the business transacted by the company in Illinois. If it were a product of the company's Missouri business, the privileges-and-immunities clause would require that the statute be administered for the benefit of citizens of other states in the same way as for Missouri citizens.²²⁶

223. *Lukens v. International Life Ins. Co.*, 269 Mo. 574, 191 S.W. 418 (1917); *writ of error dismissed "per stipulation,"* 248 U.S. 596 (1919).

224. As, somewhat similarly, the Minnesota court held the Civil Damage Act applicable as between Minnesota parties although the place of injury was Wisconsin. *Schmidt v. Driscoll Hotel*, *supra* note 220; *cf.* *Bowen v. New York Life Ins. Co.*, 117 F.2d 298, 300 (8th Cir.), *cert. denied*, 313 U.S. 583 (1941). This is not to say that Missouri would necessarily, or should, so hold. Missouri might reasonably assert an interest in so protecting its residents, and if so the holding should survive attack under the due-process and full-faith-and-credit clauses. It might with equal or greater reason conclude that it should not in such manner interfere in the business transacted by domestic corporations in other states, thus creating interstate conflicts. "It is evidently the policy of this State to leave . . . [domestic] insurers which operate in other States on the basis of equality where the laws of such States place them." 269 Mo. at 587, 191 S.W. at 422.

225. *New York Life Ins. Co. v. Head*, 234 U.S. 149 (1914). The *Head* case was cited by the Missouri court, 269 Mo. at 582, 191 S.W. at 420. See also *Bowen v. New York Life Ins. Co.*, *supra* note 224, following the *Lukens* case.

226. The court left this question open, implying that if the contract had been made in Missouri by a citizen of another state physically present there the equal protection clause would present a serious problem.

Without much question, the benefits of the statute must, under the equal protection clause, be extended to residents not citizens to the same extent as to citizens.

A United States district court in Missouri has held the contrary—erroneously, we submit.²²⁷ The company, a Missouri corporation (not licensed to do business in California, so far as appears), issued a policy to a citizen of California in a direct-mail transaction. The court held the Missouri suicide statute unavailable to the widow-beneficiary, a citizen of Texas, on three grounds: (1) the contract, having been made in California, was governed by California law; (2) any discrimination based upon citizenship was directed against the insured, and the beneficiary lacked standing to complain of it; and (3) the rights conferred by the Missouri statute were not “fundamental.”²²⁸ Thus the court was misled by three false guideposts: (1) the conventional rule for choice of law; (2) *Chambers v. Baltimore & O.R.R.*,²²⁹ and (3) *Corfield v. Coryell*.²³⁰

VI. ACCESS TO COURTS

The right “to institute and maintain actions of any kind in the courts of the state” was acknowledged to be a privilege or immunity of citizenship, protected by the Constitution, in the pioneer federal court decision construing the clause.²³¹ For years, therefore, many state courts doubted or denied their power to employ anything resembling the modern doctrine of forum non conveniens.²³² The decision of the Supreme Court in *Douglas v. New York, N.H. & H.R.R.*²³³ should have put an end to such doubts; that it has not altogether succeeded in doing so is attributable in good part to Mr. Justice Holmes’ curt and unsatisfactory disposition of the problem. To a considerable extent he relied upon the facile distinction between residence and citizenship, discrediting the perfectly sound decision in *Blake v. McClung*²³⁴ without overruling it, and thus leaving confusion. But if there is any substantial offense to constitutional principles in a policy of closing the doors of a state’s courts to controversies between people from other states, that offense cannot be exorcised by the sophistry that a hypothetical citizen of the forum state who is a nonresident is similarly denied access to the courts, while a hypothetical citizen of another state residing in the forum will be heard. Only in one brief sentence did Mr. Justice Holmes suggest an adequate ground for sustaining such a policy, and even then the reasoning was dubious in part: “There are manifest reasons for pre-

227. *Wheeler v. Business Men’s Acc. Ass’n of America*, 247 Fed. 677 (W.D. Mo. 1918).

228. Only one circumstance prevents the decision from being squarely in conflict with the position stated in the text: we do not know with certainty that Missouri would have extended the benefit of the statute to a citizen of Missouri in the same circumstances. It *should* so extend the statute; if it does, it should also extend it to citizens of other states.

229. 207 U.S. 142 (1907), discussed in text at note 262 *infra*.

230. 6 Fed. Cas. 546 (No. 3230) (C.C.E.D. Pa. 1823), discussed at note 36 *supra*.

231. 6 Fed. Cas. at 552.

232. See Annot., 32 A.L.R. 6 (1924). New York was a conspicuous exception. *Molony v. Dows*, 8 Abb. Pr. 316 (1859); *Burdick v. Freeman*, 120 N.Y. 420, 24 N.E. 949 (1890); *Collard v. Beach*, 93 App. Div. 339, 87 N.Y. Supp. 884 (1904).

233. 279 U.S. 377 (1929), discussed in text at note 91 *supra*.

234. 172 U.S. 239 (1898), discussed in text at notes 44, 78-82 *supra*.

ferring residents in access to often overcrowded Courts, both in convenience and in the fact that broadly speaking it is they who pay for maintaining the Courts concerned."²³⁵ It has already been noted that the word "citizens" could be substituted for "residents" without in the least impairing the soundness of the statement. It should be added that the fact that local residents or citizens primarily bear the cost of local facilities does not of itself justify refusal of their use to citizens of other states. Thus the right of ingress and egress²³⁶ could hardly be denied on the ground that local citizens and residents bear most of the cost of the highways and of police protection.

In the more recent case of *Missouri ex rel. Southern Ry. v. Mayfield*,²³⁷ all nine justices assumed that the sole test of validity for a state's policy of forum non conveniens, so far as the privileges and immunities clause is concerned, is whether the policy is stated and administered in accordance with the concept of residence as distinguished from citizenship.²³⁸ The majority position was that Missouri was free under the Constitution to decline to adjudicate actions between nonresidents for foreign torts, and that since Missouri had perhaps exercised jurisdiction under the mistaken apprehension of constitutional compulsion, the case should be remanded for determination of the question whether the doctrine of forum non conveniens was recognized by Missouri law.

By reason of the Privileges-and-Immunities Clause of the Constitution, a State may not discriminate against citizens of sister States. Art. IV, § 2. Therefore Missouri cannot allow suits by nonresident Missourians for liability under the Federal Employers' Liability Act arising out of conduct outside that State and discriminatorily deny access to its courts to a non-resident who is a citizen of another State.²³⁹

While four justices dissented,²⁴⁰ they disagreed as to how the lower court's statement as to the posture of Missouri law should be interpreted. The Missouri court had said: "Since Missouri does allow its citizens to maintain Federal Employers' Liability actions in its courts, . . . it follows that not to allow citizens of other states the right to file Federal Employers' Liability suits in our courts would violate Article 4, Section 2, of the Constitution of the United States."²⁴¹ To the dissenters it seemed clear enough that Missouri would in no circumstances deny one of its citizens, though a nonresident, the right to sue in Missouri for injuries sustained elsewhere; it followed that the Consti-

235. 279 U.S. at 387.

236. See text at notes 58-60 *supra*.

237. 340 U.S. 1 (1950).

238. The portion of Mr. Justice Holme's opinion in the *Douglas* case referring to the cost of maintaining the courts, see text at note 235 *supra*, was not quoted. *Blake v. McClung*, *supra* note 234, was not cited.

239. 340 U.S. at 3-4.

240. *Id.* at 6.

241. *Ibid.*, quoting *Missouri ex rel. Southern Ry. v. Mayfield*, 359 Mo. 827, 839, 224 S.W.2d 105, 110 (1949).

tution precluded denial of the same right to a citizen of another state. Hence there was no point in remanding.

Talk of the distinction between residence and citizenship, like the patter of the prestidigitator, tends to divert attention from what is happening.²⁴² Beneath the surface plausibility of such talk the Supreme Court is saying to the State of Missouri a shocking thing: The price you must pay, if you wish to adhere to the doctrine of *forum non conveniens*, is that you must close the doors of your courts to those of your own citizens who reside outside the state and are injured outside the state by nonresidents. Missouri replied: We will not pay that price.

The policy of this state has been to bar none of its citizens from its courts where there is proper venue and jurisdiction of the parties and subject-matter, and this applies to citizens who are residents as well as nonresidents. . . .

Since the policy of this state has been, and is, to allow citizens of Missouri (resident and nonresident) to bring and maintain suits under the Federal Employers' Liability Act in the courts of this state, we cannot bar citizens of other states from doing likewise.²⁴³

The Supreme Court required that Missouri, in order to avoid conflict with the privileges-and-immunities clause, pursue a course which in the judgment of the Supreme Court of Missouri was in conflict with the fundamental rights of citizenship, and which in our judgment is in conflict with the equal-protection clause of the fourteenth amendment.

The question whether a state may deny access to its courts to a nonresident citizen seems never to have been squarely presented, no doubt because the nonresident domiciliary is so rare as to make the distinction between residence and citizenship quite artificial; but few courts have ever denied a forum to their own residents because the cause of action arose outside the state and was asserted against a nonresident.²⁴⁴ The reasoning of decisions upholding the right of residents to sue is equally applicable to citizens, and is sometimes made applicable to citizens in so many words. Thus Missouri, in an earlier case:

[T]he courts of this State were created by her citizens, primarily for their own use, and, secondarily, for the use of those who may sue therein, under the laws of the United States, or those of comity. To compel a

242. The analogy is not perfect, since in this case the talk deceives the performer as well as the audience.

243. Missouri *ex rel.* Southern Ry. v. Mayfield, 362 Mo. 101, 107, 109, 240 S.W.2d 106, 108-09 (1951). This is not to imply that Missouri would have embraced *forum non conveniens* if it could have done so without excluding nonresident citizens. Indications are that the state welcomed litigation by nonresidents generally.

244. A few states have refused to entertain actions for wrongful death occurring outside the state even when all parties belong to the forum state, but the practice has been condemned on constitutional grounds. See Currie, *The Constitution and the "Transitory" Cause of Action*, 73 HARV. L. REV. 36 (1959). Texas has refused to entertain suits by residents predicated on the law of Mexico, Mexican Nat'l Ry. v. Jackson, 89 Tex. 107, 33 S.W. 857 (1896); *cf.* Slater v. Mexican Nat'l Ry., 194 U.S. 120 (1904), but the practice has been protested. Mexican Cent. Ry. v. Mitten, 13 Tex. Civ. App. 653, 36 S.W. 282 (1896).

citizen of this State under like circumstances to go to Illinois against his will and sue on such a policy, issued there, when service might be had here, would be an outrage, and unwarranted by any authority that we have been able to find.²⁴⁵

And New York:

The courts of this state were primarily for the residents of this state. There must be some forceful and controlling reason entering into the very nature and essence of the action which would close their doors to its own citizens. . . .

A selection between resident plaintiffs—opening the courts to one and closing them to the other—would probably run counter to the constitutional provisions of section 1 of the Fourteenth Amendment of the Constitution of the United States.²⁴⁶

The nonresident citizen remains subject to many of the obligations and responsibilities of citizenship, including amenability to suit in his home state.²⁴⁷ The primary interest of a state is the welfare of its citizens. The protection and benefits of the state's laws are extended to others, in many cases, not as a matter of interest but of grace or constitutional compulsion. How can the right to resort to the courts of the state be denied to a nonresident citizen when in the same circumstances that right is accorded to resident aliens?²⁴⁸

245. *Missouri ex rel. Pacific Mut. Life Ins. Co. v. Grimm*, 239 Mo. 135, 185, 143 S.W. 483, 499 (1912). The case involved action by a nonresident against a foreign insurance company on a policy issued in Illinois.

246. *Gregonis v. Philadelphia & Reading Coal & Iron Co.*, 235 N.Y. 152, 159, 139 N.E. 223, 225 (1923). Cf. *Currie*, *supra* note 244, at 60-62; cf. *Arizona Commercial Mining Co. v. Iron Cap. Copper Co.*, 119 Me. 213, 110 Atl. 429 (1920), entertaining a suit between two Maine corporations despite "difficulties which can be avoided without apparent hardship to the plaintiff if it brings these suits in the courts of Arizona." *Id.* at 216, 110 Atl. at 430. See also *Hatch v. Spofford*, 22 Conn. 485, 499 (1853) ("That country is undutiful and unfaithful to its citizens, which sends them out of its jurisdiction, to seek justice elsewhere.").

In the *Gregonis* case the plaintiff became a resident of New York after the cause of action arose. We do not associate ourselves with the holding that equal protection requires that he be permitted access to New York courts in such circumstances, preferring to postpone consideration of that question until the problem under the equal-protection clause can be studied comprehensively.

247. *Milliken v. Meyer*, 311 U.S. 457 (1940); *Owens v. Superior Court*, 52 Cal. 2d 822, 345 P.2d 921 (1959). As to taxation see CHEATHAM, GOODRICH, GRISWOLD & REESE, *CASES ON CONFLICT OF LAWS* 719-22 (4th ed. 1957); cf. *Cook v. Tait*, 265 U.S. 47 (1924). As to the duty to testify, cf. *Blackmer v. United States*, 284 U.S. 421 (1932). As to the duty of obedience to the law of the domicile in general, see *Skiriotes v. Florida*, 313 U.S. 69 (1941).

248. Cf. *Hancock, The Fallacy of the Transplanted Category*, 37 CAN. B. REV. 535 (1959). The distinction was borrowed from cases on federal diversity jurisdiction. See *Steigleder v. McQuesten*, 198 U.S. 141 (1905). This is not the place to question its validity in that context; yet it may be observed that the language of the fourteenth amendment is: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." Lawyers in 1868 well knew the distinction between domicile and residence. See STORY, *CONFLICT OF LAWS* 39 (1834).

It is time to abandon this facile, transplanted, artificial, and discriminatory distinction in the analysis of problems under the privileges-and-immunities clause. It was first suggested to the Court in 1898, and was rejected then.²⁴⁹ It was revived in the context of the right of access to courts in a most cavalier fashion, without adequate consideration of the problem.²⁵⁰ It is true that the circumstance of actual residence may at times be a reasonable basis for classification.²⁵¹ Beyond that, the distinction serves no useful purpose and may, in rare cases, unconstitutionally deprive a nonresident citizen of his right of access to courts. In the present context, actual residence has no such independent significance as it had in *Michigan Trust Co. v. Ferry*.²⁵²

The validity of a state's policy of forum non conveniens is dependent on no such artificially contrived justification. In the first place, the state announcing such a policy disclaims any interest in providing a forum for litigation within the scope of the policy, *i.e.*, litigation between foreigners on causes of action predicated on the laws of another state. The fact that a state limits its legal policies to matters in which it has a legitimate interest is, while not decisive, a step toward justification of its withholding the benefits of those policies from citizens of other states. In the second place, the state does have an interest in maintaining the efficiency of its courts in the performance of their proper function—the adjudication of cases which the state is interested in adjudicating, and those which it has a constitutional obligation to adjudicate. It has a further interest in preventing its judicial establishment from being used as an instrument of vexation and harassment, and generally in protecting it against the abuses of migratory litigation. (Note that the doctrine is usually limited to personal injury and wrongful death cases.) In the third place, the state announcing such a policy evinces a decent respect for the interests of other states. In migratory personal-injury litigation there is usually another state that has at least a latent interest in protecting the defendant against the hazards of the plaintiff's forum-shopping, and in having the case tried in its own courts. Sometimes this interest is made explicit by an injunction against prosecution of the action abroad;²⁵³ sometimes it is made explicit by statute.²⁵⁴ When it is made explicit, other states having no countervailing interest in providing a forum should be required by the full-faith-and-credit clause to respect the localizing provision of the judgment or statute.²⁵⁵ Even Texas, a state which successfully refused to recognize the localizing provision of a New Mexico statute in an action by a resident of Arizona,²⁵⁶ has recog-

249. *Blake v. McClung*, 172 U.S. 239 (1898).

250. *Douglas v. New York, N.H. & H.R.R.*, 279 U.S. 377 (1929).

251. *Michigan Trust Co. v. Ferry*, discussed in text at note 68, *supra*.

252. Note 231 *supra*. See also *LaTourette v. McMaster*, 248 U.S. 465 (1919).

253. See *James v. Grand Trunk W.R.R.*, 14 Ill. 2d 356, 152 N.E.2d 858, *cert. denied*, 358 U.S. 915 (1958).

254. *Tennessee Coal, Iron & R.R. Co. v. George*, 233 U.S. 354 (1914); *Atchison, T. & S.F. Ry. v. Sowers*, 213 U.S. 55 (1909).

255. See *Currie*, *supra* note 244, at 66-82.

256. *Atchison, T. & S.F. Ry. v. Sowers*, note 254 *supra*.

nized that such a provision is entitled to respect where the plaintiff is a resident of the localizing state.²⁵⁷ Thus to some extent a refusal to entertain litigation between foreigners may be regarded as required by constitutional limitations on state power; and even where the interest of the other state has not been made explicit, the forum's deference to the latent interest of that state, added to its interest in protecting its own courts from abuse, amply justifies the *forum non conveniens* policy.

The familiar rhetorical statements of the unqualified duty of a state to open its courts to citizens of other states²⁵⁸ are no longer to be taken literally; the constitutionality of the doctrine of *forum non conveniens* is firmly established.²⁵⁹ These statements do, however, express the truth that the privileges-and-immunities clause requires a state to open the doors of its courts to citizens of other states who assert claims against local residents and citizens, even on causes of action predicated upon the law of another state, if it would allow its own citizens to assert such a cause of action.²⁶⁰ "[I]t is the duty of governments to make their citizens and persons residing within their borders respond to their civil obligations; any other rule would be intolerable."²⁶¹ In short-range terms a state has no interest in subjecting its citizens to suits by foreigners; thus we have here further evidence that a classification that merely follows the line of state interests is not necessarily proof against attack under the privileges-and-immunities clause. In the long run, however, the interests of the state would be best served by a less provincial attitude; and one of the

257. *Southern Pac. Co. v. Dusablon*, 48 Tex. Civ. App. 203, 106 S.W. 766 (1907).

258. See *Chambers v. Baltimore & O.R.R.*, 207 U.S. 142, 148 (1907); *Cole v. Cunningham*, 133 U.S. 107, 113-14 (1890).

259. *Cf. Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

260. The privileges-and-immunities clause alone cannot remedy the injustice of *Livingston v. Jefferson*, 15 Fed. Cas. 660 (No. 8411) (C.C.D. Va. 1811) (according to which a citizen of another state may be deprived of all remedy because the forum state refuses to entertain an action on the ground that it is local, being for trespass to foreign land), since the forum state similarly denies relief to its own citizens. But it may some day come to be recognized that the denial of relief to citizens of the forum state is a denial of equal protection of the laws because the circumstance that foreign land is involved does not provide a reasonable basis for classification. *Cf. Arizona Commercial Mining Co. v. Iron Cap Copper Co.*, 119 Me. 213, 110 Atl. 429 (1920). In that event the privileges-and-immunities clause will require that citizens of other states be heard in similar actions.

The statement in the text should not be interpreted as suggesting that the forum state is obliged to apply the foreign law. See text at note 267 *infra*.

With respect to corporate defendants the statement in the text presents problems which we do not here undertake to resolve. For example, in *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952), the Court said that due process did not require Ohio to provide a forum for a suit by a nonresident against a Philippine corporation whose affairs were being managed in that state, although war conditions at the time the suit was brought apparently prevented suit in the Philippines. The privileges-and-immunities clause was not discussed. There is also the question whether a state would be required to entertain an action by a citizen of another state against a purely local enterprise incorporated for convenience in another state such as Delaware. See note 18, *supra*.

261. Annot., 32 A.L.R. 6, 26 (1924).

basic values of federal union is that the fundamental compact between the constituent states can secure the right of access to courts on a basis of mutual-ity, thus avoiding the cycle of retaliation and reciprocity. The privileges-and-immunities clause cannot mean less than this.

Moreover, the privilege of access to courts should be freed of the strangulating interpretation placed upon it by the Supreme Court in wrongful death cases. In *Chambers v. Baltimore & O.R.R.*,²⁶² the Court sustained an Ohio statute providing in effect that no action for death caused by wrongful act or default in another state could be brought in Ohio unless the deceased were a citizen of Ohio. The statute was the rankest sort of attempt to discriminate against citizens of other states; yet the Court, speaking through Mr. Justice Moody, upheld it by insisting that there was no discrimination against the *plaintiff*—the widow and personal representative—on the ground of citizenship. There was no inquiry into the reasonableness of the classification in terms of the citizenship of the deceased. Mr. Justice Harlan, joined by Justices White and McKenna, dissented:

[E]very citizen of Ohio, when in another State, for whatever purpose, is accompanied by the assurance on the part of his State that its courts will be open for suit by his widow or representative if his death, while in another State, is caused by the negligence or default of another person or company. But that privilege is denied by the Ohio statute to the representative of citizens of other States meeting death under like circumstances. Indeed, if a citizen of Ohio should go into another State and while there *willfully*, or by some wrongful act, neglect or default on his part, cause the death of someone, although he might be liable to a suit for damages in the State where death occurred, yet if sued for damages in the courts of his own State, he need only plead in bar of the action in Ohio that the decedent was not, at the time of his death, a citizen of Ohio. . . .

The case is plainly one in which Ohio attempts, in reference to certain kinds of actions that are maintainable in perhaps every State of the Union, including Ohio, to give to its own citizens privileges which it denies, under like circumstances, to citizens of other States. To a citizen of Ohio it says: "If you go into Pennsylvania, and are killed there, in consequence of the negligence or default of some one, your widow may have access to the Ohio courts in a suit for damages, provided the wrongdoer can be reached in Ohio by service of process." But to the citizen of Pennsylvania it says: "If you come to your death in that State by reason of the negligence or default of some one, *even if the wrongdoer be a citizen of Ohio*, your widow shall not sue the Ohio wrongdoer in an Ohio court for damages because, and only because, you are a citizen of another State." This is an illegal discrimination against living citizens of other States, and the difficulty is not met by the suggestion that no discrimination is made against the widow of the deceased because of *her* citizenship in another State.²⁶³

262. 207 U.S. 142 (1907).

263. 207 U.S. 151, 157, 159-60 (1907). (Emphasis in the original.) Mr. Justice Holmes concurred in the result reached by the majority on the apparent ground that the Court lacked power to extend the benefits of the statute to persons not within its coverage. *Id.* at 151; *cf.* note 121 *supra*.

The reasoning of this dissent is unanswerable.²⁶⁴ The *Chambers* case should be overruled.

It does not follow, however, that Ohio would be required to entertain a case precisely like the *Chambers* case. There the defendant was a foreign corporation;²⁶⁵ the deceased and the widow were both citizens of Pennsylvania; the injury and death occurred in Pennsylvania; Ohio law was inapplicable. There was no apparent reason why the action should have been brought in Ohio rather than in Pennsylvania or Maryland. If Ohio has a policy of *forum non conveniens* it may refuse to entertain the action on that ground. The Constitution does not require Ohio to entertain an action for the benefit of citizens of other states for foreign tort where the defendant is a nonresident or a foreign corporation.²⁶⁶

Nor does it follow that in such an action against an Ohio defendant Ohio would be required to apply the law of Pennsylvania, despite a faint intimation to that effect in *Hughes v. Fetter*.²⁶⁷ In that case, holding that full faith and credit obliged Wisconsin to entertain a cause of action for wrongful death in Illinois (though not that Wisconsin must apply the substantive law of Illinois), the Court distinguished *Chambers* on the ground that the full-faith-and-credit clause was not there invoked. But we submit that full faith and credit does not require a forum in cases of the *Chambers* type, much less that the law of the place of injury be applied. If a forum is required in that type of case (as it is when the defendant is a citizen or resident of the forum state), it is by virtue of the privileges-and-immunities clause, which implies no obligation to apply any law other than that which would be applied if the plaintiff were a citizen of the forum state.²⁶⁸ The interest of Ohio in her own citizens and residents, sued in Ohio courts, will justify the application of Ohio law for their protection. Thus if the maximum recovery under the Ohio wrongful death statute is less than that permitted by the state of injury or of the residence of the deceased, or if contributory negligence is a complete bar to recovery under Ohio law, but not under the law of the other state, Ohio would be justified in apply-

264. See Currie, *supra* note 244, 47 n.46, 59 n.90.

The New York courts, in applying the doctrine of *forum non conveniens*, have indicated that in wrongful death cases it is not the citizenship of the plaintiff administrator that is controlling, *Pietraroia v. New Jersey & H.R. Ry. & Ferry Co.*, 131 App. Div. 829, 116 N.Y. Supp. 249 (1909), *aff'd on other grounds*, 197 N.Y. 434, 91 N.E. 120 (1910), and further that, as between the deceased and the beneficiary, it is the residence of the deceased that is the important consideration. *Zeikus v. Florida E. Coast Ry.*, 153 App. Div. 345, 351, 138 N.Y. Supp. 478, 482 (1912). See also Note, 28 COLUM. L. REV. 347, 351 n.31 (1928).

265. The Baltimore & Ohio Railroad is, and always has been, a Maryland corporation. MOODY'S TRANSPORTATION MANUAL 177 (1958).

266. Note that the vice of the Ohio statute would not be cured if the word "resident" were substituted for "citizen." By force of the equal protection clause the statute as it stands includes residents, since to allow actions for the foreign deaths of citizens and deny them for the foreign deaths of residents not citizens would be arbitrary.

267. 341 U.S. 609, 611 n.6 (1951).

268. See Currie, *supra* note 244, at 59 n.90.

ing its own law; thereby it would give to citizens of other states the same protection it gives to its own.

It may be suggested that Ohio might go farther and limit the recovery in the case of the nonresident decedent to that allowed by the state of his residence, if the Ohio law is more generous. An argument could be made in support of such a suggestion by analogy to the solution suggested in this paper for the case of the incapacitated married woman. We reject such an argument here. The privileges or benefits of the wrongful death statute are extended generally to citizens and residents of Ohio, not to classes of residents especially in need of protection. Having imposed the more stringent liability on its own citizens for the sake of its own citizens, Ohio should extend the same benefits to citizens of other states.²⁶⁹ It may be observed that by referring to the law of the place of injury (assuming that to be also the residence of the injured or deceased person), conventional doctrine does limit recovery to that provided by the law of his home state, while potentially subjecting the domestic tortfeasor to a liability greater than that imposed by the law of the forum. Would it not be more reasonable and consonant with the constitutional scheme to assure the nonresident as much as, and not more than, the law of the forum provides for its own citizens?

The only remaining decisions of the Supreme Court dealing with the privileges-and-immunities clause in the context of private law are two concerning allegedly discriminatory application of the forum's statute of limitations. The problems presented are somewhat similar to those posed by simple refusal to entertain the action brought by a nonresident, and have been so treated by the Court.

In *Chemung Canal Bank v. Lowery*²⁷⁰ a New York corporation sued a citizen and resident of Wisconsin in his home state on a judgment recovered in New York. The action was barred by Wisconsin's ten-year statute of limitations, but would not have been barred had the plaintiff been a resident of Wisconsin. The Wisconsin law, as paraphrased by the Supreme Court, was to the effect that "[w]hen the defendant is out of the State, the Statute of Limitations shall not run against the plaintiff, if the latter resides in the State, but

269. Such a suggestion may deserve consideration, however, in connection with national law at the level of international conflicts. In *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959), the Court held the Jones Act and the general American maritime law inapplicable in an action by a Spanish seaman against his Spanish employer for injuries sustained on board ship in New York Harbor. An important consideration was that American standards of compensation would yield a recovery disproportionate to that provided by Spanish law, and so would interfere with international commerce while giving the plaintiff far more than would be recovered by his fellow crewmen injured elsewhere. Yet the case was allowed to proceed against alleged joint tortfeasors who were Americans. See Currie, *The Silver Oar and All That: A Study of the Romero Case*, 27 U. CH. L. REV. 1 (1959). Since neither the privileges-and-immunities clause nor the equal-protection clause is operative in such a case (even in a state court), the plaintiff might well be limited to the protection afforded him by the law of his home country.

270. 93 U.S. 72 (1876).

shall, if he resides out of the State."²⁷¹ The defendant had moved to Wisconsin within ten years prior to the filing of the action, and the plaintiff claimed the same time to sue that the statute accorded to residents of Wisconsin.²⁷² The Court, however, affirmed a judgment for the defendant:

There is, in fact, a valid reason for the discrimination. If the statute does not run as between non-resident creditors and their debtors, it might often happen that a right of action would be extinguished, perhaps for years, in the State where the parties reside; and yet, if the defendant should be found in Wisconsin,—it may be only in a railroad train,—a suit could be sprung upon him after the claim had been forgotten. The laws of Wisconsin would thus be used as a trap to catch the unwary defendant, after the laws which had always governed the case had barred any recovery. This would be inequitable and unjust. . . .

It is also to be considered, that a personal obligation is due at the domicile of the obligee. It is the duty of the debtor to seek the creditor, and pay him his debt, at the residence of the latter. Not doing this, he is guilty of laches against the law of the creditor's domicile, as well as his own. But he evades this law by absenting himself from the jurisdiction. As long as he does this, the Statute of Limitations of that jurisdiction ought not to run to the creditor's prejudice. This cannot be said with regard to the non-resident creditor. It is not the laws of Wisconsin any more than those of China which his non-resident debtor contemns by non-payment of the debt, and absence from the State: it is the laws of some other State. Therefore, there is no reason why the Statute of Limitations of Wisconsin should not run as against the non-resident creditor; at least, there is not the same reason which exists in the case of the resident creditor.²⁷³

This holding is susceptible of the following rearrangement and restatement: Wisconsin has an interest in providing a forum in which its residents may assert their claims against debtors, domestic and foreign, and in allowing a reasonable time for the filing of such claims. That time is not to be diminished by any period during which the defendant's absence from the state makes it impossible for the plaintiff to serve process on him there. But Wisconsin has no interest in similarly providing a forum and a minimum period in which suit may be brought for residents of other states. If there were nothing more than this negative—this lack of interest in the welfare of citizens of other states—it might be argued persuasively that the Constitution requires Wisconsin to place them on an equal footing with its own residents in this respect. But there is more. If Wisconsin were as a matter of course to extend the same protection to nonresidents, it would, at least in some cases, find itself seriously interfering with the interests of other states—as, for example, that of the state in which the debtor resides, which has an interest in protecting him against stale

271. *Id.* at 76.

272. Although the Court had held in *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868), that a corporation is not a citizen within the protection of the clause, it preferred to rest this decision on the "broad ground" of no discrimination rather than upon the status of the plaintiff. 93 U.S. at 78.

273. *Id.* at 77.

claims. With no countervailing interest of its own at stake, Wisconsin cannot legitimately impair the interests of other states; and its denial of the protection of the statute to nonresidents is a reasonable means of avoiding such impairment.

The reasoning in *Canadian No. Ry. v. Eggen*²⁷⁴ is less satisfactory, but the considerations justifying the result are similar. The Minnesota "borrowing" statute provided:

When a cause of action has arisen outside of this state and, by the laws of the place where it arose, an action thereon is barred by lapse of time, no such action shall be maintained [*sic*] in this state unless the plaintiff be a citizen of the state who has owned the cause of action ever since it accrued.²⁷⁵

The plaintiff, a citizen of South Dakota, sued the defendant, a Canadian corporation, in Minnesota for injuries sustained in Canada. Under the borrowing statute the cause of action was barred by the Canadian statute of limitations (one year); the Minnesota statute of limitations, of which a citizen of Minnesota could take advantage, allowed six years. The Court affirmed a judgment for the defendant, noting that "[i]t is plain that the act assailed was not enacted for the purpose of creating an arbitrary or vexatious discrimination against non-residents of Minnesota."²⁷⁶ Beyond this, the opinion contributes little more than what is contained in a sentence: "[T]he constitutional requirement is satisfied if the non-resident is given access to the courts of the State upon terms which in themselves are reasonable and adequate for the enforcing of any rights he may have, even though they may not be technically and precisely the same in extent as those accorded to resident citizens."²⁷⁷ No importance was attached to the use in the statute of the word "citizen," which is as it should be since the equal protection clause would require that the same protection be extended to residents other than citizens. Again the persuasive ground for the decision is that Minnesota had an interest in providing a period of years in which its residents could sue on foreign causes of action; it was justified in asserting that interest though in so doing it would come in conflict with the interest of the state of the defendant's domicile in protecting it against stale claims; but Minnesota had no interest in providing a similarly long period during which a nonresident could sue the foreign defendant; and to extend the privilege to nonresidents would have been, in the case before the Court, clearly to impair the interest of the foreign state without the justification of advancing any interest of its own. Avoidance of that result—which even with respect to a foreign country may amount to a denial of due process²⁷⁸—was a reasonable basis for classification.

274. 252 U.S. 553 (1920).

275. *Id.* at 558.

276. *Id.* at 559.

277. *Id.* at 562.

278. *Cf. Home Ins. Co. v. Dick*, 281 U.S. 397 (1930) (concerning, however, a foreign contractual time limitation rather than a foreign statute).

VII. CONCLUSION

Problems of discrimination are inherent in conflict-of-laws cases. These problems are not avoided but only obscured by the system of purportedly impersonal choice-of-law rules. Such rules are often discriminatory, sometimes against domestic people and sometimes against citizens of other states. Moreover, such rules often deny legitimate self-interest, or lead to intrusion upon the concerns of other states, and sometimes result in the unjustifiably retroactive dislocation of settled rights, thus resulting in serious constitutional problems in addition to problems of discrimination.

This review of Supreme Court decisions involving the privileges-and-immunities clause in the context of private law suggests the following conclusions:²⁷⁹

In general, the rights and privileges that are involved in private litigation in the field of conflict of laws—such ordinary rights as dower, workmen's compensation, recovery for wrongful death, parity of treatment for creditors, the protection of a statute of limitations or a statute of frauds—are within the protection of the clause. It is not necessary to establish that a privilege or immunity is "fundamental" or that it "pertains to" citizenship as such.

The test of the validity of excluding citizens of other states from enjoyment of a privilege or immunity enjoyed by local citizens or residents is the reasonableness of the classification.

The validity of a classification is not established merely because it is in terms of residence rather than citizenship, nor is it destroyed merely because it is in terms of citizenship rather than residence; but actual residence may in some circumstances have a significance tending to establish the reasonableness of the classification.

Other constitutional limits on the power of a state of course constitute a reasonable basis for classification; that is to say, a state may without offense to the privileges-and-immunities clause decline to apply its law for the benefit of a citizen of another state if to do so would violate the full-faith-and-credit clause or the due-process clause. Perhaps we may go farther and say that even though it is not clear that the limits of state power would be exceeded by extension of the benefits of local law to citizens of other states, uncertainty about those limits and a purpose not to exceed them constitute a reasonable basis for the classification.²⁸⁰ Probably also a purpose not to intrude upon the interests of a foreign state, as distinguished from another state of the Union, is a reasonable basis for classification.

The fact that a state has no interest in extending the protection of its laws to nonresidents, even if there is added the fact that no declared policy of a sister state will be advanced by extending the protection, is probably not suf-

279. So far as we are aware, there has been no previous general study of the impact of the privileges-and-immunities clause on conflict-of-laws problems. For this reason, among others, the present study is not regarded as definitive but only as tentative and exploratory.

280. See text at notes 167, 273 *supra*.

ficient, in general, to justify a classification excluding citizens of other states. When the benefits of a law are potentially available to the population of the state in general, and when extension of its benefits to citizens of other states would advance the mutual interests of all states by avoiding the cycle of retaliation and reciprocity, the Constitution requires such extension.

In certain cases, *e.g.*, where the benefits of a law are not designed for the population of the state in general, but for groups of persons deemed to be in need of special protection, as, for example, laws incapacitating married women, a classification excluding some citizens of other states may be reasonable if it distinguishes among persons according to whether or not they are so protected by the laws of their home states. The validity of such a classification may be defended on the ground that such privileges or immunities are not among those enjoyed by citizens of the state in general; it is more clearly supported by the consideration that such a classification evinces no provincial or hostile attitude toward citizens of other states, but reasonably distinguishes between those persons who are regarded by their home states as needing special protection and those who are not.

The method of approach to conflict-of-laws problems that calls for their analysis in terms of the governmental interests of the states concerned is not vitiated, but rather vindicated, by this review of the effect of the privileges-and-immunities clause. That method counsels the rational, moderate, and controlled pursuit of self-interest; it also counsels that self-interest should be subordinated freely, and even gladly, to the constitutional restraints required and made possible by federal union. Under conventional conflict-of-laws doctrine, legal scholars, and to a lesser degree the courts under their influence, because of the compulsion of internationalist and altruist ideals, have guiltily suppressed the natural instincts of community self-interest. The impersonal choice-of-law rules that are employed in this process are themselves discriminatory at times, and at other times enforce a purposeless self-denial, or an unwarranted intrusion into the concerns of other states, or an unintended and unjustified retroactive impairment of settled rights and obligations. To free ourselves of this neurotic condition, we need "a new sort of conscience, one which demands a more accurate and yet more scrupulous self-centeredness."²⁸¹

281. RIEFF, FREUD: THE MIND OF THE MORALIST 97 (1959). The quotation should be understood simply as a literary allusion. We do not suggest that problems of conflict of laws can be solved by psychoanalysis.

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