THE
UNIVERSITY OF CHICAGO LAW REVIEW

VOLUME 28 AUTUMN 1960 NUMBER 1

UNCONSTITUTIONAL DISCRIMINATION IN THE CONFLICT OF LAWS: EQUAL PROTECTION*

BRAINERD CURRIE†
HERMA HILL SCHRETER‡

I. THE EQUAL-PROTECTION CLAUSE

WHEN THE SUPREME COURT first had occasion to consider the equal-protection clause of the fourteenth amendment, Mr. Justice Miller said:

In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause. The existence of law in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.

If, however, the States did not conform their laws to its requirements, then by the fifth section of the article of amendment Congress was authorized to enforce it by suitable legislation. We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision.[1]

Thus judicial interpretation of the equal-protection clause, as of the privileges-and-immunities clause, got off to a bad start.[2] Both of these great constitutional guarantees against discrimination were at first narrowly construed. The

* This is the second of two studies of the extent to which the constitutional prohibitions against discrimination limit the freedom of state courts in deciding conflict-of-laws cases. For an introductory statement of the considerations giving rise to the study see Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, 69 YALE L.J. 1323 (1960).

† Professor of Law, The University of Chicago.

‡ J. D. 1959, The University of Chicago; Acting Assistant Professor of Law 1960–61, The University of California (Berkeley).

[1] The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1872).

[2] See Corfield v. Coryell, 6 Fed. Cas. 546 (No. 3230) (C.C.E.D. Pa. 1823), discussed in Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, 69 YALE L.J. 1323 (1960).

view that the privileges-and-immunities clause applies only to such privileges and immunities as are "in their nature, fundamental"[3] has been discredited, but its influence persists as a major cause of the uncertainty that surrounds the significance of the clause. By contrast, developments since the Civil War have proved Mr. Justice Miller a poor prophet indeed. While racial discrimination is the context in which the clause is still most dramatically—and controversially—applied, the litigated cases, numerically considered, are predominantly concerned with other problems, and any person whatever, irrespective of race, color, creed, or nationality, has standing to complain of state action which discriminates against him arbitrarily in any respect.[4] Moreover, thanks to the relative simplicity of the clause and to the large number of cases in which the Supreme Court has been called upon to consider it, its significance is much less obscure than that of the privileges-and-immunities clause. Our preliminary sketch of the scope of the clause and of the problems that remain unsolved may therefore be brief.

While the clause protects only against state action, the protection extends to judicial as well as to legislative and administrative action.[5] Aliens are within its protection,[6] as are corporations. The strange course of development by means of which corporations came to be included has been recounted elsewhere,[7] and need only be sketched here. In the beginning Circuit Judge Woods held that "the plain and evident meaning of the section is, that the persons to whom the equal protection of the law is secured are persons born or naturalized or endowed with life and liberty, and consequently natural and not artificial persons."[8] In several cases the Supreme Court decided on the merits questions raised by corporations under the due-process and equal-protection clauses without considering whether corporations were among the persons protected.[9] The Supreme Court of California, considering the validity of

[3] Corfield v. Coryell, *supra* note 2, at 551.

[4] See generally THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 1141–70 (Corwin ed. 1953).

[5] Virginia v. Rives, 100 U.S. 313, 318–19 (1879); *Ex parte* Virginia, 100 U.S. 339 (1880); Shelley v. Kraemer, 334 U.S. 1 (1948).

[6] Truax v. Raich, 239 U.S. 33 (1915); Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948). *Cf.* Terrace v. Thompson, 263 U.S. 197 (1923); see also Oyama v. California, 332 U.S. 633 (1948).

[7] The classic treament of the early period is Sholley, *Corporate Taxpayers and the Equal Protection Clause* (pts. 1–2), 31 ILL. L. REV. 463, 567 (1936–37), in 5 ASSOCIATION OF AMERICAN LAW SCHOOLS, SELECTED ESSAYS ON CONSTITUTIONAL LAW 92 (1938) (hereinafter cited as AALS ESSAYS). See also Holt, *Full Faith and Credit—A Suggested Approach to the Problem of Recognition of Foreign Corporations*, 89 U. PA. L. REV. 453 (1941).

[8] Insurance Co. v. New Orleans, 13 Fed. Cas. 67, 68 (No. 7052) (C.C.D. La. 1870).

[9] Chicago, B. & Q.R.R. v. Iowa, 94 U.S. 155 (1877); Peik v. Chicago & N.W.R.R., 94 U.S. 164 (1877); Richmond R.R. v. City of Richmond, 96 U.S. 521 (1878).

that state's tax treatment of the railroads, held that a corporation was not a person within the meaning of the fourteenth amendment.[10] When that litigation was shifted to the federal courts, Mr. Justice Field, sitting on circuit, requested that counsel brief the question, pointedly suggesting the argument that the corporation might assert the rights of the natural persons of whom it is composed.[11] In his subsequent decision on the merits Mr. Justice Field, to no one's surprise, reached just that result,[12] Circuit Judge Sawyer concurring on the ground that the corporation itself was a person.[13]

Mr. Justice Field reiterated his position in a companion case[14] which finally reached the Supreme Court and was argued in 1886. In the meantime that Court had decided two cases in which counsel had argued the question of a corporation's standing under the fourteenth amendment, but in neither did the Court make any reference to that question.[15] When the California railroad tax case was called for argument, Mr. Chief Justice Waite announced to counsel at the outset:

> The Court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a state to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does.[16]

In the opinion of the Court there was no reference to the two opinions of Mr. Justice Field on circuit, nor to that of another member of the Court, Mr. Justice Woods, who as circuit judge had rendered a contrary opinon[17] which had been followed by the Supreme Court of California.[18] It has been suggested that the Court was persuaded of the desirability of extending the protection of the clause to corporations, but was not prepared to choose between the theory that the corporation itself is a person and the theory that the corporation is entitled to assert the rights of its members.[19] At all events the question was now decided, it is fair to say "by mere judicial fiat,"[20] and

[10] Central Pac. R.R. v. State Bd. of Equalization, 60 Cal. 35 (1882).

[11] County of San Mateo v. Southern Pac. R.R., 13 Fed. 145, 149–52 (C.C.D. Cal. 1882).

[12] County of San Mateo v. Southern Pac. R.R., 13 Fed. 722 (C.C.D. Cal. 1882).

[13] *Id.* at 757.

[14] County of Santa Clara v. Southern Pac. R.R., 18 Fed. 385 (C.C.D. Cal. 1883).

[15] Kentucky Railroad Tax Cases, 115 U.S. 321 (1885); Missouri Pac. Ry. v. Humes, 115 U.S. 512 (1885).

[16] Santa Clara County v. Southern Pac. R.R., 118 U.S. 394, 396 (1886).

[17] See note 8 *supra.*

[18] See note 10 *supra.*

[19] Sholley, *supra* note 7, at 5 AALS ESSAYS 103.

[20] *Ibid.*

the Court shortly embraced the theory that the corporation itself is a person entitled to the equal protection of the laws.[21]

This settlement of the question was not judicially challenged until 1938, when Mr. Justice Black, in dissent, revived the view that corporations were not meant to be protected, and urged that the precedents to the contrary be overruled as "wrong."[22] In 1949 he was joined by Mr. Justice Douglas, who maintained that the established interpretation was a "substantial revision" of the amendment.[23] The Court has not been swayed by this minority position, and the dissenting justices have not been consistent in maintaining it.[24] There is substantial support for the minority position, and it deserves better than to be dismissed out of hand.[25] We have already resolved, however, for the purposes of this discussion of the effect of the clause in conflict-of-laws cases, to adopt in case of doubt that interpretation which will give it maximum effect as a restraint upon discriminatory state action. We shall therefore assume here that the established interpretation is the correct one. "These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality. . . ."[26]

Interpretation of the equal-protection clause has not been embarrassed by any such limiting conception of the character of the rights protected as the "fundamental rights" view of the privileges-and-immunities clause. The provision of the fourteenth amendment is comprehensive; it prohibits "all invidious discrimination."[27] It is abundantly clear, however (though the same is only darkly clear with respect to the privileges-and-immunities clause),

[21] Pembina Mining Co. v. Pennsylvania, 125 U.S. 181 (1888); Gulf, Colo. & S.F. Ry. v. Ellis, 164 U.S. 150, 154 (1897).

[22] Connecticut Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, 85 (1938).

[23] Wheeling Steel Corp. v. Glander, 337 U.S. 562, 579 (1949) (dissenting opinion).

[24] See the separate opinion of Mr. Justice Jackson in the *Wheeling Steel* case, *supra* note 23, at 574.

[25] See Graham, *The "Conspiracy Theory" of the Fourteenth Amendment* (pts. 1–2), 47 YALE L.J. 371, 48 *id.* 171 (1938); Boudin, *Truth and Fiction about the Fourteenth Amendment*, 16 N.Y.U.L.Q. REV. 19 (1938); Hurst, Review of Graham and Boudin, *supra*, 52 HARV. L. REV. 851 (1939); Snyder, *The Corporate Person and the Fourteenth Amendment*, 8 BROOKLYN L. REV. 4 (1938); Martin, *Is a Corporation a "Person"?*, 44 W. VA. L. REV. 274 (1938); Comment, *Artificial "Persons" and the Fourteenth Amendment*, 48 MICH. L. REV. 983 (1950).

[26] Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). The generality of the term "person" has been restricted only by decisions holding that a municipal corporation cannot invoke the clause against the state that created it. City of Newark v. New Jersey, 262 U.S. 192 (1923); Williams v. Baltimore, 289 U.S. 36 (1933).

[27] THE CONSTITUTION OF THE UNITED STATES OF AMERICA, *op. cit. supra* note 4, at 1144; *cf.* Barbier v. Connolly, 113 U.S. 27, 31 (1885). *But cf.* Heim v. McCall, 239 U.S. 175 (1915); Powell, *The Right to Work for the State*, 16 COLUM. L. REV. 99 (1916); Note, 83 U. PA. L. REV. 74 (1934).

that the states have broad discretion to establish reasonable classifications.[28] In determining the question of reasonableness the Court has been conspicuously deferential to state legislatures,[29] sometimes to an extent that is difficult to justify.[30] In the discussion of the effect of the clause upon conflict-of-laws cases the reasonableness of the classification will frequently be the decisive consideration.

The major ambiguity in the clause lurks in the phrase "within its jurisdiction." When is a person within the jurisdiction of a state so as to be entitled to the equal protection of its laws? This major problem will permeate the discussion in this paper, and we are not so sanguine as to hope that we can reach a definitive understanding of it. Here we propose only to observe the rather halting and inconclusive manner in which the Court has approached the problem, and to suggest that certain first impressions and dogmatic statements concerning it require qualification.

Read literally, and especially with natural persons in mind, the phrase appears to mean "physically present within its territorial limits." Despite occasional dicta referring to the territorial concept,[31] this interpretation is almost certainly too narrow. On the basis of views that were orthodox in the nineteenth century, such an interpretation would at once exclude foreign corporations from the protection of the clause.[32] Yet, whatever mysteries may surround the standing of a foreign corporation to claim the privilege of doing business within a state, or to retain that privilege without compliance with discriminatory conditions and payment of discriminatory taxes and license fees,[33] it seems quite clear that, once a

[28] See generally THE CONSTITUTION OF THE UNITED STATES OF AMERICA, *op. cit. supra* note 4, at 1145–46; Armour & Co. v. North Dakota, 240 U.S. 510, 517, 548 (1916).

[29] See Dominion Hotel, Inc. v. Arizona, 249 U.S. 265, 268 (1919). This comment does not apply to classifications based on race, which may now be regarded as per se unreasonable. See Brown v. Board of Education, 347 U.S. 483 (1954).

[30] See, *e.g.*, Kotch v. Board of River Pilot Comm'rs, 330 U.S. 552 (1947); Railway Express v. New York, 336 U.S. 106 (1949).

[31] *E.g.*, "These provisions are universal in their application, *to all persons within the territorial jurisdiction*...." Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). (Emphasis added.)

[32] "[A] corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty." Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 588 (1839).

[33] We shall not attempt in this paper to resolve the problems involved in the series of cases dealing with the power to exclude foreign corporations from doing business. They are ably considered in Shelley, *Corporate Taxpayers and the Equal Protection Clause* (pts. 1–2), 31 ILL. L. REV. 463, 576 (1936–37), in 5 AALS ESSAYS 92 (1938). While such cases necessarily have a bearing on the interpretation of the clause in other contexts, they involve considerations tangential to the present inquiry. They deal with public law rather than private law in the sense that one of the parties is the state, or a state agency, whereas in the cases to be discussed here the parties are private persons, and private rights alone are involved.

foreign corporation has been licensed to do business in a state, it is (subject always to the principle of reasonable classification) entitled to the equal protection of the laws at least with respect to matters not concerning the right to continue to do business.[34]

The privileges-and-immunities clause secures to citizens of other states substantially the same equality of treatment as that secured by the equal-protection clause, and this without regard to whether they are (physically) "within the jurisdiction" of the state whose laws are in question. This dual coverage makes it unnecessary in many cases to inquire whether the complaining party is "within the jurisdiction," and may therefore account in large measure for the failure of the Court to interpret that phrase as it applies to natural persons. In several cases that might have presented the question the Court did not take the occasion to consider it.[35] In two other cases the decisions rested on the full-faith-and-credit clause.[36] If, as has been suggested, the defensible basis of those decisions was the equal-protection clause rather than the full-faith-and-credit clause,[37] there is an inference—circuitous, it is true, but to us persuasive—that the protection of the clause extends to a resident of the state injured or killed while temporarily absent therefrom.[38]

Apart from cases on the licensing and exclusion of foreign corporations, the significant cases on whether a foreign corporation is a person "within the jurisdiction" are few. In *Blake v. McClung*[39] the Court, while restoring to the privileges-and-immunities clause much of the significance of which it had been shorn by the "fundamental rights" concept, gave a narrow interpretation to the equal-protection clause. While citizens of other states could not be

[34] This proposition follows a fortiori from the cases vindicating the right of foreign corporations under the equal-protection clause to license renewal on nondiscriminatory terms (*e.g.*, Southern Ry. v. Greene, 216 U.S. 400 (1910); Hanover Fire Ins. Co. v. Harding, 272 U.S. 494 (1926)); it is directly supported by cases such as Power Mfg. Co. v. Saunders, 274 U.S. 490 (1927), and Quaker City Cab Co. v. Pennsylvania, 277 U.S. 389 (1928).

[35] Hillsborough Township v. Cromwell, 326 U.S. 620 (1946). A nonresident of New Jersey sued in a United States district court for a declaratory judgment that taxes assessed against her intangible property by a New Jersey township were discriminatory. The fact that the Supreme Court upheld the district court's jurisdiction without considering the standing of the nonresident under the equal-protection clause may give rise to some inference that the Court did not doubt such standing (*cf.* the separate opinion of Jackson, J., in Wheeling Steel Corp. v. Glander, 337 U.S. 562, 574 (1949)); but in this case the inference must be extremely attenuated since (1) the case was disposed of on the merits by reference to state law rather than the Constitution; (2) the plaintiff relied on the due-process clause as well as the equal-protection clause; and (3) jurisdiction apparently existed by virtue of diversity of citizenship in any event.

See also the cases cited by Sholley, *supra* note 7, at 5 AALS ESSAYS 105 n.63.

[36] Hughes v. Fetter, 341 U.S. 609 (1951); First Nat'l Bank v. United Air Lines, Inc., 342 U.S. 396 (1952).

[37] Currie, *The Constitution and the "Transitory" Cause of Action* (pts. 1–2), 73 HARV. L. REV. 36, 268 (1959).

[38] *Id.* at 60–62, especially n. 98.

[39] 172 U.S. 239 (1898).

subordinated to residents of Tennessee in the distribution of the local assets of an insolvent corporation, a foreign corporate creditor was, of course, not a citizen of another state, nor was it a person "within the jurisdiction" of Tennessee within the meaning of the equal-protection clause. There was no constitutional inhibition, therefore, of discrimination against the foreign corporate creditor. Concerning the troublesome phrase Mr. Justice Harlan had this to say:

> The court cannot assume that those words were inserted without any object, nor is it at liberty to eliminate them from the Constitution and to interpret the clause in question as if they were not to be found in that instrument. Without attempting to state what is the full import of the words, "within its jurisdiction," it is safe to say that a corporation not created by Tennessee, nor doing business there under conditions that subjected it to process issuing from the courts of Tennessee at the instance of suitors, is not, under the above clause of the Fourteenth Amendment, within the jurisdiction of that State. Certainly, when the statute in question was enacted the Virginia corporation was not within the jurisdiction of Tennessee.... It does not appear to have been doing business in Tennessee... under any statute that would bring it directly under the jurisdiction of the courts of Tennessee by service of process on its officers or agents. Nor do we think it came within the jurisdiction of Tennessee, within the meaning of the Amendment, simply by presenting its claim in the state court and thereby becoming a party to this cause. Under any other interpretation the Fourteenth Amendment would be given a scope not contemplated by its framers or by the People, nor justified by its language. We adjudge that the statute, so far as it subordinates the claims of private business corporations not within the jurisdiction of Tennessee, (although such private corporations may be creditors of a corporation doing business in the State under the authority of that statute,) to the claims against the latter corporation of creditors residing in Tennessee, is not a denial of the "equal protection of the law" secured by the Fourteenth Amendment to persons within the jurisdiction of the State, however unjust such a regulation may be deemed.[40]

In several respects this is a remarkable holding. But for the fact that Mr. Justice Harlan himself was the author of the Court's opinion in the California railroad tax case,[41] which he cited without qualification,[42] one might suspect that he was out of sympathy with the basic determination that a corporation is a person within the protection of the clause. The tendency of the opinion is to interpret the phrase as if it read, "within the jurisdiction of its courts." Apart from the possibility that in some sense it may be true that the laws of a state are ultimately brought to bear through the instrumentality of its courts, there is no apparent justification for such an interpretation; to the contrary, it is not easy to reconcile such a view with the Court's earlier statement that the prohibitions of the clause "refer to all the instrumentalities of the State, to its legislative, executive and judicial authorities...."[43] That

[40] *Id.* at 260–61.

[41] See note 16 *supra.*

[42] 172 U.S. at 259.

[43] *Id.* at 260.

this difficulty is not wholly academic is indicated by Mr. Justice Harlan's remark that, when the statute was enacted, the Virginia corporation was not within the jurisdiction of the Tennessee Courts. It would make sense to say that Tennessee shall not, through its courts, deny the equal protection of the laws to any person within their jurisdiction. It does not make very obvious sense to suggest that Tennessee, through its legislature, may deny the equal protection of the laws to persons who are not within the jurisdiction of its courts at the time of the legislation, when the consequence of the suggestion is that the Tennessee courts will deny equal protection to the same persons later coming within their jurisdiction.

Mr. Justice Harlan did not even concede the phrase the full scope that it would have if it read, "within the jurisdiction of its courts." Surely it was established law in 1898, as it is now,[44] that a foreigner seeking relief in the courts of a state thereby subjects himself to the jurisdiction of those courts for all proper purposes relating to the claim that he asserts. Yet Mr. Justice Harlan denied that the corporation came within the jurisdiction of Tennessee by presenting its claim to the state court, supporting this ipse dixit only by another: "Under any other interpretation the Fourteenth Amendment would be given a scope not contemplated by its framers or by the People, nor justified by its language."[45] In short, this interpretation of the phrase is: The person invoking the clause must be within the reach of compulsory process of the state's courts (voluntary submission may not suffice) at the time of the state action complained of—*i.e.*, in the *Blake* case, at the time of the enactment of the statute by the legislature.

So stated, the interpretation is insupportably narrow. While the person invoking the protection of the clause will normally be, at that time, within the jurisdiction of the state's courts, that need not necessarily be so, and there is no apparent reason for believing that whether he is or is not is relevant to the applicability of the clause. To the extent that amenability to process is relevant, it should be sufficient that the person invoking the clause is subject to the jurisdiction of the courts of the state at the time when a discrimination against him is upheld, whether the origin of this discrimination be legislative, administrative, or judicial. The novel suggestion that the sequence of state action in time should be viewed disjunctively would lead to absurdities, such as that local residents unborn at the time a discriminatory statute was enacted have no standing to challenge the enactment when it is applied to them by the courts.

Although there was no dissent from this restrictive interpretation, the Court quietly nullified it a quarter of a century later. A Kentucky corporation brought an action of replevin in Wisconsin to recover an automobile unlaw-

[44] RESTATEMENT, JUDGMENTS § 21 (1942).

[45] 172 U.S. at 261.

fully taken from its possession by a third person and sold to the defendant in Wisconsin. The plaintiff did no business in Wisconsin. Pursuant to a Wisconsin statute the defendant obtained an order requiring the plaintiff's secretary, who resided and was employed in Louisville, Kentucky, to appear in Milwaukee for pre-trial examination, and to bring with him all relevant files and records. When the secretary, with the plaintiff's approval, refused to comply with the order the complaint was stricken and the action was dismissed. The United States Supreme Court reversed, holding the statute and the order made under it a denial of equal protection.[46]

The precise basis for the decision, on the merits, was that the statute discriminated arbitrarily against foreign corporations as compared with nonresident individuals. When a foreign corporation was a party, examination of its officer or agent could be had in any county of Wisconsin. A nonresident party other than a foreign corporation could be examined only if he could be personally served in Wisconsin with notice and subpoena, and then only in the county of service. Resident parties could be examined only in the county of their residence. The state supreme court had sought to justify the difference of treatment as a reasonable exercise of authority over a foreign corporation seeking a remedy in its courts. The Supreme Court disagreed, emphasizing that the statute might have the effect of depriving the plaintiff of any remedy for recovering its property.[47] "There could be no reason for requiring a corporate resident of Louisville to send its secretary, papers, files and books to Milwaukee for the purpose of an adversary examination that would not apply equally to an individual resident of Louisville in a like case."[48]

The question of immediate interest relates not to the decision on the merits

[46] Kentucky Finance Corp. v. Paramount Auto Exch. Corp., 262 U.S. 544 (1923).

[47] This aspect of the case has given rise to the sugestion that the basis for the decision is the due-process clause. Sholley, *Corporate Taxpayers and the Equal-Protection Clause* (pts. 1–2), 31 ILL. L. REV. 463, 567 (1936–37), in 5 AALS ESSAYS 92, at 109 n.78.

[48] 262 U.S. at 551. The Court added: "The discrimination is further illustrated by the provision that as to all residents of Wisconsin, individual and corporate, the examination should be had in the county of their residence, no matter what its distance from the place of suit." *Ibid.* But the holding on the merits is easily understandable only in connection with the differential treatment of foreign corporations and nonresident individuals. The trial court, in an apparent effort to put the plaintiff on an equality with resident plaintiffs in that it would not have to bear the expense of travel *within Wisconsin*, ordered that the defendant tender railroad fare to Milwaukee from the southern boundary of the state (though this was not prescribed by the statute). Under such an arrangement, the foreign corporation would still have to bear the expense of travel to Wisconsin, and this might be sufficiently heavy to discourage suit if the amount involved were small. See Brief for Plaintiff in Error, p. 11, Kentucky Finance Corp. v. Paramount Auto Exch. Corp., 262 U.S. 544 (1923). Yet a rule requiring all plaintiffs, resident or nonresident, to appear for pre-trial examination in the county in which the action is pending would presumably be upheld as nondiscriminatory, although under such a rule the foreign plaintiff would be at a disadvantage as compared with local plaintiffs. The fact that a nonresident may find it relatively expensive to litigate in the courts of a state is, standing alone, hardly decisive. *Cf.* National Union Fire Ins. Co. v. Wanberg, 260 U.S. 71 (1922).

but to the standing of the foreign corporation to invoke the clause. As to this the Court, through Mr. Justice Van Devanter, said:

> The words "within its jurisdiction" are comprehensive, but we have no need for attempting a full definition of them here. It is enough to say that, when the plaintiff went into Wisconsin, as it did, for the obviously lawful purpose of repossessing itself, by a permissible action in her courts, of specific personal property unlawfully taken out of its possession elsewhere and fraudulently carried into that State, it was, in our opinion, within her jurisdiction for all the purposes of that undertaking.[49]

In support of this proposition the Court actually cited *Blake v. McClung*, which held quite the opposite—unless one can believe that a constitutionally significant distinction may be drawn between a suit by a creditor to recover money and a suit by an owner to recover specific personal property.[50] Brandeis and Holmes, dissenting, observed that the holding "would seem to require the Court to overrule *Blake v. McClung* . . .,"[51] and there seems no escape from that conclusion. We regard this aspect of *Blake v. McClung* as overruled. A foreign suitor in the courts of a state, whether a foreign corporation or a nonresident individual,[52] is for the purposes of the litigation a person within the jurisdiction of the state, regardless of whether he is within reach of compulsory process from the state courts and regardless of the time when the legislation in question was enacted. This proposition is subject to limitations the net effect of which is obscure. The cases from which it is drawn relate to equality of treatment for persons who have been permitted to become litigants in the courts of the state, yet they have clear implications as to the right of access to those courts. That right is not unqualified. For example, a state may close its courts to a foreign corporation seeking to enforce rights growing out of the unauthorized transaction of business within the state.[53] And, while access is ordinarily freely extended to aliens,[54] the privilege may be denied to enemy aliens. Since most such questions can be determined by reference to the reasonableness of the classification, it seems entirely possible that the Court may never find it necessary to give a definitive interpretation of the phrase "within its jurisdiction."

[49] 262 U.S. at 550.

[50] *Cf.* Sholley, *supra* note 47.

[51] 262 U.S. at 552.

[52] "And we think there is no tenable ground for regarding [the foreign corporation] as any less entitled to the equal protection of the laws in that State than an individual would have been in the same circumstances. . . ." 262 U.S. at 550.

[53] Hemphill v. Orloff, 277 U.S. 537 (1928).

[54] See Janusis v. Long, 284 Mass. 403, 188 N.E. 228 (1933), 29 ILL. L. REV. 101 (1934). In this case the court rejected the contention that an alien who had entered the country illegally "was in theory of law not here at all" (284 Mass. at 407), and allowed him to recover damages for personal injuries suffered in the state. The constitutional question was not considered.

II. Equal Protection in Conflict-of-Laws Cases

The equal-protection clause may bear upon a state court's determination of conflict-of-laws problems in two general ways: (1) Although a state may assert an interest in the application of its laws only to the extent necessary to secure their benefits for its citizens or residents, the clause may require extension of those benefits to others "within its jurisdiction." (2) Even within the class of primary beneficiaries, the benefits of the state's laws must be made available impartially; they may not be withheld from certain members of the class except on the basis of reasonable classification. These propositions are so elementary that it may seem unnecessary to state them; yet their implications for conflict-of-laws cases are anything but obvious, and as those implications are developed some problems of substantial difficulty emerge.

The first proposition may be considered in two stages. Some of the effects of the clause are so clear, and the situations in which they occur are so uncomplicated, that the only reason for discussing them is to insure that their significance for conflict of laws is not overlooked. These may be considered first.

Assume a purely domestic case of wrongful death in a state having a statute modeled on Lord Campbell's Act.[55] All parties are citizens of the state; the wrongful conduct, the injury, and the death occurred there, and the action is brought there. Certainly no problem of conflict of laws is involved, and ordinarily no constitutional question. Suppose, however, that the deceased, instead of being a local citizen, is (*a*) a citizen of a sister state, (*b*) a resident alien, or (*c*) a nonresident alien. Conceivably a provincial and short-sighted court might reason that the financial burden imposed by the statute on local defendants was justified only because of the correlative benefit conferred on the local victim,[56] and that the statute should not be applied to benefit foreigners at the expense of local citizens. If so, a constitutional problem is clearly presented. It is less clear that a problem in the conflict of laws is presented. Most modern lawyers, perhaps, would feel that there is no such problem: none of the "contacts" made relevant by prevailing conflict-of-laws doctrine is foreign; both the "occurrence" and the action are associated with a single state. Yet if conflict of laws is regarded as concerned in the first instance with the construction or interpretation of domestic law in its application to cases having potentially significant foreign aspects, then the circumstance that the deceased was a foreigner raises just such a problem. If a central concern of conflict of laws is the administration of private law in such a way as to foster amicable relations among the people of different states, this situation presents a problem in conflict of laws. If there were no constitu-

[55] 1846, 9 & 10 Vict., c. 93.

[56] The reason for treating the deceased rather than the beneficiaries as the object of legislative concern is discussed in Currie, *The Constitution and the "Transitory" Cause of Action*, 73 Harv. L. Rev. 36, 46–47 (1959).

tion to be considered—if we were to postulate not a state of the Union but an independent nation—the suggested discrimination on the ground of alienage would still present a problem for the courts. The problem then would not be one of constitutional law, but of conflict of laws.[57]

The solution of the constitutional problem is at the same time a solution of the conflicts problem; and, up to a point, at least, the solution of the constitutional problem is clear. It will hardly be doubted that a rule denying the benefits of the wrongful death statute in the three cases supposed, solely on the ground that the deceased was an alien or a nonresident, would violate the equal-protection clause; in the case of the citizen of another state, such a rule would also violate the privileges-and-immunities clause.[58]

The prime significance, for present purposes, of this elementary proposition is that it requires the conclusion—which we have already reached with respect to the privileges-and-immunities clause[59]—that a classification in terms of residence or citizenship is not reasonable merely because it coincides with the limits of a state's interest in applying its law. It is possible to argue that it is reasonable for a state to apply its laws only in those situations in which application will advance the interests of the state; indeed, the argument has been made in stronger terms: since the imposition of liability upon one person for the benefit of another is justified only by the power of the state to accomplish purposes within its legitimate governmental concern, the state cannot extend the operation of the law beyond the limits of those purposes. Such an argument was properly rejected by the California Supreme Court in *Quong Ham Wah Co. v. Industrial Acc. Comm'n*[60] with respect to the

[57] In France the status of foreigners is considered under the rubric of international private law. See BATIFFOL, DROIT INTERNATIONALE PRIVÉ 203 (2d ed. 1955). In other countries it is not so considered (see 1 RABEL, CONFLICT OF LAWS: A COMPARATIVE STUDY 1 (2d ed. 1959)), and it appears to be generally assumed that discrimination in matters of private law on the basis of alienage has been so thoroughly repudiated that the problem hardly exists as a practical matter. The point to be made, however, is that, if the problem has not been solved by constitutional provisions or otherwise, it remains to be dealt with in some branch of the law, and that it may logically and conveniently be regarded as a problem in conflict of laws.

[58] Chambers v. Baltimore & O.R.R., 207 U.S. 142 (1907), upheld a discrimination in terms of the citizenship of the deceased on the ground that there was no such discrimination in terms of the citizenship of the living beneficiaries, or persons entitled to sue. The decision has been discredited. See Currie, *supra* note 56, at 47 n.46, and 59 n.90. We are unable to accept it as authoritative, and are constrained to believe that the Court was able to render that decision only because the result reached was sustainable on other grounds: all parties being nonresidents and the injury having occurred elsewhere, the refusal of a remedy was justified on the principle of forum non conveniens. It is difficult indeed to imagine that the Court today would countenance the refusal of a remedy where the defendant is a citizen of the forum state and the injury occurred within the state, on the ground that distinctions based on the citizenship or residence of the deceased do not discriminate against the persons beneficially interested.

[59] See Currie & Schreter, *supra* note 2.

[60] 184 Cal. 26, 192 Pac. 1021 (1920), *writ of error dismissed*, 255 U.S. 445 (1921); discussed in Currie & Schreter, *supra* note 2.

privileges-and-immunities clause, and must also be rejected with respect to equal protection. Something more than the state's lack of concern for the victim is needed to establish the reasonableness of withholding the benefits of such a law from persons "within the jurisdiction" of the state.[61] The limits of a state's interests become vitally important, however, when the defendant, as well as the deceased, is a nonresident. Imposition of liability on a nonresident for the benefit of a person in whose welfare the state has no concern may involve a violation of the due-process clause or the full-faith-and-credit clause; and, of course, the equal-protection clause does not command violation of other provisions of the Constitution.[62]

For example, suppose that the deceased and the defendant are both residents of State X, the deceased being a guest in the defendant's car, and the injury and death occur in State F. The surviving dependents are residents of State X. The law of State F is more favorable to the guest than that of State X, predicating liability on a showing of ordinary negligence and placing a higher limit on the amount recoverable. Despite the entrenched doctrine that the law of the place of the injury is controlling, the fact that State F has no interest in applying its law,[63] added to the fact that State X has provided explicit protection for the defendant, means that the law of F must yield to that of X.[64] The only wrongful death case that can be cited in support of

[61] For example, denial of recovery for wrongful death might be upheld where the beneficiaries are nonresident aliens, at least if there is reasonable ground to believe that the proceeds of the judgment are unlikely to be enjoyed by the beneficiaries. Most states have construed their wrongful death statutes as allowing recovery for the benefit of alien dependents (see Annot., 21 L.R.A. N.S. 271 (1909)), but a few have denied it, *e.g.*, Deni v. Pennsylvania R.R., 181 Pa. 530, 37 Atl. 558 (1897); McMillan v. Spider Lake Saw Mill & Lumber Co., 115 Wis. 332, 91 N.W. 979 (1902). (The rule in both states has since been changed by statute. See PA. STAT. tit. 12, § 1602 (1936); Wis. Laws 1911, ch. 26.) The bearing of the equal-protection clause seems not to have been argued in this type of case, probably because attention was focused on the beneficiaries, and it would be difficult to maintain that they were persons within the jurisdiction. But we have the support of Holmes as well as of Harlan (Chambers v. Baltimore & O.R.R., 207 U.S. 151, 157, 195–60 (1907) (dissenting opinion)) for focussing on the deceased as the object of the state's concern: "In all cases the statute has the interest of the employees in mind. It is on their account that an action is given to the widow or next of kin. . . . In other words, it is primarily a penalty for the protection of the life of a workman in this state. We cannot think that workmen were intended to be less protected if their mothers happen to live abroad. . . ." Mulhall v. Fallon, 176 Mass. 266, 269, 57 N.E. 386, 387, 388 (1900).

[62] See Currie & Schreter, *supra* note 2.

[63] This is an assumption, but a reasonable one. The case of wrongful death has been selected for discussion rather than a case of simple personal injury because it is difficult to maintain convincingly in the wrongful death case that the state of injury (1) has an interest in deterring wrongful conduct within its borders (since there is typically no liability unless there is pecuniary loss to a qualified beneficiary) or (2) has an interest in providing a fund from which local medical creditors of the victim can be reimbursed (since the proceeds are typically not assets of the estate within the reach of creditors).

[64] See Currie, *The Constitution and the "Transitory" Cause of Action*, 73 HARV. L. REV. 36, 60 n.91 (1959).

this proposition is *Bradford Elec. Light Co. v. Clapper*,[65] a precedent which, because of some misunderstanding, is not held in the highest esteem today.[66] If, for that reason, the proposition arouses skepticism, the same point can be made in respect of contracts. Despite the dictum that "the Constitution and the first principles of legal thinking allow the law of the place where a contract is made to determine the validity and consequences of the act,"[67] the law of the state of contracting cannot constitutionally be applied where that state has no interest in the application of its law and such application infringes the interest of another state in regulating the transaction.[68] We have already observed that the territorial interpretation of the phrase "within its jurisdiction" is too restrictive; these considerations demonstrate that it is also too inclusive. In some instances a state is not only not required, but is forbidden, to apply its own laws equally for the benefit of all persons physically present within its territorial limits.

A secondary significance of the elementary proposition first stated relates to the privileges-and-immunities clause. It is commonly believed that while a distinction between citizens and noncitizens is invalid as applied to a citizen of a sister state, a distinction between residents and nonresidents is valid if the fact of residence has some reasonable relation to the object of the legislation.[69] But if the equal-protection clause invalidates a provision for the benefit of citizens alone, or requires extension of the benefits of the provision to all others within the jurisdiction,[70] then there is no such thing, for purposes of the privileges-and-immunities clause, as an otherwise valid law discriminating between local citizens and citizens of another stste.

[65] 286 U.S. 145 (1932).

[66] See Currie, *The Constitution and the Choice of Law*, 26 U. CHI. L. REV. 9, 23 (1958).

[67] Mutual Life Ins. Co. v. Liebing, 259 U.S. 209, 214 (1922).

[68] New York Life Ins. Co. v. Head, 234 U.S. 149 (1914).

[69] See LaTourette v. McMaster, 248 U.S. 465 (1919); Douglas v. New York, N.H. & H. R.R., 279 U.S. 377 (1929), discussed in Currie & Schreter, *supra* note 2.

[70] A possible consequence of unconstitutional discrimination is that the discriminatory rule is null and void; another is that its benefits are automatically extended to the disfavored class. In the context of the privileges-and-immunities clause the latter result is facilitated by the form of the constitutional provision, which may be regarded as "self-executing," *i.e.*, as by its own force extending the scope of the law. See Quong Ham Wah v. Industrial Acc. Comm'n, 184 Cal. 26, 192 Pac. 1021 (1920). That argument is not available with respect to the equal protection clause. Nevertheless it seems that a possible consequence of discrimination in violation of the equal protection clause, in some instances, is automatic extension of the benefits of the law to the disfavored class. *Cf.* Brown v. Board of Education, 347 U.S. 483 (1954). An analysis of this problem would be well beyond the scope of this paper; it involves such problems as whether the effect of invalidity is a question of federal or state laws, and whether the complaining party has standing to raise the constitutional issue. The point in the text can be made without resolving these problems: before any question under the privileges-and-immunities clause need be reached, it can be determined either that a law providing benefits for local citizens alone is void under the equal-protection clause or, alternatively, that its benefits are automatically extended to other persons within the jurisdiction.

Conflict-of-laws cases in which the equal-protection clause has been a decisive factor have been rare indeed.[71] Legislatures seldom enact laws for the sole benefit of local citizens or residents; courts are not disposed to interpret laws so as to give them such effect. In part this may be true because the effect of the equal-protection clause is so clear; in greater part it seems a result of a distaste for discrimination, independent of constitutional prohibitions. It is fair to say that the traditional system of conflict of laws has tended to minimize cases of outright discrimination in the realm of private law, thanks to its utilization of neutral and impersonal choice-of-law rules. It is difficult to cite cases in support of the elementary proposition that a law providing benefits for local citizens must in general provide the same benefits for nonresidents, including aliens, similarly situated. In most of the cases that have arisen the nonresident is a citizen of another state, so that the question can be referred to the privileges-and-immunities clause, and usually is so referred—perhaps because in that context there is no necessity to determine whether the complaining party is a person within the jurisdiction.[72] Thus when we ask in what situations benefits intended primarily for citizens or local residents must be extended to others by virtue of the equal-protection clause we find a dearth of actual case material. The problem is most likely to arise in clear-cut form in connection with foreign corporations, since corporations are not entitled to the protection of the privileges-and-immunities clause.

Kentucky Finance Corp. v. Paramount Auto Exch. Corp.[73] can be regarded as a conflict-of-laws case only by a stretch of our already unconventional definition. That the law of the forum concerning examination before trial, as distinguished from the law of another state, was applicable was not doubted. Nor was there any question of construing a generally phrased statute to determine its application to foreign parties. The statute was precise as to residents, nonresident individuals, and foreign corporations. The most that can be said is that the decision throws some light on how conflict-of-laws cases should be decided: a foreign corporation in the position of the plaintiff in that case is within the protection of the clause, and a court construing a general statute in such a way as to accomplish the discrimination that was expressed in the Wisconsin statute would similarly violate the equal-protection clause.

Much the same must be said of other cases involving matters of procedure. Three of these may be mentioned. All involve foreign corporations, and all relate to the validity of statutes in which the differential treatment was express-

[71] "Conflict-of-laws cases" are here taken to mean cases involving private law and private parties in which there is a significant foreign element.

[72] See Currie & Schreter, *supra* note 2.

[73] 262 U.S. 544 (1923); see text at note 46 *supra*.

ly authorized. *Central Loan & Trust Co. v. Campbell Comm'n Co.*[74] upheld the validity of a statute[75] which, while in general requiring the plaintiff in attachment proceedings to post bond to secure the defendant reimbursement of damages resulting from unlawful seizure, dispensed with bond where the defendant was a nonresident or a foreign corporation. The Court's reasoning is unsatisfactory. Brushing aside the defendant's efforts to suggest that a discrimination between residents and nonresidents is arbitrary unless the fact of residence has some relation to legitimate governmental policy, Mr. Justice White simply observed that a state might allow process of attachment against nonresidents and not against residents at all; the validity of the "greater" discrimination established the validity of the lesser. Obviously related to the kind of thinking that sustains the imposition of burdensome conditions on foreign corporations by reference to the power to exclude altogether, this position ignores the fact that, while there is a legitimate reason for allowing attachment against nonresidents but not against residents, there is no apparent reason for dispensing with a bond where the defendant is a nonresident except to deprive him of a protection enjoyed by resident defendants, and this for the convenience of plaintiffs who perhaps are residents more often than not.[76]

In *Power Mfg. Co. v. Saunders*[77] the Supreme Court found a denial of equal protection in an Arkansas venue statute which subjected foreign corporations (doing business in the state) to suit in any county, while limiting the venue of actions against domestic corporations by reference to factors relating to the convenience of the defendant. "No doubt there are subjects as to which corporations admissibly may be classified separately from individuals and accorded different treatment, and also subjects as to which foreign corporations may be classified separately from both individuals and domestic corporations and dealt with differently. But there are other subjects as to which such a course is not admissible, the distinguishing principle being that classification must rest on differences pertinent to the subject in respect of which the classification is made."[78] In *Washington ex rel. Bond & Goodwin & Tucker, Inc. v. Superior Court*[79] the Court upheld a statute providing, in

[74] 173 U.S. 84 (1899).

[75] Okla. Comp. Stat. 1893 § 4124; *cf. id.* § 4070.

[76] In the case under discussion, however, both plaintiff and defendant were foreign corporations.

[77] 274 U.S. 490 (1927).

[78] *Id.* at 493–94. The decision does not deal with the effect of invalidity of the provision that a foreign corporation might be sued in any county. The defendant had made a timely motion to dismiss, which the Court held should have been sustained. Presumably a new action filed in a county in which the defendant might have been sued if it were a domestic corporation would not be dismissed, but this is not self-evident.

[79] 289 U.S. 361 (1933).

certain circumstances, for service on a foreign corporation by service on the secretary of state although no provision was made requiring the secretary to notify the defendant. For present purposes we pass the serious question of due process created by such an arrangement: the equal-protection problem stems from the fact that, with respect to domestic corporations having no office in the state and with respect to foreign *insurance* companies, service on the secretary was effectual only if the secretary notified the defendant. The argument that this distinction was a denial of equal protection was disposed of with one sentence: "The legislature was entitled to classify corporations in this respect, and a mere difference in the method of prescribing how substituted service should be accomplished works no unjust or unequal treatment of the appellant."[80]

Perhaps the most interesting aspect of these two cases concerns the showing that must be made by one who complains of the reasonableness of a classification. It is fair enough to say that the burden is upon the complainant,[81] and that there is a strong presumption of validity.[82] But what do these statements mean when the complainant has established that a classification is apparently arbitrary, in the sense that it discriminates in favor of local and against foreign interests without apparent justification? Is something more than such a negative showing required? Must there be an independent showing of some ulterior or malign purpose in order to rebut the presumption that the legislature had a valid reason, though none can be plausibly imagined? The *Power* case seems to us to exhibit the proper attitude toward such questions. Having in mind the purpose of venue statutes, the Court inquired whether the difference between foreign and domestic corporations had any pertinence to the considerations entering into a determination of where suit might be brought, and could find none. "Of course the restricted venue as to domestic corporations and individuals is prompted by considerations of convenience and economy; but these considerations have equal application to foreign corporations. So far as the plaintiffs in such actions are affected, it is apparent that there is no more reason for a statewide venue when the action is against a foreign corporation than when it is against a domestic corporation or a natural person."[83] A fortiori, the process statute in *Bond & Goodwin & Tucker* should have been invalidated. The obvious purpose of providing for notice to the defendant that an action has been commenced

[80] *Id.* at 366. This holding was no doubt influenced by the theory that the state was entitled to condition the privilege of doing business—that theory having been the foundation of the holding with respect to due process. But that theory had been rejected in Power Mfg. Co. v. Saunders, 274 U.S. 490 (1927), as a justification for the discriminatory venue provision.

[81] Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).

[82] Middleton v. Texas Power & Light Co., 249 U.S. 152 (1919); Madden v. Kentucky, 309 U.S. 83 (1940); Crescent Cotton Oil Co. v. Mississippi, 257 U.S. 129 (1921).

[83] 274 U.S. at 494.

against him is to afford him an opportunity to appear and defend; there is no conceivable reason why such an elementary concession should be withheld from foreign corporations generally while it is accorded to domestic corporations similarly situated, and to foreign insurance companies. Granted that foreign corporations may for some purposes be treated differently from domestic ones, and that insurance companies may be treated differently from corporations generally, there is no imaginable reason why any one of these classes should be denied notice when it is provided for the others. If no rational justification can be suggested for a classification, it should be invalidated without more.[83a]

III. Debtors' Exemptions

There are certain areas of private law in which the courts have been called upon to construe statutes in order to determine their applicability to cases involving foreign factors, or otherwise to decide conflict-of-laws questions, in which problems of discrimination have been encountered. One of these concerns debtors' exemptions. Typically the cases involve individuals, often citizens of another state, so that, like other cases of discrimination that have previously been considered,[84] they might be treated under the privileges-and-immunities clause. We shall consider them here primarily from the standpoint of the equal-protection clause.

The *Restatement* summarily disposes of problems of the type to be discussed: "The law of the forum determines matters pertaining to the execution of a judgment, and what property of a judgment defendant within the state is exempt from execution. . . ."[85] A leading casebook states that "Debtor's exemption laws are usually governed by the law of the forum."[86] Beneath the simplicity of these dispositions, however, there lies a tangle of unresolved problems; the result is a disorderly situation in which public and private interests are at the mercy of strategic maneuvers and counter-maneuvers, and which does no credit to the system of conflict of laws nor to the manner in which we have utilized the tools of federalism.

Many years ago a cow owned by a resident of Canada "casually strayed" into Vermont, where she was opportunely seized by an officer holding a writ of attachment sued out by a creditor. It was the only cow the nonresident debtor had. He therefore brought an action of trespass against the officer in Vermont, relying on a Vermont statute which directed the officer to levy

[83a] *But cf.* Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911): "When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed."

[84] See Currie & Schreter, *supra* note 2.

[85] Restatement, Conflict of Laws § 600 (1934).

[86] Cheatham, Goodrich, Griswold & Reese, Cases and Materials on Conflict of Laws 197 (4th ed. 1957).

on the property of the debtor, "always excepting one cow, and such suitable apparel, bedding, arms, and articles of household furniture, as may be necessary for upholding life."[87] Notwithstanding the inevitable argument that the exemption law was for the benefit of local residents, the court ordered judgment for the plaintiff.[88] The decision was not in constitutional terms; indeed there was then no applicable constitutional provision against discrimination. The equal-protection clause had not been added to the Constitution, and the debtor, not being a citizen of a sister state, could not invoke the privileges-and-immunities clause. Yet the reasoning of the court is relevant to constitutional considerations. After saying, much in the manner of the *Restatement*, that the law of the forum must govern matters of remedy, the court continued:

> Whatever remedy our laws give to enforce the performance of a contract, will equally avail the citizen or the foreigner; and they equally must be subject to any restraints which the law imposes upon them. Our inhabitants can have no greater rights in enforcing a claim against a foreigner, than an alien can have in enforcing a similar claim against one of our own citizens. Whoever submits himself or his property to our jurisdiction, must yield to all the requirements which are made of our citizens in relation to the collecting of debts, or maintaining suits; *and is clearly entitled to all the benefits, exemptions, and privileges, to which other debtors or suitors, belonging to our own state, are subject or entitled.* If the one can hold a cow, suitable wearing apparel, and necessary household furniture, without having the same taken from him by execution, so can the other.[89]

The following year the New Hampshire court independently reached the same result in a precisely parallel case, except that the plaintiff-debtor was a resident of a sister state. "It is immaterial where the plaintiff resided. By the laws of this state a man's only cow is exempted from attachment, let him reside where he will."[90]

Pennsylvania took a different view. A debtor who had resided there having moved and become a citizen of Ohio, his real estate was sold to satisfy certain judgments he had left unpaid. The trial court approved a distribution of the proceeds which set apart to the debtor a portion pursuant to a statutory exemption of "$300, exclusive of all wearing apparel of the defendant and his family, and all Bibles and school-books in use in the family."[91] The Supreme Court reversed: "[We] do not legislate for men beyond our jurisdiction. The Act of 1849 was designed for our own citizens, for the families of the poor who are with us, that the rapacity of creditors might not strip

[87] Haskill v. Andros, 4 Vt. 609, 610 (1832).

[88] Cynics may feel that the decision was influenced by the fact that the debtor-plaintiff, while at all relevant times a resident of Canada, was a native of Vermont.

[89] 4 Vt. at 611. (Emphasis added.)

[90] Hill v. Loomis, 6 N.H. 263, 264 (1833).

[91] Collom's Appeal, 2 Pennypacker 130, 132 (Pa. 1882).

them of every comfort and convenience."[92] The debtor, who was represented on the appeal, invoked the privileges-and-immunities clause,[93] but this argument was not noticed. The case is distinguishable from the "only cow" cases. The court observed that if nonresidents were permitted to claim the exemption of $300 they might also claim in their home states the exemptions provided by the foreign law, thus withdrawing from creditors money or property that should properly be applied to payment of their claims. The courts of Vermont and New Hampshire might have had similar difficulty had it not appeared that the subject of the attachment was the debtor's only cow. This complication will be considered in due course. At this point it must be observed that the conflict as to whether nonresidents are entitled to the forum's exemption laws is real; the benefits of such laws are denied to nonresidents by cases that are not distinguishable on any such ground as the possibility of double exemption.

Thus the Georgia workmen's compensation law provided that all compensation and claims therefor should be exempt from claims of creditors, but when an injured employee left the state and became a resident of Chicago the Georgia courts held that the amounts due from his employer were subject to garnishment.[94] The exemption was "a mere privilege, and not an absolute right."[95]

> It is provided only as a matter of State policy for the benefit of residents of this State, and cannot be claimed either by or for a debtor who has removed to another State.... Regardless of what may be "the better view," this court is committed to the rule that where an exemption statute is not expressly or impliedly made applicable to non-residents, it will not be given effect in their favor.[96]

And nonresidents have been denied the benefit of such noncumulative exemptions as those relating to wages[97] or tools of the debtor's trade.[98]

The cases denying nonresidents the benefit of exemptions are probably

[92] *Id.* at 132. This language was borrowed from an earlier decision holding that a statutory exemption from levy and sale on execution or by distress for rent was inapplicable to foreign attachments. "We do not legislate for men beyond our jurisdiction, and certainly not for absconding debtors; but the Act of 1849 was designed for our own citizens—for the familes of the poor who are *with us*—that the rapacity of creditors might not strip them of every comfort and convenience. The primary object of the process of foreign attachment is to compel the appearance of the debtor, and if it fail of this purpose—if he will not come within our jurisdiction to answer to his liabilities—let him not come to appropriate our bounties." Yelverton v. Burton, 26 Pa. (2 Casey) 351, 354 (1855). The language was quoted with approval by Mr. Justice Sharswood in McCarthy's Appeal, 68 Pa. (18 P. F. Smith) 217, 219–20 (1871) (dictum).

[93] *Id.* at 131.

[94] Smith v. Georgia Granite Corp., 186 Ga. 634, 198 S.E. 772 (1938).

[95] *Id.* at 636, 198 S.E. at 774.

[96] *Id.* at 637–38, 198 S.E. at 775–76.

[97] Southern Ry. v. Rollins, 22 Ga. App. 393 (1918); Harvey v. Thompson, 2 Ga. App. 569 (1907); Kelson v. Detroit, G. H. & M. Ry., 146 Mich. 563, 109 N.W. 1057 (1906).

[98] Wagner v. Farmers Co-op. Exch. Co., 147 Minn. 376, 180 N.W. 231 (1920) (*semble*).

in the minority.[99] It may be that a thorough study would show that with comparatively rare exceptions the exemption is denied only when it is of such a character that allowance would lead to duplication of the benefit, or to formidable questions of practicability, such as valuation and apportionment of property without the state. The cases denying the exemption are sufficiently numerous, however, to command attention, especially since no court seems ever to have held such denial an unconstitutional discrimination, or even to have considered the question in constitutional terms.[100] A leading nineteenth-century commentator on the Constitution affirmed (without citation of authority) that "it is unquestionable that many other rights and privileges may be made—as they usually are—to depend upon actual residence: such as the right to vote, to have the benefit of exemption laws, to take fish in the waters of the State, and the like."[101] Nevertheless, we submit that when a state, at the suit of a local creditor, withholds the benefit of its exemption laws from nonresidents, when there exists no basis for the distinction independent of the mere fact of alienage, it violates one or both of the constitutional prohibitions against discrimination.

These cases lend significant support to the thesis that problems in the conflict of laws should be analyzed in terms of the governmental interests involved. In the most explicit terms possible the courts reiterate that the policy of exemption laws is to add to the comfort and encourage the industry of the people,[102] and to prevent indigent debtors from becoming public charges.[103] In equally explicit terms they reiterate that the state has an interest in curtailing the rights of domestic creditors only when the protected debtors are local people:

> [The object of exemption laws] is to secure benefit or the means of living, to the families of those of our own people who, by misfortune or improvidence, become involved beyond their ability to pay. It was thought better, and more in accordance with humanity and the interests of the state, that creditors should lose their just claims to that extent, than that the wives and children of unfortunate debtors should be reduced to entire destitution, and possibly become a charge to the community. These reasons and objects could not be made properly to apply in the case of citizens of other states, who might be indebted to ours. We are under no obligation to make provision for them. They must look to their own governments for protection.[104]

[99] See Annot., 119 A.L.R. 554 (1938); 22 AM. JUR. *Exemptions* § 14 (1939).

[100] Indeed, our examination of the cases reveals only one instance in which the constitutional argument has been advanced. Collom's Appeal, 2 Pennypacker 130, 131 (Pa. 1882).

[101] COOLEY, CONSTITUTIONAL LIMITATIONS 492 (5th ed. 1883). *Cf.* Judge Cooley's decision in McHugh v. Curtis, 48 Mich. 262 (1882), where there is no reference to the Constitution.

[102] McHugh v. Curtis, *supra* note 101; Leonetti v. Tolton, 264 Mich. 618, 250 N.W. 512 (1933).

[103] Hawkins v. Pearce, 11 Humph. (Tenn.) 44 (1850).

[104] Lisenbee v. Holt, 1 Sneed (Tenn.) 42, 50–51 (1853) (dictum). See also Atchison, T. & S.F. R.R. v. Maggard, 6 Colo. App. 85, 91, 39 Pac. 985 (1895) (dictum); Snow v. Dill, 6 W.N.C. 330 (Pa. 1879).

Thus these courts have adopted an entirely rational attitude toward the conflict-of-laws problem: local laws are construed in the light of local governmental policy and interest, and are applied accordingly in cases involving foreign factors. Even in an international context, however, this rational pursuit of self-interest may prove to be short-sighted: such discrimination is likely to be followed by retaliation, which can be relieved only by the cumbersome device of reciprocity. And by ignoring the constitutional restraints on the pursuit of local interests these courts have overlooked one of the basic values of federalism. In a federal union such as ours there is no room for the cycle of discrimination, retaliation, and reciprocity.[105] Each state may and should extend the benefits of its laws to foreigners, not merely with the hope but with the assurance that all other states will reciprocate as a matter of course.

At first sight it may appear that the nonresident debtor in a garnishment or attachment proceeding is clearly not within the jurisdiction of the forum state so as to be in position to raise the issue of discrimination under the equal-protection clause; and, indeed, in case of his default, an initial question is how the issue of his entitlement to the exemption comes to be raised at all. One partial answer is that a garnishee is normally permitted, and sometimes required, to claim an exemption available to the nonresident defendant.[106] This, however, does not seem sufficient to overcome the objection that the person on whose behalf the exemption is claimed is not within the jurisdiction of the forum state. On the other hand, when, as in the "only cow" cases, the nonresident sues the attaching officer in trespass,[107] a decent argument may be made, by analogy to the *Kentucky Finance* case,[108] that he is within the jurisdiction.[109] More important, the problem is not confined

[105] Even the rudimentary palliative of reciprocity has not been developed in relation to debtors' exemptions. Those states which deny the benefits of local statutes to nonresidents commonly do so without inquiring whether the state of the debtor's residence is more generous; on the other hand, states extending the benefit of local statutes to nonresidents do so without inquiry into the practice of the state where the debtor resides, and apparently with no though of retaliation. An extremely rare expression of the notion of reciprocity is found in a dictum in Kyle & Co. v. Montgomery, 73 Ga. 337, 344–45 (1884), intimating that local exemptions might be extended to the nonresident debtor if his home state similarly treated nonresidents. The unsatisfactory character of reciprocity as a solution is emphasized by the suggestion in the argument of counsel that in any event the nonresident debtor should be allowed no greater exemption than the sister state would allow a Georgian. *Id.* at 340.

[106] 2 SHINN, ATTACHMENT AND GARNISHMENT § 629 (1896). It is probable that Harris v. Balk, 198 U.S. 215 (1905), renders nugatory any duty sought to be imposed by the state of the debtor's residence upon the garnishee to plead an exemption in favor of the debtor in the foreign court.

[107] See notes 87 & 90 *supra*.

[108] See note 73 *supra*.

[109] The argument would be hampered by troublesome questions of chronology. The nonresident debtor was not within the jurisdiction at the time of the seizure and sale; on the other hand, he is within the jurisdiction for purposes of his action of trespass, and

to cases of default in proceedings quasi in rem. The judgment against the nonresident may be a personal one, based on temporary presence or former residence within the state;[110] or the defendant in garnishment or attachment may appear, as he is expected to do, and subject himself to the jurisdiction of the court by defending on the merits. In such cases there appears to be no doubt at all that he is within the jurisdiction, yet the cases denying the benefit of the exemption make no distinction between such cases and cases of default. Therefore, while the defaulting debtor in attachment or garnishment proceedings may lack standing to invoke the constitutional guarantee of equal protection, we adhere to our proposition that in general the discrimination between residents and nonresidents is unconstitutional; and we are fortified in this course by the circumstance that, where the nonresident debtor is a citizen of another state, he may invoke the privileges-and-immunities clause without reference to the limiting requirement that he be within the jurisdiction.

Plainly there are situations in which independent considerations may sustain the reasonableness of a classification restricting exemptions to residents. The homestead exemption appears to be in a class by itself: no doubt the legislature may elect to exempt homesteads rather than, or in addition to, other property and to define a homestead as a residence, so that nonresidents may not qualify.[111] And without examining the problem *in extenso* we are prepared to concede, for present purposes, that a classification denying exemptions to nonresidents may be rendered reasonable because of problems relating to duplication of benefit, or difficulties in the appraisal of property outside the state, as where the exemption is in terms of property to a stated value, or "necessary for upholding life."[112] No such independent justifications appear to exist, however, with respect to exemptions of wages, or workmen's compensation awards, or insurance proceeds, or personal injury judgments. Accordingly, if the nonresident debtor may be considered within the jurisdiction, the denial of such exemptions to him can be justified only on the theory that a classification in terms of residence is reasonable merely because the state has no interest in applying its protective policy for the benefit of foreigners.[113] But acceptance of that justification would have far-reaching

may argue that he is entitled to have the case decided as it would be decided on behalf of a resident plaintiff who happened to be out of the state at the time of seizure and sale.

[110] See Menzie v. Kelly, 8 Ill. App. 259 (1881); Collom's Appeal 2 Pennypacker 130 (Pa. 1882).

[111] See 12 AM. JUR. *Constitutional Law* § 493; 28 *id. Homestead* § 8.

[112] See text at note 87 *supra.*

[113] In terms of the privileges-and-immunities clause, the denial might be defended on the ground that exemptions are not "fundamental" rights. *Cf.* Corfield v. Coryell, 6 Fed. Cas. 546 (No. 3230) (C.C.E.D. Pa. 1825). The Georgia court may have had some such notion in mind when it spoke of the exemption as a "mere privilege" (Smith v. Georgia Granite Corp., 186 Ga. 634, 198 S.E. 772 (1938)), but the *Corfield* interpretation has been discredited (see Currie & Schreter, *supra* note 2), and "privileges" is the precise word used in article IV, § 2.

consequences, gravely impairing the vitality of the constitutional provisions against discrimination. If it is accepted with regard to debtors' exemptions it must also be accepted with regard to workmen's compensation, at least in certain situations.[114] It must even be accepted with regard to the case which we have treated as almost self-evident: that of the wrongful death in the state, at the hands of a resident, of a citizen of a sister state, a resident alien, or a nonresident alien.[115] It cannot, therefore, be accepted, and the consequence is that to deny debtors' exemptions to nonresidents merely because the policy of the law is concerned solely with the welfare of residents is to violate one or both of the constitutional provisions against discrimination.

We have been discussing the type of case in which the action is by a local creditor against a nonresident debtor, and the debtor claims the benefit of the exemption laws of the forum. In the same type of case the nonresident may claim the benefit of the exemption laws of his domicile. On the assumption that he will do this only when his domiciliary law is more favorable to him, it is quite clear, both on the basis of the decided cases[116] and in terms of the analysis with which we approach conflict-of-laws problems, that the nonresident's claim should be rejected. In this situation the interest of the forum state in affording its creditors a relatively high degree of security is in conflict with that of the domiciliary state in affording its debtor class a relatively high degree of protection. This conflict is not resolved by considerstions of due process or full faith and credit, nor by any sound principle of conflict-of-laws law;[117]

[114] *Cf.* Quong Ham Wan Co. v. Industrial Acc. Comm'n, 184 Cal. 26, 192 Pac. 1021 (1920), *writ of error dismissed*, 255 U.S. 445 (1921), discussed in Currie & Schreter, *supra* note 2.

[115] Part II, *supra*.

[116] Willard v. Sturm, 96 Iowa 555, 65 N.W. 847 (1896); Atchison, T. & S.F. R.R. v. Maggard, 6 Colo. App. 85, 39 Pac. 985 (1895); American Cent. Ins. Co. v. Hettler, 46 Ill. App. 416 (1892) (*semble*); Roche v. Rhode Island Ins. Ass'n, 2 Ill. App. 360 (1878) (*semble*); Leiber v. Union Pac. R.R., 49 Iowa 688 (1878) (*semble*). In the last three cases cited it does not positively appear that the plaintiff was a resident of the forum state. Our inference that he was is based on the fact that where both parties are non-residents that fact is usually stated.

[117] The problem was presented in its most acute form in a federal interpleader case, Sanders v. Armour Fertilizer Works, 292 U.S. 190 (1934). The Supreme Court, by a vote of 5–4, resolved the conflict in favor of the Illinois creditor although the interpleader proceeding was in Texas, the state of the debtor's residence, on the ground that the Illinois garnishment proceedings gave rise to a lien entitled to full faith and credit in Texas. The minority took the position that Illinois law gave rise to no such lien. Since the case does not involve a question of discrimination, a full analysis would be beyond the scope of this paper. Such an analysis, in addition to resolving the controversy as to whether Illinois law creates a lien, should also concern itself with the question whether the lien, if any, has any significance for the debtor's claim of exemption, or whether its sole function is to give the garnishing creditor a preferred position with respect to other creditors. For a similar problem concerning the law applicable in federal interpleader proceedings, see Griffin v. McCoach, 313 U.S. 498 (1941), discussed in Currie, *Change of Venue and the Conflict of Laws*, 22 U. CHI. L. REV. 405, 492 (1955); Currie, *Change of Venue and the Conflict of Laws: A Retraction*, 27 U. CHI. L. REV. 341 (1960).

and certainly the anti-discrimination clauses of the Constitution do not require a state to treat foreigners better than it treats its own people.

One of these relatively innocuous cases reached the Supreme Court by a circuitous route, providing that Court with an opportunity to say some most unfortunate things and so contribute to the disorderly state of the law in this area.[118] Willard, a resident of Iowa, sued Sturm, a resident of Kansas, in an Iowa court, summoning the railroad, Sturm's employer, as garnishee.[119] The garnishee pleaded to no avail that the debtor's wages were exempt by the laws of the state of his residence, and judgment went against the railroad accordingly.[120] Sturm sued the railroad in Kansas to recover his wages, and the railroad unsuccessfully pleaded the Iowa garnishment in bar.[121] The Kansas Supreme Court affirmed, thus subjecting the railroad to double liability. On jurisdictional principles that are now familiar,[122] but were then spectacularly unsettled, the judgment against the garnishee was entitled to full faith and credit. The Court so held, settling the proposition that service on the garnishee in the circumstances was sufficient to sustain the judgment. But in addition to its error concerning the "situs" of the debt, the Kansas court had expressed the view that the exemption laws of Kansas should have protected the debtor in the Iowa proceedings; and its refusal to recognize the Iowa judgment was based in part on the refusal of the Iowa court to apply those laws. This aspect of the case required, of course, but a single comment, and the Court supplied it: "It may have been error for the Iowa court to have ruled against the doctrine, but the error did not destroy jurisdiction."[123] Not another word was needed. But Mr. Justice McKenna—not the most discriminating analyst to grace the supreme bench[124] —was not content to leave well enough alone. He was moved to set forth his views on exemption statutes in the conflict of laws:

[118] Chicago, R.I. & Pac. Ry. v. Sturm, 174 U.S. 710, 717–18 (1899).

[119] Willard v. Sturm, 96 Iowa 555, 65 N.W. 847 (1896).

[120] The railroad also vainly pleaded an Iowa statute, enacted after the commencement of the garnishment proceeding, granting nonresident debtors the benefit of the exemption laws of the state of their residence. 96 Iowa at 557, 65 N.W. at 849. It is interesting to compare this type of altruism with the solution to be suggested here, that the Constitution requires that non-residents be given the benefit of the exemption laws of the forum *in the absence of a reasonable basis for classification.* See Part V *infra.*

[121] For simplicity we treat the case as if the judgment in garnishment had come first, though the contrary is the fact. 96 Iowa at 556. The Iowa court relied on the circumstance that the garnishment proceeding was the first to be commenced, *cf.* Sanders v. Armour Fertilizer Works, 292 U.S. 190 (1934), and the Supreme Court assumed without discussion that the judgment against the garnishee was entitled to full faith and credit to the same extent as if it had been the first judgment rendered.

[122] See Harris v. Balk, 198 U.S. 215 (1905).

[123] 174 U.S. at 717.

[124] *Cf.* Currie, *Full Faith and Credit to Foreign Land Decrees,* 21 U. CHI. L. REV. 620, 648 (1954).

But we do not assent to the proposition. Exemption laws are not a part of the contract; they are part of the remedy and subject to the law of the forum. Freeman on Executions, sec. 209, and cases cited. . . . As to the extent to which the *lex fori* governs, see Conflict of Laws, 571 *et seq.* . . .

In *Broadstreet v. Clark*, 65 Iowa, 670, the Supreme Court of the State decided that exemption laws pertained to the remedy and were not a defence in that State. This ruling is repeated in *Willard v. Sturm* . . . and applied to the proceedings in garnishment now under review.[125]

Not only was this excursion not necessary to disposition of the case before the Court; it dealt solely with a question of the common law of conflict of laws, and did not concern a federal question. Although the treatment of exemption statutes in conflict-of-laws cases can give rise to constitutional problems under the equal-protection, privileges-and-immunities, due-process, and full-faith-and-credit clauses, no such question was before the Court (other than the question of full faith and credit to the judgment), and Mr. Justice McKenna did not purport to be announcing constitutional principles when he asserted that the exemption statutes of the debtor's domicile do not avail him when he is sued in another state. Nevertheless, by pronouncing the views of the Court on this question of common law, Mr. Justice McKenna gave them an apparently authoritative status and, no doubt unwittingly, discouraged inquiry into the constitutionality of state practices concerning exemptions in the conflict of laws. If it were possible to confine the dictum strictly to the facts of the case before the Court no particular harm would be done, since, as we have noted, no constitutional provision required Iowa, in a proceeding by an Iowa creditor, to give a Kansas debtor the benefit of the exemption laws of Kansas. But the language used is such as can be cited by state courts in support of their refusal to extend the exemption laws of the forum to nonresident debtors.[126] Worse still, the language readily lends itself to support of the proposition that the exemption law of the debtor's domicile may be disregarded by the forum in another type of situation: that in which the creditor and the debtor have a common domicile in a sister state. In this situation the exemption laws of the common domicile cannot be disregarded consistently with either sound conflict-of-laws analysis or sound constitutional interpretation.

This situation, since it does not involve discrimination, is not within the scope of this paper; yet it must be noticed briefly if the problem of discrimina-

[125] 174 U.S. at 717–18.

[126] *Cf.* Kyle & Co. v. Montgomery, 73 Ga. 337, 344 (1884); Annot., 67 L.R.A. 209, 222 (1905); 11 AM. JUR. *Conflict of Laws* § 202. It does not appear whether Iowa law similarly exempted wages. On the assumption that it did, the opinon of the Court can even more plausibly be interpreted as lending encouragement to the view that the equal-protection clause does not stand in the way of withholding the benefit of local exemptions from nonresidents.

tion is to be seen in its proper relation to the deplorable state of the law concerning exemption conflicts generally. Judging by the reports and the reference works, it is fairly common practice for a creditor, unable to collect from his debtor by reason of the exemption laws of their common domicile, to bring garnishment proceedings, usually against the debtor's employer, in another state. The tactic often succeeds, because of the rule of thumb that exemption laws pertain to the remedy, so that foreign law is not relevant, and either (1) the law of the forum provides no similar exemption or (2) if it does, the courts of the forum state hold that local exemption laws are not for the benefit of nonresidents. Thus it may happen that the debtor is deprived of his protection although the laws of the two states are identical.[127] The domiciliary state may well be concerned on account of such stratagems. It may enjoin the creditor from instituting or maintaining the foreign proceedings;[128] with or without statutory basis it may hold the creditor liable to the debtor for damages;[129] it may even make such evasions of its law and policy a penal offense.[130] Yet the forum states continue unconcernedly to entertain such imported litigation; some may even find themselves in the hypocritical position of entertaining such garnishment proceedings while adhering to a strict policy against exportation of litigation for the purpose of evading domestic exemption laws.[131]

[127] Harvey v. Thompson, 2 Ga. App. 569, 60 S.E. 11 (1907). *Cf.* Harwell v. Sharp, 85 Ga. 124, 126, 71 S.E. 561 (1890). Other courts have avoided this result by holding that, when the asset would be exempt both by the law of the forum and that of the common domicile, the law of the forum applies (*e.g.*, Missouri Pac. Ry. v. Maltby & Co., 34 Kan. 125, 8 Pac. 235 (1885), *distinguishing* Burlington & M.R.R. v. Thompson, 31 Kan. 180, 1 Pac. 622 (1884)), though this may be merely the result of a disposition to apply local exemption laws to nonresidents without discrimination. See Goodwin v. Claytor, 67 L.R.A. 209 (N.C. 1904); Wright v. Chicago, B. & Q. R.R., 19 Neb. 175, 27 N.W. 90 (1886); Wabash R.R. v. Dougan, 142 Ill. 248, 31 N.E. 594 (1892) (noting that by an act of 1891, inapplicable to the case at bar, Illinois made applicable the exemption laws of the state of the debtor's domicile). Still other courts have applied the domiciliary exemption law. Drake v. Lake Shore & M.S. Ry., 69 Mich. 168, 37 N.W. 70 (1888); see Kestler v. Kern, 2 Ind. App. 488, 497, 28 N.E. 726 (1891).

[128] See Anderson v. Canaday, 37 Okla. 171, 174, 131 Pac. 697 (1913); Harwell v. Sharp, 85 Ga. 124, 127, 11 S.E. 561 (1890); Sweeny v. Hunter, 145 Pa. 363, 372, 22 Atl. 653 (1891); 2 STORY, EQUITY JURISPRUDENCE § 1224 (14th ed. 1918); 22 AM. JUR. *Exemptions* § 146. *Cf.* Cole v. Cunningham, 133 U.S. 107 (1890).

[129] Anderson v. Canaday, 37 Okla. 171, 131 Pac. 697 (1913) (no statute); Bishop v. Middleton, 43 Neb. 10, 61 N.W. 129 (1894) (statute); Sweeny v. Hunter, 145 Pa. 363, 22 Atl. 653 (1891) (statute). In the absence of statute the right to damages was denied, with an intimation that to recognize such a cause of action would be to deny full faith and credit to the foreign judgment, in Harwell v. Sharp, 85 Ga. 124, 11 S.E. 561 (1890).

[130] Wabash R.R. v. Dougan, 142 Ill. 248, 257, 31 N.E. 544 (1892); Uppinhouse v. Mundel, 103 Ind. 238, 2 N.E. 719 (1885) (denying damages although statute made assignment for out-of-state collection a misdemeanor); Kestler v. Kern, 2 Ind. App. 488 28 N.E. 726 (1891) (*contra* as to damages).

[131] Thus, while Georgia would enjoin foreign garnishment proceedings to evade local exemptions, Harwell v. Sharp, 85 Ga. 124, 127, 11 S.E. 561 (1890), it would refuse to allow

So far as we are aware, no court has ever held such depredations by the courts of the forum unconstitutional, or even considered the matter in constitutional terms. Yet we submit that to disregard the properly invoked exemption laws of the domicile in such a case is to deny full faith and credit to the public acts of the domiciliary state and to deprive the debtor of property without due process of law. This is so because the domiciliary state has an obvious and legitimate interest in the effectuation of its policy for the protection of resident debtors, and the forum state has no interest whatever in the effectuation of its contrary policy—if any.[132]

In summary, we submit:

(1) That in actions by resident creditors the nonresident debtor is entitled by virtue of the equal protection clause to the benefit of the exemption laws of the forum, subject to the qualifications stated: *i.e.*, if the debtor is "within the jurisdiction" of the forum state, and if there is no basis for the classification other than the fact of nonresidence and the state's lack of interest in protecting foreigners.

(2) That in actions by resident creditors no constitutional principle requires that the nonresident debtor be given the benefit of the exemption laws of his domicile.

(3) That in actions between parties having a common domicile, the exemption laws of the domicile, if properly invoked, must be applied by virtue of the due-process and full-faith-and-credit clauses. A fortiori, a judgment of the domiciliary state enjoining prosecution of the claim in the forum state should be entitled to full faith and credit.[133]

Adoption of these propositions would go far toward cleaning up the unseemly mess that exists in this branch of the law. Adoption of the first proposition alone would be beneficial since, apart from the fact that it would eliminate a deplorable type of discrimination voluntarily eschewed by most states, it would materially reduce opportunities for evasion of the law of the common domicile, on the assumption that there is considerable similarity among exemption laws. And the need for injunctions, damage suits, and criminal prosecutions for evasion of the law of the common domicile would be elimi-

---

either local or foreign exemptions while entertaining a proceeding between parties having a common domicile in a sister state, Harvey v. Thompson, 2 Ga. App. 569, 60 S.E. 11 (1907). *Compare* Sweeny v. Hunter, 145 Pa. 363, 22 Atl. 653 (1891), *with* Morgan v. Neville, 74 Pa. 52 (1873).

[132] That a state may not apply its own law, or disregard the law of a sister state, when it has no interest in the application of its legal policy to the case at hand and a sister state has a reasonable basis for the assertion of an interest in the application of its policy, is, we believe, the teaching of the Supreme Court's decisions in analogous cases. See Currie, *The Constitution and the Choice of Law*, 26 U. CHI. L. REV. 9 (1958).

[133] See Comment, *Full Faith and Credit to Foreign Injunctions*, 26 U. CHI. L. REV. 633 (1959); Currie, *The Constitution and "Transitory" Cause of Action*, 73 HARV. L. REV. 36, 66 n.113 (1959).

nated if courts would approach the problem in terms of the legitimate governmental interests of the states instead of mouthing formulas to the effect that exemption laws pertain to the remedy, and have no "extraterritorial" effect.[134]

IV. Classification of Nonresidents in Terms of the Law of the Domicile

The most interesting question concerning discrimination in the conflict of laws relates to the reasonableness of classifying nonresidents in terms of the laws of their home states. We have previously considered this question with reference to the privileges-and-immunities clause, reaching the conclusion that there is a limited category of situations in which such classification is permissible.[135] We consider it here not only because the intrinsic difficulty of the problem makes constant re-examination appropriate, but also because the differences between the equal-protection clause and the privileges-and-immunities clause may require different results when one clause rather than the other is involved.

For purposes of the present discussion it would be desirable to have cases of discrimination in matters of private law such that the privileges-and-immunities clause cannot apply: *e.g.*, cases of discrimination against aliens or foreign corporations. Such cases do not come readily to hand.[136]

[134] It will be observed that one type of case is omitted from the summary: the creditor is a resident of one foreign state and the debtor of another; the disinterested forum is confronted with a conflict between the laws of two other states, each having an interest in the application of its policy. This type of problem has been encountered before in attempts to analyze conflict-of-laws problems in terms of governmental interest. See Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. Chi. L. Rev. 227, 262 (1958). The problem is essentially insoluble by judicial means. In the absence of legislation by Congress under the full-faith-and-credit clause, the most rational dispositions appear to be: (1) Dismissal, including conditional dismissal, on the ground of forum non conveniens where that would not result in injustice, *cf.* Thistle v. Halstead, 95 N.H. 87, 58 A.2d 503 (1948); or (2) application of the law of the forum on the ground that no sufficient reason has been advanced for the application of any particular foreign law (see Currie, *On the Displacement of the Law of the Forum*, 58 Colum. L. Rev. 964, 1017–18 (1958). If the action is not dismissed most courts would probably resort to established choice-of-law rules—a course which in the matter of debtors' exemptions would tend to result in application of the law of the forum; in the generalized case it would often result in the quite capricious frustration of the interest of one or the other of the foreign states.

[135] Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, 69 Yale L.J. 1323 (1960).

[136] Older cases denying alien dependents the right to recover for the wrongful death of a resident do not readily lend themselves to the purposes of the present discussion. See, *e.g.*, Deni v. Pennsylvania R.R., 181 Pa. 525, 37 Atl. 558 (1897); Mariorano v. Baltimore & O.R.R., 216 Pa. 402, 65 Atl. 1077 (1907); Zeiger v. Pennsylvania R.R., 151 Fed. 348 (C.C.W.D. Pa. 1907); Fulco v. Schuylkill Stone Co., 163 Fed. 124 (C.C.E.D. Pa. 1908). In such cases the discrimination is preferably to be considered as directed against the deceased resident (See Currie, *The Constitution and the "Transitory" Cause of Action*, 73 Harv. L. Rev. 36, 46–47 (1959)); on that basis, the question is different from the one considered in this section, which concerns discrimination against nonresidents. If the

We may easily construct one, however, as a variant of a type of case that actually appears in the reports; and this procedure has the advantage of leading into the problem by indicating how the analysis of conflicts problems in terms of governmental interests reveals latent problems of discrimination.

The case concerns the immunity of charitable corporations from tort liability. In 1956 a fifteen-year old girl, apparently residing in New York,[137] enrolled in that state for a western tour to be conducted by American Youth Hostels, a New York corporation conceded to be an eleemosynary institution. The venture included a climb of Mt. Hood, in Oregon, in the course of which the girl fell to her death. Her father, also apparently a resident of New York,[138] sued in that state in his own right and as administrator of the estate. One of the defenses was that the defendant, as a charity, was immune. That defense having been abolished by New York law, the defendant's reliance was necessarily upon the law of Oregon. The Appellate Division sustained this defense on the simplistic ground that the law of the place of injury determines liability in tort, and the Court of Appeals affirmed.[139]

One commentator has remarked that the decision is "in line with classical doctrine . . . although the result in the specific case seems harsh."[140] The arsenal of legal criticism ought to permit a more effective attack than this; and, in fact, we are not so destitute of critical resources as this comment implies. The decision is indefensible in terms of the policies and interests of the states involved. Both New York and Oregon have policies of protection and indemnity for the victim of tortious conduct. Oregon has an overriding policy of fostering and conserving the funds of charitable enterprises.[141]

---

discrimination is considered as directed against the nonresident alien dependents, there is a serious question whether they are persons "within the jurisdiction." In either case, although the reasoning of the Pennsylvania court expresses nothing more than the rank provincialism of its decisions regarding debtors' exemptions (see Deni v. Pennsylvania R.R., *supra*), the fencing out of alien survivors might be justified by doubts as to whether the proceeds of recovery would actually reach and be enjoyed by them. At all events, the Pennsylvania discrimination has been abolished by statute. See PA. STAT. tit. 12, § 1602 (1936). *But cf.* as to workmen's compensation and occupational disease benefits, PA. STAT. ANN. tit. 77, §§ 563, 1410 (Supp. 1958).

137 See Grad, *Conflict of Laws*, in *1959 Annual Survey of New York Law*, 34 N.Y.U.L. REV. 1347, 1355 (1959).

138 Grad, *supra* note 137.

139 Kaufman v. American Youth Hostels, Inc., 6 App. Div. 2d 223, 177 N.Y.S.2d 587 (1958), *modified in other respects*, 5 N.Y.2d 1016 (1959).

140 Grad, *supra* note 137, at 1356.

141 "From the beginning, the overriding public policy of this state . . . has been to protect the assets of charitable institutions from use for any purpose other than that for which they were organized." Landgraver v. Emanuel Lutheran Charity Bd., 203 Ore. 489, 493–94, 280 P.2d 301, 302 (1955). As to the policy foundations for the defense of charitable immunity in general, see PROSSER, THE LAW OF TORTS 784 (1955); 2 HARPER & JAMES, THE LAW OF TORTS §§ 29.16, 29.17 (1956); Annot., 25 A.L.R.2d 29 (1952). For present purposes we assume, with the Oregon court, that to the extent that the rule states a rational governmental

But the decision furthers the interest of neither state. Oregon has no conceivable interest in conserving the assets of a New York corporation which is not so protected by the law of New York, at least where the corporation is not doing business in Oregon. Thus the decision, while advancing no interest of Oregon, frustrates New York's interest in requiring the tortfeasor to provide indemnity. The application of the law of a state having no interest in the matter ought to be regarded as a denial of due process of law.[142] The refusal to apply New York law because the injury occurred outside the state, although New York is the only state whose policies are involved, should also be regarded as a denial of the equal protection of the laws.[143] The only pragmatic consideration that can be adduced in support of the decision is that, if other states similarly apply the simplistic rule that the law of the place of injury governs, there will be uniformity of result irrespective of the fortuitous circumstance that the action is brought in one state rather than another; but the same uniformity would result if all states were to apply the law of New York, on the ground that New York alone is concerned with the matter, irrespective of the fortuitous circumstance that the injury occurred on Mt. Hood rather than in the Catskills.

It follows from this reasoning that, if the action against American Youth Hostels had been brought in Oregon, the courts of that state should have applied New York law with respect to the defense of immunity. The Oregon policy being for the benefit of Oregon institutions, there was no conflict between the interests of Oregon and New York, and, New York being the only interested state, both due process and full faith and credit dictate the application of New York law. And, of course, if the Oregon law is for the benefit of Oregon corporations alone, then the law of the place of injury does not provide immunity for New York corporations. There has been a tentative approach to this sort of thinking in the cases. The trial court in the *Youth Hostels* case, relying on an earlier New York decision,[144] had held that the Oregon rule of immunity was solely for the benefit of Oregon corporations, and hence that, though the law of the place of injury was controlling, it furnished no defense.[145] The Appellate Division, however, rejected this reason-

---

policy it is one of conserving the assets of charities. With the soundness of the rule we are not here concerned; from the standpoint of conflict-of-laws analysis, Oregon has the right to be wrong, and the disposition of conflicts problems should not be influenced by one's convictions as to the wisdom or unwisdom of a state's internal policy.

[142] See Currie, *The Constitution and the Choice of Law*, 26 U. CHI. L. REV. 9, 16 (1958).

[143] *Cf.* Currie, *The Constitution and the "Transitory" Cause of Action* (pts. 1–2), 73 HARV. L. REV. 36, 268 (1959); see also Part VI *infra*.

[144] Heinemann v. Jewish Agric. Soc'y., 178 Misc. 897, 37 N.Y.S.2d 354 (Sup. Ct. 1942), *aff'd*, 266 App. Div. 907, 43 N.Y.S.2d 746 (1943).

[145] Kaufman v. American Youth Hostels, Inc., 13 Misc. 2d 8, 174 N.Y.S.2d 580 (Sup. Ct. 1957).

ing, taking the Oregon law to be for the benefit of charities generally.[146] This result has actually been commended as fortifying the *lex loci delicti* rule and "clarifying" the law,[147] although it makes no sense in pragmatic terms and despite the serious constitutional questions involved. On our analysis, not only should the Oregon rule of immunity be construed as inapplicable in the *Youth Hostels* situation, but its application should be forbidden on sound constitutional principles.

Where all the parties are of New York, as in the *Youth Hostels* case, this position is clear and strong. The logic of the position leads us to say, however, that if the deceased and her father had been residents of Oregon, the same result should follow; the defense of immunity should be disallowed. At this stage we encounter the problem of discrimination. If Oregon, in actions by its own residents, affords domestic charities the defense of immunity, may it deny that defense to foreign charities consistently with the constitutional requirement of equal protection? Before stating and explaining a qualified affirmative reply to that question, we may examine briefly other decisions bearing upon the problem.

No case has been found in which the court has denied the benefit of a domestic rule of immunity to a foreign charity, and in consequence the question of discrimination has not arisen. It is fair to say that, so far as the decided cases disclose, the courts usually extend the benefit of the domestic rule of immunity without regard to the law of the state of incorporation, and also without regard to whether the injured person is a resident or a nonresident of the forum state. It is equally fair to say that such decisions make little sense.

The Supreme Court of Kansas, without considering the conflict-of-laws question, allowed the immunity defense in an action for personal injuries brought—apparently by a local resident—against the Salvation Army, an Illinois corporation.[148] Three circumstances may justify the decision: (1) It does not appear that the law of Illinois was invoked by the plaintiff; (2) Illinois law at the time provided for similar immunity;[149] and (3) the Salvation Army, though incorporated in Illinois, was carrying on its work of charity in Kansas to such an extent that the courts of that state might with some reason have desired to give it the same protection afforded to domestic charities. Such a policy may seem a rather futile one in view of the fact that this nationwide organization will be held responsible for injuries inflicted in states not recognizing the immunity doctrine; but it is perhaps no more so than application of the immunity rule to domestic corporations, since, either under the rule that the *lex loci delicti* governs or under the interest analysis advocated

[146] Kaufman v. American Youth Hostels, Inc., 6 App. Div. 2d 223, 177 N.Y.S.2d 587 (1958).

[147] Note, 33 ST. JOHN'S L. REV. 147, 148 (1958).

[148] Webb v. Vought, 127 Kan. 799, 275 Pac. 170 (1929).

[149] Hogan v. Chicago Lying-In Hospital, 335 Ill. 42, 166 N.E. 461 (1929).

here, it is clear that the assets of a Kansas charity will be diverted by tort judgments for injuries to local residents in states not recognizing the immunity rule.[150]

A California case injects the novelty of a charitable enterprise incorporated not by another state but by act of Congress.[151] The application of the law of the forum and place of injury to bar recovery by a local resident does not obviously serve any interest of either California or the national government. Assuming congressional power to incorporate such enterprises, it probably follows that Congress could confer an immunity which would be entitled to recognition not merely as a matter of choice of law but by reason of the supremacy clause; but the California court made no inquiry into the existence of any such national policy. As in the *Salvation Army* case, however, the court may have felt that, by reason of their extensive local activities, the Boy Scouts were essentially a domestic charity.

The next case chronologically is the only one in which the problem has been considered as one of construction and interpretation instead of in accordance with rules of thumb; it has already been mentioned.[152] The plaintiff was a resident of New York and the defendant was a New York corporation. The injury occurred in New Jersey, where the corporation maintained a training farm for refugees. New Jersey gave immunity to charities in actions by beneficiaries, while New York had abrogated the immunity rule. Finding that the New Jersey immunity rule was intended to benefit New Jersey charities only, the court did not reach the question of which law was controlling, since, under either law, the defense would be denied. The decision is an enlightened one, and it is cause for regret that its authority has been impaired by later New York decisions.[153]

In *Hinman v. Berkman*[154] a United States District Court in Missouri,

[150] In Bodenheimer v. Confederate Memorial Ass'n, 68 F.2d 507 (4th Cir. 1934), immunity was upheld in an action by a citizen of North Carolina against a Mississippi corporation for injuries sustained in Virginia, where the corporation carried on what was apparently its principal activity. Of these three states the court referred to the law of only one (Virginia), and that with no great deference. Reliance was placed on the court's own interpretation of the general common law. The decision does nothing to further the present inquiry. It is a period-piece, interesting only as a reminder of the pre-*Erie* incongruity of deciding cases in such a way as to disregard the governmental interests involved. See Currie, *Change of Venue and the Conflict of Laws: A Retraction*, 27 U. CHI. L. REV. 341 (1960).

[151] Young v. Boy Scouts of America, 9 Cal. App. 2d 760, 51 P.2d 191 (1935).

[152] Heinenmann v. Jewish Agric. Soc'y., 178 Misc. 2d 897, 37 N.Y.S.2d 354 (Sup. Ct. 1942).

[153] See note 146 *supra*. A possible objection to the court's analysis is that it overlooked New Jersey's interest in fostering the charitable enterprise as a local institution, though incorporated elsewhere. Such a consideration might justify New Jersey's allowance of the defense in an action by a local resident; it does not, however, mean that New York should forego its interest in providing compensation for its own residents.

[154] 85 F. Supp. 2 (W.D. Mo. 1949).

applying Missouri law in a diversity situation, extended the benefit of the local rule of charitable immunity to a New York corporation, well knowing that New York had abrogated the immunity rule. It does not appear positively that the plaintiffs were residents of Missouri, nor is there indication of the extent of the corporation's activities in that state. The opinion treats such matters as unimportant; the decision flows inexorably from the rule of thumb that the law of the place of injury determines liability in tort.[155]

The *lex loci delicti* rule of thumb has recently been endorsed, and the method of construction and interpretation rejected, by a federal court in Washington.[156] The plaintiff, a California citizen enrolled in Whitworth College at Spokane, was injured in Idaho in the course of a college outing known as a "Snow Frolic." The reasoning of the court follows the conventional sequence of steps, and in the end becomes involved with the troublesome problem of retroactivity in conflict of laws:[157] By way of the *Erie-Klaxon* doctrine[158] the district court is referred to the choice-of-law rule of Washington, the state in which it sits; that rule in turn points to the law of the place of injury, Idaho, which grants immunity to charitable corporations; the Idaho rule is not offensive to Washington's public policy; hence it is the rule of decision and the defendant is not liable. But plaintiff pressed the argument that has enjoyed brief recognition in New York: Is not the Idaho rule of immunity designed solely for the protection of Idaho charities, and would not Idaho refuse to apply it for the benefit of a foreign corporation not similarly protected by the law of its domicile? The lone decision cited in support of this approach[159] was rejected on the ground that it "admittedly rests upon 'principle' alone."[160] In addition the court found no reason to suppose that Idaho would be so discriminating as to limit its immunity rule to cases in which it had an interest. Then came the final fillip: The injury occurred more than a year and a half before Washington itself, by judicial decision, had abandoned the rule of immunity; hence, said the court, "[E]ven if I assume that the Idaho Court would determine whether defendant was immune by consulting the law of Washington, the state of its incorporation, I must also assume that the Idaho Court would take the Washington law

[155] To the same effect (except that the law of the state of incorporation is not noticed) is Allison v. Mennonite Publications Bd., 123 F. Supp. 23 (W.D. Pa. 1954); but here the ruling as to the applicability of the *lex loci delicti* is dictum, since the holding is that the corporation is not a qualified charity.

[156] Jeffrey v. Whitworth College, 128 F. Supp. 219 (E.D. Wash. 1955).

[157] *Cf.* 4 RABEL, THE CONFLICT OF LAWS—A COMPARATIVE STUDY, pt. 16 at 501 (1958).

[158] Erie R.R. v. Tompkins, 304 U.S. 64 (1938); Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).

[159] Heinemann v. Jewish Agric. Soc'y, 178 Misc. 2d 897, 37 N.Y.S.2d 354 (Sup. Ct. 1942).

[160] 128 F. Supp. at 225.

as it stood at the time of plaintiff's injury and, therefore, would be obliged to conclude that defendant was immune from tort liability."[161]

This last circumstance seems at first glance to deprive the case of all its complexity. The plaintiff could hope to recover only on the basis of either Washington law or Idaho law; if the law in force at the time of the injury is controlling, she has no hope on either basis. If there had been no reference to foreign law, the federal court in Washington might have held simply that "the plaintiff's substantive rights became fixed as of the time of her injury."[162] If so, the result would have been the same as that reached circuitously by the reference to Idaho law and back. On the other hand, if there had been no reference to Idaho law, the court might have concluded that abrogation of the common-law doctrine of immunity had the effect of extirpating retroactively an erroneous exception to the general principles of liability, thus allowing recovery for injuries suffered previously.[163] We shall not explore the merits of that choice here. It is sufficient to point out that the circuitous method considered by the court, of determining the rights of the plaintiff under Washington law by reference to Idaho law, involves the risk that the possibility of recovery under the second alternative may be foreclosed,[164] whereas if the question of immunity had been straightforwardly considered according to the law of Washington, without reference to the law of a state having no concern in the matter, that possibility would have been clearly open to consideration.

Hinman v. Berkman[165] is nearly an ideal case for our purposes if we make two assumptions: (1) that the plaintiffs were residents of Missouri and (2) that the New York charity was not carrying on its benevolent operations in Missouri. On those assumptions Missouri would have served its own interests without impairing the interests of any other state by construing the immunity exception as applicable only to local charities, thus holding the defendant liable. As one commentator has said, with insight rarely so aptly expressed:

> Indeed, it is difficult to see what conceivable interest Missouri might have in attempting to protect a foreign corporation from dissipating its trust funds by payment of

[161] *Ibid.*

[162] *Ibid.*

[163] *Cf.* Molitor v. Kaneland Community Unit Dist., 18 Ill. 2d 11, 25–29, 163 N.E.2d 89, 96–98 (1959), where, in abrogating the comparable doctrine of immunity for municipal corporations, the court expressly limited its decision to prospective operation, thus avoiding the retrospective operation that presumably would have otherwise resulted. See 163 N.E.2d at 103–04 (dissenting opinion). When the Supreme Court of Washington abrogated the rule of immunity for charities the majority did not discuss the possibility of retroactive effect, nor did it limit the effect of the decision in time; and a dissenting justice assumed that the decision would operate retrospectively. Pierce v. Yakima Valley Mem. Hosp. Ass'n, 43 Wash. 2d 162, 181–83, 260 P.2d 765, 776 (1953).

[164] "She either had, or did not have, an enforceable claim or cause of action *under Idaho law* on February 12, 1952 [the date of injury]." 128 F. Supp. at 225. (Emphasis added.)

[165] 85 F. Supp. 2 (W.D. Mo. 1949).

damages, where such corporation is not so protected by its domiciliary state and any protection by Missouri law would . . . hence remain completely ineffective.[166]

On the other hand, New York has no policy for the protection of its charitable corporations, and hence can have no interest in conflict with that of Missouri. There is here no true problem of conflict of laws. There is only a question of construction of Missouri law, to determine whether that state has an applicable policy of protection and indemnity for its residents injured by tortious conduct; and there is little difficulty in reaching an affirmative answer to this question if the immunity rule is interpreted as an exception for local charities only. Given that conclusion, there is only one sensible thing for the Missouri court to do in the circumstances: to give judgment against the foreign charity.

Would such a result conflict with the equal-protection clause? We have no hesitation in saying that it would—*if* the ultimate formulation were to the effect that immunity is denied to all foreign charities without distinction. If the state of incorporation should have the same immunity rule as that of Missouri there would be no support for denial of the exemption other than a desire on the part of Missouri to eat its cake and have it too—to sacrifice the interests of local plaintiffs in an effort to foster charitable enterprise, while protecting local plaintiffs against foreign charities merely because they are foreign. Denial of immunity in such a case may very well lead to retaliation: the domiciliary state refuses immunity to Missouri charities, and retaliation could be relieved, if at all, only by the cumbersome and unseemly device of reciprocity. In such a context reciprocity implies that the rights of the parties will be determined neither by rules for choice of law nor by reference to enlightened governmental interest. Thus a Missourian suing a charity incorporated in State X might fail while another Missourian suing a charity incorporated in State Y might succeed, although all three states provide for immunity, solely because State X has agreed to extend immunity to Missouri charities while State Y has not. Surely the equal-protection clause prevents such a debacle. The minimum significance of federal union should be that in such a case Missouri is expected to treat foreign corporations even-handedly, in the full assurance that other states will, and indeed must, do likewise with respect to Missouri corporations.

The fact remains that for Missouri to give immunity to the New York corporation in our hypothetical case, where New York law provides no immunity, is nonsense. This proposition is reconcilable with that advanced in the preceding paragraph because Missouri can avoid both the anomaly

[166] Annot., 25 A.L.R.2d 29, 56–57 (1952). The complete passage suggests that Missouri's protection would be limited to actions brought in Missouri. That is not so, since, as the cases discussed above disclose, any state in which the action is brought is likely to apply the law of the place of injury to give immunity. The general point as to futility is well made, however, since the corporation is liable for injuries incurred in the state of its domicile.

of protecting the New York charity and the encroachment on the equal-protection clause by extending the benefit of its immunity rule to foreign charities similarly protected by their domiciliary laws. In so doing Missouri does not draw the line of classification between domestic and foreign charities, but between protected and unprotected charities. Such a classification is reasonable because it involves no invidious and hostile discrimination against foreign charities because they are foreign, but seeks only to avoid the futility and irrationality of sacrificing a domestic interest to no purpose. Specifically, Missouri might accord to the foreign charity the immunity provided by Missouri law, or that provided by the state of incorporation, whichever is more restricted in scope and degree.[167] For example, if by Missouri law the immunity is available only when the action is brought by a beneficiary of the charity, but by the law of the domiciliary state it is available whether the action is by a beneficiary or a stranger, Missouri might restrict the defense to actions by beneficiaries; and the same result would follow if the respective laws were reversed. The Missouri position thus formulated would not violate the constitutional prohibition against discrimination: equal protection does not require that Missouri give foreign corporations a greater degree of immunity than it gives its own, nor does it prohibit a classification which limits the foreign corporation to the degree of immunity conferred upon it by the laws of the state which created it.[168]

We have no difficulty in fitting this solution into our previous analysis of such differential treatment in connection with the privileges-and-immunities clause.[169] It is easy to predicate recovery on the law of Missouri; for, despite the fact that Missouri appears superficially to provide no cause of action for a resident injured by a charity, it is apparent that Missouri has two policies: a basic policy for the protection of its residents against tortious injury, subject only to an exception in favor of local charities.[170] Moreover, the immunity conferred is not one enjoyed by the citizenry of the state in general,

[167] For the variety of ways in which the "rule" of immunity is qualified, see Pierce v. Yakima Valley Mem. Hosp. Ass'n, 43 Wash. 2d 162, 174–75, 260 P.2d 756, 772 (1953); Annot., 25 A.L.R.2d 29 (1952).

[168] The reference here proposed to the law of the state of incorporation should be distinguished from a choice-of-law rule of the traditional type making similar reference. Such a choice-of-law rule would imply application of the law of the domiciliary state irrespective of the interests of the state of the forum and the plaintiff's residence; our formulation assumes that if the state of the plaintiff's residence has no policy of immunity for charities it would resolve the conflict with the law of the corporate domicile in favor of its own policy of imposing liability for the protection of its residents.

[169] Currie & Schreter, *supra* note 135.

[170] "It should first be noted that we use the term 'immunity rule' merely as a matter of convenience. The 'rule' is that one is liable for his negligent or tortious conduct.... The immunity from suit granted charitable institutions, in actions involving tortious conduct, is an exception to these rules." Pierce v. Yakima Valley Mem. Hosp. Ass'n, 43 Wash. 2d 162, 165, 260 P.2d 765, 768 (1953).

but is available only to a special type of enterprise deemed to be deserving of unusual protective treatment. Thus there is a clear analogy to the case of the disabilities imposed upon married women for their protection—a case with respect to which we have concluded that similar differential treatment by reference to the law of the domicile is consistent with the privileges-and-immunities clause.[171] Such differential treatment is discriminating rather than discriminatory. It does not entail the cycle of retaliation and reciprocity that is typical of unconstitutional discrimination. If other states respond in like manner, by limiting residents of the first state to the degree of immunity afforded by the law of that state if it falls short of the immunity conferred by the other, this can hardly be deprecated as retaliation. It is only a precise ordering of affairs so that the interests of each state will be maximized, with avoidance of what is sometimes futile and pointless altruism, while not penalizing foreigners merely because they are foreigners.

We do have difficulty, however, in determining the extent to which this sort of differential treatment can appropriately be applied to cases of a different type. We have previously suggested that, so far as the privileges-and-immunities clause is concerned, the area in which the device may be employed may be quite limited. We have suggested that two conditions may be necessary to justify it: (1) It must be possible to discern in the law of the forum *two* policies, one of which will suffice to support the judgment, as the basic policy for the protection of residents against tortious injury would sustain the judgment in the case of the foreign charity; and (2) the other policy, conferring the exceptional privilege or immunity, must not be one enjoyed or potentially enjoyed by citizens or residents of the forum state in general, but only by a specially favored segment of the population, such as married women, infants, or charities. The latter condition was probably suggested by the concept that the privileges and immunities guaranteed by article IV are only those that "pertain to citizenship";[172] an inference is possible that the force of that article can be avoided with certainty only where the privilege or immunity does not attach to citizenship or residence as a matter of course, but only to membership in a special class. But the fourteenth amendment does not speak of the privileges and immunities of citizens of the states; it simply requires, for all persons within the jurisdiction, the equal protection of the laws. The limited character of the privilege or immunity would therefore seem to be irrelevant in the context of the equal-protection clause; and the present study has generated doubts as to whether it has the significance attributed to it in the context of privileges and immunities.[173]

[171] Currie & Schreter, *supra* note 135.

[172] Conner v. Elliott, 59 U.S. (18 How.) 591, 593 (1855).

[173] The concept that the privileges and immunities guaranteed by article IV are only those that "pertain to citizenship" was not taken as seriously in the former study as the discussion in the text may seem to imply. The position taken was that if a state, having a

The problem may be clarified if we refer again to debtors' exemptions. Some states, probably a majority, have avoided the problem of invidious discrimination against foreigners simply by making the exemption laws of the forum applicable to all persons without distinction as to residence. As we have seen, this is highly objectionable if debtor and creditor have a common foreign domicile;[174] with respect to actions by local creditors, however, it is unobjectionable on constitutional grounds. Certainly all debtors, domestic and foreign, are accorded equal protection of the laws. It is true that such a policy sacrifices the domestic interest in protecting local creditors where the law of the creditor's domicile gives the debtor less protection than does the law of the forum; but the local creditor who suffers as a result can hardly complain. He cannot demand that his home state set up intricate classifications in order to protect him to the full limit of its power to do so. The purpose to treat all debtors equally without regard to whether they are domestic or foreign, and the purpose to simplify law administration by obviating frequent reference to foreign law in matters of small moment, surely justify such a policy.

On the other hand, we have firmly concluded that those states that indiscriminately deny the benefit of local exemption laws to nonresidents violate the equal-protection clause. The question is, what courses are open to such a state in order to conform to the constitutional requirement, other than extending the benefit of local exemption to nonresidents?

One such course, actually adopted by some states, is to give nonresidents the benefit of the exemption laws of their respective domiciles.[175] This is unobjectionable on constitutional grounds. To the extent that it affords more liberal exemptions than those provided by the law of the forum it sacrifices the domestic interest in protecting local creditors; but such differential treatment of creditors is amply justified by the purpose of avoiding conflict with the interests of sister states. This, it may be observed at this point, is a basic principle of general applicability: a purpose to avoid conflict with

---

policy for the protection of local married women, were to deny that protection to all foreign married women at the suit of local creditors, the privileges-and-immunities clause would be infringed. Thus there was a basic repudiation of the restrictive interpretation. One alternative to the unconstitutional denial of the privilege to citizens of other states would be to extend it to them generally; but this appears to be irrational where the foreign married woman is unprotected by the laws of her home state. Hence we turned to the intermediate course of classifying all married women according to the protection afforded by the domiciliary law, which appears eminently reasonable and nondiscriminatory. But since there are some situations in which it appears difficult to accept the *bona fides* of such classiffications, we resorted again to the rejected concept of privileges that inhere in citizenship in order to fortify the reasonableness of the classification in a clear case. This makeweight argument now seems inconsistent with the underlying premise as to the character of the rights protected.

[174] See text at note 127 *supra*.

[175] See note 120 *supra*.

the interest of another state or nation is a legimitate basis for classification. From the standpoint of the debtors, while some of them are treated less generously than others, the distinctions made are not arbitrary but are the result of a reasonable classification according to the protection afforded by the home state.

May the state adopt the intermediate course and, instead of giving nonresident debtors broadly the benefit of the law of the forum, or of the law of their respective domiciles, give them no more than the lesser of the two exemptions, thus maximizing its interest in protecting local creditors without infringing the equal-protection clause? We think that it may. We have already explained our reasons for this view in discussing the foreign charity and the foreign married woman. Here as in those cases it is easy to discern two state policies: one for the protection of local creditors, subject to an overriding exception in favor of local debtors. The only difference is that debtors' exemptions exist for the potential protection of all residents of the state, while charitable immunity and the disabilities of coverture exist for the benefit of special classes. That difference seems without significance in a discussion of the equal-protection clause; and, indeed, it would seem anomalous to make a distinction in this respect between an alien debtor, residing in a sister state, who can invoke only the equal protection clause, and the nonresident debtor who is a citizen of a sister state, and can invoke both clauses.

While we think a state may adopt such a policy, we think it unlikely that any state would do so, or that it would be well advised to do so, in such a context as that of debtors' exemptions. Here the amounts involved are typically small, the cases are likely to arise in inferior courts, and the burden of inquiry into foreign law is disproportionately great. The forum state's own interest in the expeditious and convenient administration of justice may well outweigh its interest in assisting local creditors to squeeze marginal dollars out of foreign debtors. The case of the local resident injured by a foreign charity, liable under its domiciliary law, is quite another matter; the state that fails to afford maximum recovery in such cases has probably not consulted its true interests.

We think the intermediate course is also available in other situations in which we have previously doubted its appropriateness. If the Statute of Frauds is regarded as expressing a policy of protection for persons charged with promissory liability, the persons intended to benefit are primarily local residents; and while a state could not justify refusing its protection to all nonresidents, it could justify, so far as the Constitution is concerned, withholding the protection of the local statute to the extent that it exceeds the protection afforded by the law of the domicile.[176] As in the context of debtors' exemptions, however, the game might not be worth the candle; the more altruistic

[176] For the contrary view, see Currie & Schreter, *supra* note 135.

and more convenient practice of applying the local statute to all alike—in actions by local creditors—seems definitely preferable as a matter of policy. It may be that such considerations as to the practical inutility of the intermediate course in this context influenced our earlier opinion as to its validity; but of course it is unfortunate for such considerations to influence the determination of the constitutional question.[177]

The most difficult situation in which to justify classification in terms of the nonresident's home law has seemed to us to be that involving the rule that actions for personal injuries shall survive the death of the tortfeasor.[178] California, along with a number of other states, has by statute abrogated the common-law rule of abatement, and the California Supreme Court has applied the principle of survival to a situation in which, all parties being residents of California, the injury occurred in Arizona, where the common-law rule of abatement prevailed.[179] This decision properly effectuated the interests of California without impairing any interest of Arizona.[180] What of the situation in which an Arizona plaintiff brings his action in California against the administrator of the deceased California tortfeasor? Rather plainly, for California to deny the benefit of its survival statute to nonresidents generally would be a violation of the equal-protection clause (or the privileges-and-immunities clause). Would it be permissible to grant that benefit or deny it according to whether the law of the state where the plaintiff resides also provides for survival?

In a superficial way, it might be said that California has an "interest" in protecting the estates of local decedents against tort liability, subject to an overriding exception in favor of securing compensation for local victims. But an interest is the product of the application of legal policy to a state of facts; and it is questionable whether California can be said to have retained a policy of protecting the estates of decedents against liability for their torts in any situation. If not, California can have no interest in their protection, and there is no California law in existence to preclude recovery by any nonresident. Because we could not discern in California law any residual policy for the protection of decedents' estates we have previously expressed the opinion that a classification of nonresident plaintiffs according to their domiciliary laws in order to determine their right to sue California estates would be not

177 Following the same basic analysis, the intermediate course of classification according to the law of the state where the mortgagor resides should be available in the case of the North Carolina statute barring deficiency judgments on purchase-money mortgages, and there the stakes may be sufficiently great to warrant the trouble involved. See Bullington v. Angel, 220 N.C. 18, 16 S.E.2d 411 (1941), discussed in Currie & Schreter, *supra* note 135.

178 See Currie & Schreter, *supra* note 135.

179 Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953).

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

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.[181]

We adhere to the view that differential treatment of nonresidents on the basis of their domiciliary laws cannot be justified unless the law of the forum expresses two policies, one of which sustains the judgment against the disfavored nonresident. We fear, however, that in concluding that California retained no policy for the protection of decedents' estates we may have ventured beyond the proper function of the conflict-of-laws technician. That function is to analyze the applicability of a state's law to cases having foreign aspects, given the state's authoritative determination of the policies expressed in its laws and its interest in applying those policies. Except in extreme cases, the authoritative determination of the policy and of the circumstances in which the state has an interest in applying it are to be accepted, whether the technician as a lawyer-at-large would agree with the determination or not. Even now we cannot imagine a responsible court's holding that a statute abrogating the common-law rule of abatement leaves in force a residual policy for the protection of local estates against tort liability; but if the California courts should declare that such is the correct interpretation, we could say only that the decision was unfortunate, not that it was "erroneous" or violative of constitutional principle. In that event we should have to concede the validity of a classification of nonresident plaintiffs according to the laws of their home states.

We advocate a method of conflict-of-laws analysis that emphasizes the governmental interest of the individual state and in general counsels that the courts of the state should decide conflict-of-laws cases in such a way as to maximize, or at least not ignore, those interests. Because such a method quickly encounters problems of discrimination, we have been at pains to acknowledge the force of constitutional restraint, and have declared our intention of leaning over backward in order to give the constitutional prohibitions against discrimination maximum scope. In considering the reasonableness of classifications in terms of the law of the nonresident's home state, however, and in taking the view that such classifications are permissible only in a very narrowly defined type of case, we seem to have leaned too far backward, with the inevitable result.[182]

V. Latent Discrimination in Conflict-of-Laws Rules

Analysis in terms of governmental interests will reveal, we believe, that many a conventional conflict-of-laws rule discriminates arbitrarily against

[181] Currie & Schreter, *supra* note 135; see also Currie, *Survival of Actions: Adjudication versus Automation in the Conflict of Laws*, 10 Stan. L. Rev. 205, 231–32 (1958).

[182] This need not be understood as a definitive retraction of the earlier opinion. Both studies are regarded as tentative, and relate to an area in which there is little authoritative guidance. It seems appropriate to tender both views for the consideration of other students of the problem.

residents and citizens of the state adhering to and applying the rule. It is, of course, difficult to adduce specific authority in support of this proposition. Discussions of conflict-of-laws problems in terms of governmental interests have been relatively rare. The natural-law flavor of rules such as those referring to the law of the place of contracting, or the law of the place of injury, has had a tendency to create the impression that the results of applying such rules are not only reasonable but unavoidable. Moreover, because choice-of-law rules in particular are couched in neutral and impersonal terms, and seldom lead to perceptible discrimination against nonresidents, they have acquired an aura of irreproachability so far as discrimination is concerned. Nevertheless, instances of discrimination against nonresidents in conflicts cases have been found, and it is probable that the instances of discrimination against residents are not only more numerous but more intimately related to the traditional conflict-of-laws system.

Perhaps the most direct judicial support for the proposition here advanced is the case of *Gregonis v. Philadelphia & Reading Coal & Iron Co.*,[183] involving the doctrine of forum non conveniens. The plaintiff, then a resident of Pennsylvania, was injured in the course of his employment in that state. Thereafter he became a resident of New York and brought action there against his employer, a Pennsylvania corporation. The appellate division reversed a judgment for the plaintiff and ordered the complaint dismissed on the ground that the injury occurred outside the state, the defendant was a foreign corporation, and the plaintiff *at the time of the injury* was a nonresident. The court of appeals in turn reversed this judgment and affirmed the judgment of the trial term:

> 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, which reads: "Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." . . . When the Supreme Court says to one resident plaintiff, "We will not hear your case against a Pennsylvania corporation for a tort committed within that State," and has the power to say to another resident, "We will hear your case on like facts," it comes very near to a violation of these constitutional provisions.[184]

The support derived from this case is the stronger because it is by no means obvious that a classification that would deny the plaintiff a New York forum in this situation would be unreasonable. A desire to avoid an important change

[183] 235 N.Y. 152, 139 N.E. 223 (1923).

[184] *Id.* at 159, 139 N.E. at 225.

in the strategic relationship between the parties as the result of a subsequent event wholly within the plaintiff's control, as well as a desire to avoid the establishment of New York residences solely for the purposes of litigation, would seem to be adequate justification for a rule determining the applicability of the doctrine of forum non conveniens as of the time of the injury. On the other hand, New York's giving effect to the subsequent change of residence so as to treat alike all who are residents when suit is filed, irrespective of residence at the time of the injury, is constitutionally unobjectionable. To the extent that this alters the position of the parties as it existed at the time of the injury, the change seems justified by New York's evidently strong policy of opening its courts to all residents alike.[185]

If refusing access to the New York courts in the *Gregonis* situation would amount to a denial of equal protection of the laws, so, a fortiori, would a similar refusal of access to those courts in an action by a nonresident citizen of New York. Yet according to a widely held belief, the forum non conveniens doctrine avoids conflict with the privileges-and-immunities clause only when it is couched in terms of residence rather than citizenship.[186] Indeed, the Supreme Court has in effect said to Missouri that it may constitutionally adopt the principle of forum non conveniens only if it closes its courts to all nonresidents, including nonresident citizens of Missouri.[187] We have previously concluded that this is a mistaken view of the matter, and that a state may constitutionally include its nonresident citizens in the class of plaintiffs who are not precluded from resorting to its courts by the doctrine of forum non conveniens without violating the provisions of article IV.[188] Here we submit the further proposition that nonresident citizens may not be excluded without infringement of the equal-protection clause. Nonresident citizens remain subject to compulsory process issuing from the courts of the state,[189] to the taxing power of the state,[190] and to the police powers of the state.[191] They are clearly, therefore, persons "within the jurisdiction"; and

[185] It would not contribute to the analysis to suggest that there is no change in the substantive rights and obligations of the parties, the right to sue in the courts of New York being merely "procedural." The fact is that the change of residence gave the plaintiff an important strategic advantage he did not have before; and there have been instances in which the provision of a forum not previously available to the parties to an existing controversy has been thought, if not unconstitutional, repugnant to judicial sensibilities. *Cf.* Jacobus v. Colgate, 217 N.Y. 235, 111 N.E. 837 (1916). Whether the availability of the new forum results from a change in the plaintiff's residence or a change in the law of the forum, the justification for providing it should be determined by reference to the state's interest in thus altering the original position of the parties.

[186] *Cf.* Douglas v. New York, N.H. & H.R.R., 279 U.S. 377 (1929).

[187] Missouri *ex rel.* Southern Ry. v. Mayfield, 340 U.S. 1 (1950).

[188] Currie & Schreter, *supra* note 135.

[189] Milliken v. Meyer, 311 U.S. 457 (1940).

[190] *Cf.* Cook v. Tait, 265 U.S. 47 (1924).

[191] *Cf.* Skiriotes v. Florida, 313 U.S. 69 (1941).

there is no apparent basis for classifying them differently from residents for this purpose, such as that which has been suggested in the case of the plaintiff who has changed his residence between the time of injury and the time of bringing suit.

The strongest support for the proposition that conflict-of-laws rules may discriminate arbitrarily between local residents is furnished by two Supreme Court decisions that do not even mention the equal-protection clause. In *Hughes v. Fetter*[192] and *First Nat'l Bank v. United Air Lines, Inc.*,[193] the Supreme Court held that statutes of Wisconsin and Illinois, construed as closing the courts of those states to actions for wrongful death occurring outside the state, were invalid as conflicting with the full-faith-and-credit clause. In both cases the deceased was a resident of the forum state. In our view the decisions cannot be supported on the basis of the full-faith-and-credit clause, but are readily supported by the equal-protection clause, these states having discriminated against certain of their own residents without reasonable justification.[194] Admittedly, one could wish for more direct support for our proposition than cases that do not cite the equal-protection clause; but the argument that the vice of the state legislation in those cases was arbitrary discrimination against local residents, rather than refusal of due deference to the law of another state, is a compelling one; and until that argument is refuted we shall regard the cases as strongly supporting the proposition that unconstitutional discrimination against residents may be found in conflict-of-laws rules.[195]

[192] 341 U.S. 609 (1951).

[193] 342 U.S. 396 (1952).

[194] See Currie, *The Constitution and the "Transitory" Cause of Action* (pts.1–2), 73 HARV. L. REV. 36, 268 (1959). The argument is too long even to be sketched here, but its essential points are: (1) The holding that full faith and credit requires the state to provide a forum is inconsistent with the Court's reservation to that state of freedom to apply its own rather than the foreign substantive law (Hughes v. Fetter, 341 U.S. 609, 612 n.10 (1951)); (2) no reason consistent with other policies of the forum state appears for the differential treatment of residents killed within and those killed without the state; and (3) as a matter of history, the first of the two statutes, which seems to have inspired the interpretation of the other, appears to have been no more than an unwanted, but supposedly necessary, incident of a legislative scheme to discriminate against *nonresident* decedents killed by local defendants.

[195] It is true that the result in the *Hughes* case would probably have been the same if the deceased had been a nonresident: Wisconsin would still have been required to entertain the action against the resident defendant. But that result may be rested on the equal-protection clause as applied in the *Kentucky Finance* case (see note 46 *supra*), or on the due-process clause (*cf.* note 47 *supra*), or, in the case of a citizen of another state, on the privileges-and-immunities clause (*but cf.* Chambers v. Baltimore & O.R.R., 207 U.S. 142 (1907), discussed in Currie, *supra* note 194, at 59 n.90). But Wisconsin would not have been required to provide a forum if all the persons involved had been nonresidents; in that situation the doctrine of forum non conveniens, approved in Douglas v. New York N.H. & H.R.R., 279 U.S. 377 (1929), would have supported dismissal. This result is difficult to explain if the full-faith-and-credit clause is the source of the obligation to provide a forum; it is readily explainable if the problem is analyzed in terms of unconstitutional discrimination. See Currie & Schreter,

Explicit, though non-authoritative, judicial support for invoking the equal-protection clause in ordinary conflicts cases to avoid arbitrary discrimination against local residents is found in an early Illinois case that involved the same statute, barring action for a "death occurring" outside the state. Confronted with a case in which a local resident had been injured in Illinois, and had died in an Indiana hospital, the Illinois Supreme Court rewrote the statute so that the place of the "wrongful act, neglect or default" became controlling, rather than the place of death.[196] Two justices concurred in the result, but strongly objected to such manhandling of language that seemed plain and unambiguous. They would have allowed recovery on the ground that a legislative distinction between Illinois residents injured and dying within the state and those injured within the state and dying elsewhere, such that a remedy in Illinois courts and under Illinois law is available to the former but denied the latter, is unconstitutional as an arbitrary denial of the equal protection of the laws.[197] Exactly the same may be said of a similar distinction between residents injured within and without the state.

Similarly, we submit that the New York courts denied the equal protection of the laws to the deceased, or to her father, in the case of *Kaufman v. American Youth Hostels, Inc.*[198] In this case, be it noted, the discrmination resulted not from statutory language or construction, but solely from the application of the choice-of-law rule referring to the law of the place of the injury. When a resident is killed by the negligence of a domestic corporation, and when the state has no policy for the protection of domestic charities, to allow recovery when the injury occurs within the state and deny it where the injury occurs in a state having no concern with the matter is purely arbitrary. At least if inquiry is limited to the policies immediately involved—*i.e.*, the policy of protection and indemnity for the victim of wrongful conduct, and the policy of protecting or not protecting charitable enterprises against tort liability—there is no reasonable justification for thus drawing the line of classification. Whether a justification can be found in broader policies associated with the law of conflict of laws will be considered shortly.

In *Schmidt v. Driscoll Hotel*[199] the Minnesota Supreme Court applied the law of the forum to hold a domestic liquor seller liable for injuries to a local resident resulting from the intoxication of a customer although the injuries occurred in Wisconsin. In so doing the court gave effect to the law and policy

---

supra note 135. Whether the same analysis applies to the *United Air Lines* case depends upon how the doctrine of forum non conveniens should be applied when the defendant is a foreign corporation having its principal place of business within the forum state—a question beyond the scope of this paper.

[196] Crane v. Chicago & W. Ind. R.R., 233 Ill. 259, 84 N.E. 222 (1908).

[197] *Id.* at 264, 84 N.E. at 224.

[198] 6 App. Div. 2d 223, 177 N.Y.S.2d 587 (1958); see text at note 139 *supra.*

[199] 249 Minn. 376, 82 N.W.2d 365 (1957).

of Minnesota without impairment of any interest of Wisconsin.[200] Had it done otherwise—had it bowed to the urging of defendant's counsel and to the weight of conventional doctrine, and applied section 378 of the *Restatement*[201] —it would have denied to the injured resident plaintiff the equal protection of the laws.[202]

Discrimination of this type is likely to occur not only as the result of statutory provisions respecting cases involving foreign factors, and of the application of ordinary choice-of-law rules, but also from the refusal to provide a forum on the basis of one of the traditional rules for refusing to entertain certain types of actions with foreign connections. In the well-known case of *Loucks v. Standard Oil Company*[203] the deceased, a resident of New York, was killed in Massachusetts by the negligence of employees of a New York corporation. He was survived by a widow and two children, also residents of New York. The courts of that state were urged by the defendant to dismiss the action on the ground that the Massachusetts law under which recovery was sought was "penal." Judge Cardozo refused. His opinion is regarded as a progressive one, tending toward "a larger comity,"[204] a more generous and less provincial recognition of foreign-based rights. The fact is, in our view, that the rejected course of refusing a forum for a claim for the wrongful death of a resident injured outside the state would have been a denial of the equal protection of the laws. We go further: Since it appears that the amount recoverable under the law of Massachusetts was less than that provided by the law of New York, the application of the law of the place of injury, depriving the plaintiff of the full amount that would have been recoverable if the injury had occurred within the state, would itself have been a denial of equal protection if the plaintiff had asserted a right to the protection of New York law. This conclusion is subject to qualification: Assuming that the New York corporation was doing business in Massachusetts, New York was not compelled by the equal protection clause to assert to the full extent its interest in protecting the local decedent and his dependents, but might reasonably limit the amount recoverable in order to avoid conflict with the interest of Massachusetts in limiting the liability of foreign corporations doing business there, in respect of injuries arising out of that business. But the choice between these two courses, which New York was free to make, was not even considered.

[200] See Currie & Schreter, *supra* note 135.

[201] RESTATEMENT, CONFLICT OF LAWS (1934).

[202] *Cf.* Eldridge v. Don Beachcomber, Inc., 342 Ill. App. 151, 95 N.E.2d 512 (1950), where the similar protection of the law of the forum was denied on the ground that the statute had no extraterritorial effect—*i.e.*, did not apply to injuries suffered outside the state. The residence of the injured plaintiff does not appear.

[203] 224 N.Y. 99, 120 N.E. 198 (1918).

[204] *Id.* at 113, 120 N.E. at 202.

Even the ancient doctrine that a court will not entertain an action for trespass to foreign land[205] may lead to a denial of equal protection where the complaining party is a local resident. The doctrine is pregnant with injustice even where the plaintiff is a nonresident.[206] Where the plaintiff is a resident the denial of a forum to him differentiates him from his fellow residents for no better reason than that "English juries in the thirteenth century were expected to have personal knowledge of the dispute presented to them."[207] It may be that, at least in the present state of legal thinking, such a classification is reasonable merely because it observes "the ancient landmark, which thy fathers have set."[208] It may even be that practical difficulties involved in the determination of foreign titles, or deference to the interest of the situs state in determining questions of title, may possess enough vitality to justify the classification.[209] But at least one state has gone far in the direction of recognizing the right of a local plaintiff to a local forum in cases involving foreign land titles. Two Maine corporations conducted mining operations on adjoining tracts in Arizona. The Maine court entertained an action brought by one against the other, based on the contention that the defendant had removed ore from the plaintiff's property, the court's theory being that the gravamen of the action was the recovery of money had and received by defendant for chattels converted and sold. "It is true . . . that great difficulties must be encountered in litigation so far from the base of supplies of evidence and experience. . . . We are of opinion, however, that great difficulties will not justify this court in declining to take jurisdiction of a controversy between Maine citizens or corporations involving only the disputed ownership of personal property."[210] The Massachusetts court, dismissing a similar action between the same parties, scoffed at the sophistry of the argument that the character of the action could be changed from local to transitory by waiving the trespass and suing for conversion, where the ultimate issue is title to the land; nevertheless, it respected the Maine court's decision to entertain the action, "for the reason that the parties are both citizens of that State,

[205] RESTATEMENT, CONFLICT OF LAWS § 614 (1934).

[206] *Compare* Reasor-Hill Corp. v. Harrison, 220 Ark. 521, 249 S.W.2d 994 (1952), 65 HARV. L. REV. 1242 (1952), *with* Livingston v. Jefferson, 15 Fed. Cas. 660 (No. 8411) (C.C.D. Va. 1811).

[207] Reasor-Hill Corp. v. Harrison, *supra* note 206, at 526, 249 S.W.2d at 996. See also Mannville v. City of Worcester, 138 Mass. 89 (1884) (*per* Holmes, J.): "This objection is purely technical. The reasons which once made the venue important have long disappeared. . . ."

[208] *Proverbs* 22:28, quoted in Reasor-Hill Corp. v. Harrison, *supra* note 206, at 529, 249 S.W.2d at 998 (dissenting opinion).

[209] *Cf.* Arizona Commercial Mining Co. v. Iron Cap Copper Co., 236 Mass. 185, 128 N.E. 4 (1920).

[210] Arizona Commercial Mining Co. v. Iron Cap Copper Co., 199 Me. 213, 222, 110 Atl. 429, 432–33 (1920).

which is one of the grounds inducing that court to assume jurisdiction of a cause of action apparently the same as that here alleged."[211]

We are thus brought to the question whether higher considerations of policy, transcending those immediately involved in a particular case, can justify the discriminations against local residents that are produced by conventional rules of conflict-of-laws; or, in other words, whether the discriminations produced by the system of rules for dealing with conflict-of-laws cases are justified by the necessity or desirability of the system itself. This abstruse question is best approached in the context of a concrete fact situation, and for the purpose we select the problem of the Statute of Frauds, although many another situation would serve almost equally well.

Suppose that two residents of Delaware, being casually in New York, engage in conversations that, according to the contention of one of them, result in a contract. Action on the alleged contract is brought in Delaware. Delaware has a Statute of Frauds such that, if the case were a purely domestic one, the defendant would have a complete defense. New York has no such statute. According to traditional doctrine, the Delaware court has only to determine whether the Delaware statute concerns substance or procedure. If it decides that the statute is a procedural one, the Delaware statute applies and the defendant wins. If it decides that the statute is substantive, relating to the validity of the contract, then the New York law applies, the Delaware statute is inapplicable, and the plaintiff wins. Suppose that the court decides that the question is one of substantive law, and that New York law governs. Thus the defendant is denied the protection that is afforded other Delaware residents similarly situated except for the circumstance that here the contract is made in New York. Does this differential treatment deny him the equal protection of the laws, or does the circumstance that the contract was made outside the state provide a reasonable basis for the classification?[212]

There has been a phase of legal thought, not susceptible of accurate dating but prominent in the first third of this century, and, unhappily, not yet extinct, according to which this question would be an incomprehensible one. "The Constitution and the first principles of legal thinking allow the law of the place where a contract is made to determine the validity and the consequences of the act."[213] To distinguish between contracts made within

[211] Arizona Commercial Mining Co. v. Iron Cap Copper Co., 236 Mass. 185, 128 N.E. 4 (1920) (*per* Rugg, C.J.).

[212] The problem might be stated conversely: Delaware has no applicable Statute of Frauds, but New York has. A decision applying the law of New York as that of the place of contracting would deprive the plaintiff of a remedy that would have been his but for the circumstance that the contract was made in New York. This form of the problem might be borne in mind by those who think of the Statute of Frauds as nuisance legislation expressing no real governmental policy. See Ehrenzweig, *The Statute of Frauds in the Conflict of Laws: The Basic Rule of Validation*, 59 COLUM. L. REV. 874 (1959).

[213] Mutual Life Ins. Co. v. Liebing, 259 U.S. 209, 214 (1922) (*per* Holmes, J.).

the state and those made in other states is not only reasonable but imperative. Of course there can be no question of denial of equal protection when Delaware refuses to extend to one of its residents the benefit of its law when the question at issue is the validity of a contract made in New York.

On the assumption that there are few scholars today who would endorse this position, we refrain from mounting the obvious attack against it. We shall only point out that, when a similar problem was presented to the Delaware court, that court did not assume that any such territorialist principle was enforced by natural law. Rather, it concluded that the local Statute of Frauds was designed for the protection of Delaware citizens, and, coldly calculating the probabilities, set out to determine which of the alternative lines of reasoning available to it would in the long run best effectuate that policy. It concluded that the maximum protection for Delaware residents could be secured by characterizing the local statute as substantive, so that it would apply to all contracts made within the state.[214] Its calculus of the probabilities is not obviously correct; with at least as much justification it might have concluded that maximum protection would have been secured by holding the statute procedural, or both procedural and substantive,[215] thus putting the New York law out of consideration. When it is so evident that such questions are not determined by principles of natural law but by considerations of expediency it should be equally evident that the discrimination against local residents who are not protected by the solution is not so easily to be justified.

The modern defense of such differential treatment would be more sophisticated. Without contending that the first principles of legal thinking require reference to the law of the state of contracting, it would assert the need for a relatively simple set of rules for the solution of conflict-of-laws cases, eschewing provincialism and, in the name of interstate and international legal order, providing for the uniform determination of any case without regard to the forum in which the action happens to be brought. The aspirations involved in such a defense are as lofty and laudable as they are unrealistic. The system of conflict-of-laws rules seeks a goal that is unattainable, given the judicial resources that are assumed; and in the process it creates false problems, which it frequently resolves in indefensible ways.

If it is to be worthwhile at all, conflict of laws must adopt as its objective the resolution of conflicting state interests. This is a task that might well be undertaken by the supreme legislative power in a federation of states, or by diplomats representing independent nations. Because of its essentially political character it is not one appropriately to be performed by courts.

[214] Lams v. F. H. Smith Co., 36 Del. 477, 178 Atl. 651 (1935), discussed in Currie & Schreter, *supra* note 135.

[215] *Cf.* Emery v. Burbank, 163 Mass. 326, 39 N.E. 1026 (1895).

Moreover, experience amply demonstrates that the courts of states whose interests are sacrificed by the rules of the system cannot be relied on to bow to that result. The system burgeons with devices for escaping the unacceptable result: vague or multiple rules for choice of law; novel characterization; manipulation of the connecting factor; "local public policy" and "fraud on the law"; and application of the procedural law of the forum. The system has failed, and realistically must be expected to fail, because the objective it sets for itself is one that cannot be attained without the sanction of a higher legal authority than that of the states involved, and such authority is either nonexistent or unexercised.

The system ought not to concern itself with cases in which there is no conflict of interest between states. Because of the way in which it is constructed, however, it does provide for such cases, thus creating false problems and, as often as not, solving them badly. Our hypothetical action between two Delaware residents concerning an alleged contract made in New York is just such a case. The Delaware courts have authoritatively declared that the purpose of the Delaware Statute of Frauds is the protection of Delaware residents against claims of promissory liability based on unreliable testimony.[216] Delaware has an interest in applying that policy for the protection of the local defendant. New York has no interest in the matter at all. There is no conflict between the interests of New York and Delaware, and hence no problem to be solved by the law of conflict of laws. If the action were by a New York plaintiff against the Delaware defendant, Delaware might still apply its protective policy or it might, consistently with the equal-protection clause, withhold application of that policy in order to avoid conflict with New York's interest in having the expectations of the plaintiff vindicated. Where both parties are of Delaware, however, the only justification for denying protection to the local resident who contracted in New York must be that we feel committed to a system that, in pursuit of an unattainable goal, finds it necessary to create false problems and resolve them in indefensible ways.

In the present state of legal thinking it is not to be supposed that the latent discriminations in conflict-of-laws rules will be invalidated overnight. There is widespread commitment to the system, with all its faults. Understandably, the Supreme Court will hesitate to denounce as unreasonable classifications based on familar rules which, in turn, are based on natural-law concepts or on aspirations for uniformity and a serene supra-state legal order. When the infirmities of the system and its inherent limitations come to be fully understood, however, many of the absurdities it has spawned will be found violative of the equal-protection clause.

[216] Lams v. F. H. Smith Co., 36 Del. 477, 178 Atl. 651 (1935).

VI. Conclusion

The inquiry to which this paper is addressed was inspired by that method of treating conflict-of-laws problems which emphasizes construction or interpretation of the relevant laws in order to ascertain the governmental interests involved. The method holds that when a court has ascertained that the interests of its own state are involved they cannot be ignored but must be recognized, respected, and in general effectuated. The method is not new; it is only neglected.[217] Equally neglected, in our concentration upon the development of an impersonal and mechanical system for the solution of conflict-of-laws problems, have been the problems of discrimination that would seem to be inherent in any attempt to deal with problems of conflicting laws and governmental interests. Revival of the method quickly brings those problems of discrimination back into view. Advocates of the method need not be dismayed when they find that it leads to constitutional problems. On the contrary, they should be quick to recognize and welcome the restraints imposed by the Constitution upon the provincial and short-sighted pursuit of domestic interest; they may properly go farther than the Constitution requires, and define local interests with moderation, or extend the benefits of local law to foreigners, in order to avoid conflict with the interests of a foreign state or in order to simplify law administration.

At the same time, revival of the method of governmental-interest analysis discloses that conventional rules of conflict of laws, both despite and because of their impersonal disregard of state interests, often produce unconstitutional discrimination. The two great constitutional prohibitions against discrimination have an important role to play in the disposition of ordinary conflict-of-laws cases; they will assume their proper role when we have shaken off the soporific effects of the traditional system.[218]

[217] See Currie, *The Constitution and the Choice of Law*, 26 U. Chi. L. Rev. 9 (1958).

[218] Another conflict-of-laws rule that may produce unconstitutional discrimination against nonresidents is that allowing preferences for local creditors attaching local property covered by a foreign general assignment. See Restatement, Conflict of Laws § 263(2) (1934). That topic, however, must be reserved for separate treatment.