

Credit Due Judgments and Credit Due Laws: The Respective Roles of Due Process and Full Faith and Credit in the Interstate Context

*Lea Brilmayer**

The full faith and credit clause of the United States Constitution provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."¹ The statute that Congress adopted to implement this provision requires that

[s]uch Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.²

The parallel treatment of judgments and legislative acts is evident. Yet virtually the entire effect of the clause and its implementing statute has occurred in the context of interstate enforcement of judicial decisions. The impact on the disregard of other states' laws has been minimal.

Interstate recognition of other states' rules of law has instead been addressed under the rubric of due process.³ The due process clause of the fourteenth amendment provides that no state "shall . . . deprive any person of life, liberty, or property, without due process of law."⁴ If one reads these words literally, one may not recognize the relationship between due process and choice of law or assertions of long arm jurisdiction, which is the other conflict of laws context in which due process has been important.⁵ And if one strays from the literal meaning, one may

* Professor of Law, Yale Law School. B.A. 1970, J.D. 1976, University of California at Berkeley; LL.M. 1978, Columbia University.

1. U.S. CONST. art. IV, § 1.

2. 28 U.S.C. § 1738 (1982). This version of the statute was not adopted until 1948; earlier versions did not include the same reference to public "acts." R. LEFLAR, L. McDUGAL III & R. FELIX, *CASES AND MATERIALS ON AMERICAN CONFLICTS LAW* 187 (1982). The failure to include public "acts" bears on some of the cases decided before 1948, but does not affect the thesis presented in this Article. Before the act was adopted, the constitutional parallelism might have required greater deference to laws; after the statute was amended in 1948 the deliberate inclusion of public "acts" should have signaled a desire for parallel treatment. The primary thrust of this Article is the different impact that the constitutional provisions themselves have had.

3. U.S. CONST. amend. XIV, § 1.

4. *Id.*

5. Due process undoubtedly implies a requirement of notice of pending judicial proceedings and an opportunity to defend. *See, e.g., Mullane v. Central Hanover Bank &*

not understand why due process has been restricted to those areas but not extended to judgments.

The puzzle is further confounded by occasional counterexamples to this general picture. One line of decisions applies the full faith and credit clause to cases involving both adjudicative jurisdiction and choice of law.⁶ These cases negate the possibility that full faith and credit applies only to judgments. Case law also contradicts the ambitious thesis, put forth by one author,⁷ that the difference between the two clauses is that due process protects individual rights and full faith and credit protects sister states' sovereignty.⁸ Cases suggest,⁹ and I agree,¹⁰ that both goals play important roles for both clauses.

The difference between the clauses lies elsewhere.¹¹ Due process prevents the states from overreaching by preventing them from applying their adjudicative processes or rules of decision to the exclusion of the adjudicative processes or rules of decision of a sister state. The paradigm due process violation involves the ouster of one state's authority by application of the authority of another. Full faith and credit prevents a different evil: discrimination. The paradigm full faith and credit violation involves a state's refusal to apply the local law of either state. Such a refusal is discriminatory if the state refuses to extend benefits of forum law without deferring to the laws of the other state. Due process sometimes forbids the state to use its own decision processes, or to apply its own law. Full faith and credit adds that foreign law, typically, is the only other choice.

That full faith and credit governs the recognition of judgments and due process regulates adjudicative jurisdiction and choice of law is coincidental in two respects. First, either of these vague phrases—"due" pro-

Trust Co., 339 U.S. 306, 313 (1950). This requirement is not unique to the conflict of laws context, however. For an analysis of the due process limits on state court jurisdiction, see generally Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77.

6. See *infra* text accompanying notes 45-50.

7. Martin, *Constitutional Limitations on Choice of Law*, 61 CORNELL L. REV. 185, 192 (1976). But see Kirgis, *The Roles of Due Process and Full Faith and Credit in Choice of Law*, 62 CORNELL L. REV. 94, 150 (1976) (response to Professor Martin). For further discussion on this point, see Martin, *A Reply to Professor Kirgis*, 62 CORNELL L. REV. 151, 153-55 (1976).

8. See *Allstate Ins. v. Hague*, 449 U.S. 302, 308 & n.10 (1981) (similar approach taken under due process and full faith and credit on choice of law questions). But see *id.* at 320 (Stevens, J., concurring) (due process protects individual's interest in fair adjudication; full faith and credit protects sovereignty of sister states).

9. See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293-94 (1980) (due process limits on personal jurisdiction implicate state sovereignty concerns).

10. See *infra* text accompanying notes 12-15, 80-84.

11. One minor distinction between the two clauses is that full faith and credit applies only when the competing jurisdiction is another state, and not a foreign country. *Home Ins. Co. v. Dick*, 281 U.S. 397, 410-11 (1930). This difference obviously has functional repercussions. It cannot explain the whole range of cases arising within the United States, some of which have been decided under full faith and credit, and some under due process.

cess, or “full” faith and credit—might have assumed either function. Keep in mind that the Supreme Court became involved in policing state assertions of long arm jurisdiction, citing full faith and credit, before the fourteenth amendment was even adopted.¹² Courts could even more easily have fit choice of law under the full faith and credit rubric; in fact, in some early cases that seem to have been discredited,¹³ the Court did exactly that.¹⁴ And judgments could perhaps have been treated under due process instead of full faith and credit. At one time the Supreme Court believed that due process placed limits on choice of law because due process protected rights that had “vested” in another state.¹⁵ This rationale is elastic enough to accommodate interstate enforcement of judgments.

The second reason that our present pattern of results is coincidental is that there is no logical reason either for discrimination issues to arise in the judgments context, or for overreaching issues to arise in choice of law or adjudicative jurisdiction contexts. Given the sorts of temptations to which states fall prey, however, it is predictable as a practical matter that discrimination would arise in one context and overreaching in another. Hence, occasional examples exist in which full faith and credit limits adjudicative or legislative jurisdiction. These anomalies and their explanations form the latter part of this analysis of full faith and credit in interstate decisionmaking.¹⁶ The best place to start is the easiest example: discrimination in the law of judgments.

I. CREDIT DUE JUDGMENTS

The credit due judgments is, unmistakably, greater than the credit due laws. For example, whether states have any constitutional obligations whatsoever with regard to the tax and penal laws of their sister states is unclear. Yet it is established that once such claims have been reduced to judgments, they must be recognized elsewhere.¹⁷ At first the difference

12. See *D’Arcy v. Ketchum*, 52 U.S. (11 How.) 165, 174-75 (1850). There the forerunners of “due process” limits on state court jurisdiction were based on the full faith and credit clause and implementing statute, and on what were termed “general principles of comity and justice.” *Id.* at 175. One aspect of personal jurisdiction to which the full faith and credit clause arguably could not have been applied, however, might be in-state enforcement of local judgments rendered without personal jurisdiction.

13. For a discussion of the argument that one such case, *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145 (1932), has been discredited, see Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 23-30 (1958), reprinted in B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 188, 205-14 (1963). *But see Nevada v. Hall*, 440 U.S. 410, 421 (1979) (*Clapper* cited recently by the Supreme Court).

14. *E.g.*, *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 155-59 (1932).

15. See *Hartford Accident & Indem. Co. v. Delta & Pine Land Co.*, 292 U.S. 143, 150 (1934) (a state “may not, on grounds of policy, ignore a right which has lawfully vested elsewhere”); *New York Life Ins. Co. v. Dodge*, 246 U.S. 357, 373-74, 376-77 (1918).

16. See *infra* text accompanying notes 45-79.

17. See, *e.g.*, *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 277 (1935) (full faith and credit for tax judgment).

might seem attributable to different institutional sources: judgments are judicial and laws are legislative. This explanation breaks down, however, because common-law precedents are probably treated as laws and not as judgments.¹⁸ The difference in treatment relates to adjudication versus legislation, and not to judges versus legislatures. The usual explanation falls into two parts: first, the constitutional policies underlying interstate enforcement of judgments; and second, the reasons for not extending those policies to legislation and precedent.

The constitutional policies underlying interstate enforcement of judgments are the familiar justifications for the rule of *res judicata*: “[They] are everywhere the same: to minimize the judicial energy devoted to individual cases, establish certainty and respect for court judgments, and protect the party relying on the prior adjudication from vexatious litigation.”¹⁹ Or, stated more succinctly, one trial of an issue is enough.²⁰ While there is no way to ascertain, without reopening the issue, that the first court did not err, the reopening cannot settle the matter any more decisively. Because there is no reason for assuming that a second decision will be more authoritative than the first, why not leave well enough alone? The losing party, after all, already had an opportunity to present his or her case.

Legislation is different. The more tentative nature of legislative judgments is due in part to the fact that legislatures themselves may change their minds. In contrast to adjudicative findings of past fact, legislation amounts to an act of will, a deliberate leap into the future. A legislative change of heart is vacillation, not inconsistency. If legislative choices can be made and remade at will, it is not clear why they should bind other coequal decisionmaking bodies, such as sister states, more than they bind the legislature itself.

Legislative decisions are also less final because they are incomplete. Before they have effect they must be instantiated through the processes of fact-finding and norm interpretation. This process may involve either the giving of content to ambiguous norms or the modification of apparently clear norms to reflect new circumstances of application. The inability of legislatures to anticipate such circumstances is one reason for the existence of the institution of judicial review.²¹ Litigation brings more than new facts into the controversy; it brings into the controversy new parties that may not have been adequately represented in the legislative process.²²

18. Jackson, *Full Faith and Credit—the Lawyer’s Clause of the Constitution*, 45 COLUM. L. REV. 1, 11-13 (1945), reprinted in *SELECTED READINGS ON CONFLICT OF LAWS* 229, 237-38 (M. Culp ed. 1956).

19. R. CRAMTON, D. CURRIE & H. KAY, *CONFLICT OF LAWS* 657 (3d ed. 1981).

20. *Baldwin v. Iowa State Traveling Men’s Ass’n*, 283 U.S. 522, 525 (1931).

21. Brilmayer, *Judicial Review, Justiciability and the Limits of the Common Law Method*, 57 B.U.L. REV. 807, 815-19 (1977).

22. Brilmayer, *The Jurisprudence of Article III: Perspectives on the “Case or Controversy” Requirement*, 93 HARV. L. REV. 297, 306 (1979).

Unlike the losing party in litigation, the losing party in legislation may not have had a "day in court."

Legislation is thus not final to the extent that it is subject, unavoidably, to legislative revision or creative interpretation and application. Judicial decisions are final, in contrast, because they are relatively complete. The facts have been found, the norms have been interpreted. In addition, after a dispute reaches court, opportunities exist to review the constitutionality of the legal norms involved. This may be particularly important in the interstate judgments context. Even if a legislative rule is clearly designed to apply to some particular interstate dispute, other states should not be required to accept that decision as final. The intended territorial application may be unconstitutional.²³ When the application of forum law has been reduced to judgment, however, the parties will have had an opportunity to dispute the constitutionality of the rule's application to those facts, and to appeal that decision if necessary. The Supreme Court will not pass on the validity of a state rule in the abstract, before a concrete dispute arises.²⁴

The greater deference due judgments can be found in a surprising variety of contexts. For instance, the Supreme Court has emphasized recently that state court judgments cannot be disregarded on the theory that state courts are inadequate tribunals for the enforcement of constitutional rights.²⁵ The Court has explained that state judges, like federal judges, have sworn oaths to uphold the Constitution. This argument is strikingly similar to the argument that Alexander Bickel made regarding the institution of judicial review. Bickel claimed that legislators, both state and federal, are sworn to respect the Constitution precisely as are federal court judges.²⁶ Why has this argument been persuasive when adjudication but not legislation is involved? The finality policies of legislation and judgments presented above form at least part of the answer.

While the respective finality accorded legislative and adjudicative decisions is common to all states, this does not mean that all states accord judgments the same degree of finality. There are some species of adjudications, such as child custody determinations, in which relitigation is more readily available.²⁷ In these areas, in particular, states differ over what constitutes an adequate basis for modification of a judgment. States also differ over questions of who may be bound, and who can take advantage

23. Typically, when the Supreme Court has analyzed whether a state has an "interest" in having its law applied, it has disregarded state choice of law provisions that have been accorded no deference. See generally Brilmayer, *Legitimate Interests in Multistate Problems: As Between State and Federal Law*, 79 MICH. L. REV. 1315, 1326 (1981).

24. See U.S. CONST. art. III, § 2, cl. 1 (case or controversy limitation).

25. See, e.g., *Allen v. McCurry*, 449 U.S. 90, 103-05 (1980). Note that the rejected approach is discriminatory in that it credits state courts less than it credits federal courts. *Id.* at 98-101.

26. A. BICKEL, *THE LEAST DANGEROUS BRANCH* 34-72 (1962).

27. See generally R. CRAMTON, D. CURRIE & H. KAY, *supra* note 19, at 858-78.

of a prior adjudication.²⁸ It is sometimes said that the full faith and credit clause places the Constitution behind the policies of res judicata and collateral estoppel.²⁹ But this surely does not mean that states are obliged to adhere to traditional res judicata rules without exception. Would it ever be said that some minimum amount of deference to judicial decisions is owing, as a matter of constitutional law? Are res judicata rules constitutionally compelled?

I doubt it.³⁰ Due precisely to the policies presented above, states have not attempted to abolish the law of res judicata. Therefore, there are no cases on this issue. Res judicata rules are simply too useful to abolish. And therein lies the true explanation for the constitutional solicitude toward judgments. As long as all states have finality rules that credit judicial decisions, it seems impermissible for a state to refuse to enforce foreign judgments. Because local judgments are enforceable, foreign judgments also should be enforceable. In every state, judgments have been accorded greater finality than laws; it is natural to expect this to be the case for interstate situations as well.

What did the framers most clearly seek to prohibit with the full faith and credit clause? The paradigm full faith and credit violation surely involves a judgment which would be enforceable under the local laws of both the rendering state and the enforcing state, but is refused enforcement simply because it is foreign. No other refusal of recognition could pose more of a threat to national unity. The fundamental problem that interstate or international judgment recognition must address is discrimination.

In the intrastate context, the meaning of discrimination is clear, although its applications are controversial. Discrimination results when cases that ought to be treated identically are treated differently. The problem is to ascertain whether cases are sufficiently different to warrant different treatment. There is an added twist in the interstate setting. On a superficial level, discrimination apparently results when a case (or person, or rule of law, or judgment) receives different treatment simply because it is foreign. Foreignness, however, is not irrelevant. If a state tries to treat all cases with foreign elements as though they are purely local, then it would fail just as miserably to respect the sovereignty of other states.

28. For instance, some states require mutuality of estoppel and some do not. Compare *Grantham v. McGraw-Edison Co.*, 444 F.2d 210, 213 (7th Cir. 1971) (Seventh Circuit requires mutuality) with *Kern v. Hettinger*, 303 F.2d 303, 340 (2d Cir. 1962) (neither New York nor California requires mutuality).

29. *Riley v. New York Trust Co.*, 315 U.S. 343, 349 (1942). Others state more accurately that the clause "puts national sanction behind state policies with respect to the effect of a judgment." R. CRAMTON, D. CURRIE & H. KAY, *supra* note 19, at 661.

30. The Court, however, does police res judicata rules to protect parties not represented in the initial decision from being bound.

Applying the local law of a competing state is not considered discriminatory because the foreign elements in the case warrant that kind of deference to foreign states. The law of judgments reinforces this conclusion. If the enforcing state declines to apply its own *res judicata* rules, applying the rules of the rendering state instead, one would not condemn the enforcing state for discriminating against the foreign judgment. To the contrary, by deferring, the state is acting precisely as the full faith and credit statute requires.³¹ And even if there were no full faith and credit statute, the result would be unobjectionable under the Constitution. Surely the Constitution would not be offended when the rights that vested in the original judgment are respected literally, according to the preclusion policies of the rendering state.

A more interesting problem involves application of the enforcing state's preclusion policies. At first this seems to be an obvious violation of the language of the implementing statute, which requires that the same effect be given to the judgment as it would have been given in the state in which it was rendered. It is a testament to the strength of the nondiscrimination principle as a full faith and credit norm that this literal approach to the statute has not been adopted. Instead, the Supreme Court has been surprisingly accommodating to application of forum *res judicata* rules, which the Court has classified as "remedial" or "procedural" when explaining its disregard of the explicit statutory language.³²

31. There is one situation in which a full faith and credit violation might occur even if the state applies one of the two contending rules. That situation arises when the state fails to consistently apply one rule or the other, choosing between them on a case by case basis by some invidious criterion. Because deference to the needs of other states is the basic principle, the forum may not use an invidious criterion inconsistent with the need for deference. For instance, it might be invidious for a state simply to choose the law that benefits the local resident more.

For the only article dealing with this double meaning of discrimination, see Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173 (1981). There Dean Ely recognizes that the garden variety interstate discrimination problem involves applying a third standard to nonresidents: the local law of neither state. *Id.* at 184-86. He then argues that *Austin v. New Hampshire*, 420 U.S. 656 (1975), may possibly invalidate as discriminatory a forum state's efforts to treat nonresidents as their home states would. This reading of *Austin* may be misguided. The "application" of home state law merely consisted of a forum state's credit toward taxes due on income earned in that forum that a nonresident paid to his home state. This is not equivalent to application of home state law because if home state tax law deliberately exempted income earned in other states, that exemption would be ignored. Second, even when home state law was applied, the result was not deference to the home state because the forum used the home state tax rate to augment its own revenue. Dean Ely is well aware of these facts, and in his insightful discussion he declines to push *Austin* too far. See Ely, *supra*, at 187. The limited relevance of *Austin* would be clearer had Dean Ely explicitly recognized the different rationales for the "applications" of home state law. Usually the rationale is deference, but as argued immediately above, invidious discrimination may underlie an apparently deferential choice of the other state's law.

32. See Jackson, *supra* note 18, at 9-10, reprinted in SELECTED READINGS ON CONFLICT OF LAWS 229, 236 (M. Culp ed. 1956).

It seems, then, that if the enforcing state applies the preclusion rules of one of the involved states, it satisfies the constitutional mandate and probably squares itself with the statutory standard as well.³³ The same cannot be said if the enforcing state adopts neither course. *Watkins v. Conway*³⁴ tests this thesis. At first the result seems to contradict the discrimination hypothesis, but the *Watkins* Court in fact adopts the thesis, while perhaps mistakenly applying it. In *Watkins*, the enforcing state, Georgia, applied a five-year statute of limitations to foreign judgments, but a longer statute of limitations to local ones.³⁵ It was argued that this violated both the full faith and credit and the equal protection clauses.³⁶ The Court agreed that if the rule were discriminatory, it might be unconstitutional.³⁷

The Court held, however, that there was no discrimination because the plaintiff could return to the rendering state and revive the judgment there.³⁸ At that point, the judgment would be enforceable in Georgia under Georgia law:

[T]he Georgia statute has not discriminated against the judgment from Florida. Instead, it has focused on the law of that State. . . . Thus, full faith and credit is insured, rather than denied, the law of the judgment State. Similarly, there is no denial of equal protection in a scheme that relies upon the judgment State's view of the validity of its own judgments.³⁹

The Court may have been incorrect in concluding that the requirement of returning to the rendering state for revival was neither burdensome nor discriminatory. In particular, if the judgment was still enforceable in Florida, but Florida had no revival procedure, then the Georgia law would deny enforcement in a discriminatory way. The Court explicitly left open how it would rule in such a case.⁴⁰ According to the reasoning in the case, however, discriminatory judgments rules are highly suspect.

While discrimination is ordinarily suspect, as with other areas of discrimination law a difference in treatment may be justifiable. There are rare situations in which the judgments law of neither state is applied, yet the full faith and credit clause is not offended. Such situations may arise under The Uniform Child Custody Jurisdiction Act (UCCJA).⁴¹ That

33. It has been noted that credit to judgments may be analyzed as a choice of law problem. Averill, *Choice-of-Law Problems Raised by Sister-State Judgments and the Full-Faith-and-Credit Mandate*, 64 Nw. U.L. REV. 686, 686 (1969); see also Brilmayer, *State Forfeiture Rules and Federal Review of State Criminal Convictions*, 49 U. CHI. L. REV. 741, 744 (1982).

34. 385 U.S. 188 (1966) (per curiam).

35. *Id.* at 188-89.

36. *Id.* at 189.

37. *Id.* at 189-90.

38. *Id.*

39. *Id.* at 190-91.

40. *Id.* at 191 n.4.

41. UNIF. CHILD CUSTODY JURISDICTION ACT, 9 U.L.A. 111 (1979). See generally Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207 (1969).

Act has now been superceded by the federal Parental Kidnapping Act⁴² but the historical and conceptual point remains the same. The UCCJA, like its federal successor, was designed to remove the incentive to forum shop for modifications of a custody order through the expedient of snatching the child in question and absconding to another jurisdiction. Because child custody orders are typically modifiable in the rendering state, the other jurisdiction appealed to could revise the decree without violating the letter of full faith and credit. The spirit of full faith and credit was hardly appeased, since although the rendering state might have had power to modify the decree, the chances that it would exercise that power were substantially lower than the chances of modification in some other state that disagreed with the original order on the merits. That, of course, was the purpose of absconding.

The solution adopted by the UCCJA was to severely restrict the power of any court other than that of the rendering state to entertain modification proceedings.⁴³ Although the issue apparently was never raised or litigated, a full faith and credit question might have been posed. When a state adopts a rule that deprives its courts of jurisdiction to entertain proceedings on other states' judgments, and the only basis for different treatment is that the judgment was not rendered locally, the state seems to lay an uneven hand on local and foreign causes of action. The response must be that while there is indeed a difference in treatment, the difference is not discriminatory because its rationale is preservation of the power of the rendering state. In fact, the intended effect is to direct the litigants back to the rendering state to raise their grievances there.

Absent such a deferential rationale, failure to accord a judgment the status it would have had under both states' local laws is a violation of full faith and credit. If the states have a common policy of finality, then denying that common policy of preclusive effect simply because enforcement is sought interstate is invidious discrimination. Such a denial is not per se invalid, but it must be explained in terms of policies consistent with the full faith and credit clause. The full faith and credit clause does not speak to the choice of law issue⁴⁴ of which forum's res judicata rule applies; it does, however, say that, absent good justification, the choice is limited to the local laws of the involved states.

II. CREDIT TO LAWS

A series of cases that apply full faith and credit to choice of law issues suggests that discrimination is the relevant mode of analysis for full

42. 28 U.S.C. § 1738A (1982).

43. Technically speaking, it is the child's "home state" that has the power to modify, but in most instances this will be the rendering state and the rationale of deference remains the same. UNIF. CHILD CUSTODY JURISDICTION ACT §§ 2(5), 3(a)(1), 9 U.L.A. 119, 122 (1979). The concept of "home state" has been adopted by the Federal Parental Kidnapping Act, 28 U.S.C. § 1738A(a)(4), (c)(2) (1982), along with its attendant difficulties.

44. For articles discussing this as a choice of law problem, see *supra* note 33.

faith and credit issues. In *Hughes v. Fetter*⁴⁵ the Court invalidated a state rule that deprived local courts of adjudicative jurisdiction over wrongful death actions that arose in other states. The Court explicitly based its invalidation on the discriminatory nature of the jurisdictional rule. Because local wrongful death actions were adjudicated with ease, there was no inherent hostility toward them. The Court distinguished situations in which the state merely had applied its own local law, suggesting that these situations were not violations of full faith and credit.⁴⁶ Other cases reinforce *Hughes*' holding and reasoning.⁴⁷

The discrimination prohibited by the full faith and credit clause in the context of credit to laws is analogous to the discrimination prohibited in the context of credit to judgments. In *Hughes* the state applied neither its own local law regarding wrongful death actions nor the wrongful death act of the state where the cause of action arose. As with credit to judgments, the obligation of credit to laws does not determine the choice between contending domestic rules. It simply requires that, absent adequate justification for the difference in treatment, one of the two domestic rules must be chosen.

First, full faith and credit is not offended when the domestic rule of the other state is chosen. This is true even though a case is treated differently because of its foreign elements. The different treatment is not invidious because it is justified by a real difference in the case, namely the factors connecting it to some other state, which make application of some other state's authority appropriate. For example, state borrowing statutes that apply the statute of limitations of the state that created the cause of action justifiably defer to the other state's interests, thereby preventing forum shopping.⁴⁸

In addition to borrowing statutes, certain other refusals to entertain an action because of its foreign elements similarly are justifiable in terms of deference. Read literally, *Hughes* would seem to invalidate long arm statutes that differentiate between causes of action that arose inside the state and those that arose outside. It would also cast doubt on forum non conveniens dismissals that are motivated in part by the out-of-state locus of the operative facts of the dispute.⁴⁹ Of course, these dismissals are permissible because, unlike the dismissal in *Hughes*, they are motivated by deference to other states. A relevant analogy may be found in the law of federal jurisdiction. While states may not "discriminate" against federal causes of action by refusing to adjudicate them, refusal to entertain claims

45. 341 U.S. 609 (1951).

46. *Id.* at 612 n.10.

47. *See, e.g.*, *Broderick v. Rosner*, 294 U.S. 629, 642-43 (1935); *Kenney v. Supreme Lodge*, 252 U.S. 411, 415 (1920).

48. *See, e.g.*, *Canadian N. Ry. v. Eggen*, 252 U.S. 553, 559, 561 (1920).

49. The forum non conveniens doctrine was recently reaffirmed in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 251-52, 256-57 (1981).

over which federal courts statutorily are given exclusive jurisdiction is not only permissible, it is required.⁵⁰ The rationale is deference.

In this regard, full faith and credit is no different from prohibitions on discrimination against persons in the interstate setting. Privileges and immunities⁵¹ and equal protection⁵² restrict differential treatment of nonresidents, while the right to travel⁵³ restricts differential treatment of new residents. All of these constitutional prohibitions operate most forcefully when the state imposes neither its own domestic law nor the law of the complainant's domicile (or, in the case of the right to travel, the old domicile).⁵⁴ The typical discrimination complaint involves a state rule that gives the benefits of neither home state nor local law. Discrimination claims have generally been unsuccessful when the rationale for differential treatment is deference to another state.⁵⁵

Application of the foreign law thus has never been characterized as a violation of full faith and credit; and discrimination against foreign causes of action that is grounded adequately in deference to other states also is unobjectionable. For instance, despite *Hughes'* language, dismissals of other states' divorce claims have not been considered violations of full faith and credit.⁵⁶ But this is too obvious. The more striking fact is that, except for certain older cases that now seem to be discredited,⁵⁷ application of local policy is an equally effective defense to alleged full faith and credit violations. That full faith and credit is not offended when a state applies

50. Brilmayer & Underhill, *Congressional Obligation to Provide a Forum for Constitutional Claims: Discriminatory Jurisdictional Rules and the Conflict of Laws*, 69 VA. L. REV. 819, 838-40 (1983).

51. U.S. CONST. art. IV, § 2.

52. *Id.* amend. XIV, § 1.

53. *Shapiro v. Thompson*, 394 U.S. 618, 630-31 (1969).

54. The typical discrimination challenge under any of these provisions involves a state law which provides different benefits for residents and nonresidents. Nonresidents are not accorded treatment as they would be by their home state. *See Ely, supra* note 31, at 186. This is not to say that there can never be a privileges and immunities challenge where the law of one of the contending states is applied; the method of choosing between the two laws may itself be invidious. *See supra* note 31; Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 408-17 (1980) (interest analysis tends to simply analyze choice of law on the basis of which law helps the local resident). When the choice between competing local laws is based on a consistent and noninvidious principle, privileges and immunities, equal protection, and right to travel clauses have not required invalidation. *See, e.g., Califano v. Torres*, 435 U.S. 1, 4-5 (1978) (*per curiam*) (state may apply its local welfare laws even though detrimental to right to travel).

55. *See, e.g., Sosna v. Iowa*, 419 U.S. 393, 406-09 (1975). The author expresses gratitude to Lee Ryan, J.D. 1984, Yale Law School, for a very helpful development of this point (unpublished manuscript on file with author).

56. Brilmayer & Underhill, *supra* note 50, at 836-37. Federal courts also decline on grounds of deference to entertain state domestic relations claims even when diversity jurisdiction would otherwise exist. *Id.*

57. *See Currie, supra* note 13, at 26-27, reprinted in B. CURRIE; SELECTED ESSAYS ON THE CONFLICT OF LAWS 188, 209 (1963) (discussing one such case, *Bradford Elec. Light Co. v. Clapper*).

its local law is demonstrated by a host of cases in which full faith and credit challenges have failed.

In *Alaska Packers Association v. Industrial Accident Commission*,⁵⁸ two worker's compensation statutes were vying for application. Each statute contained a choice of law provision that seemed to make it applicable to the instant case.⁵⁹ The Court held that the state in which the employment relationship was entered into was not required to give way to the state in which the injury occurred.⁶⁰ Justice Stone wrote:

Prima facie every state is entitled to enforce in its own courts its own statutes, lawfully enacted. One who challenges that right, because of the force given to a conflicting statute of another state by the full faith and credit clause, assumes the burden of showing, upon some rational basis, that of the conflicting interests involved those of the foreign state are superior to those of the forum.⁶¹

*Wells v. Simonds Abrasive Co.*⁶² also supports this thesis. There the plaintiff argued that the forum should apply the statute of limitations of the state that had created the cause of action, instead of applying its own statute of limitations.⁶³ The local statute of limitations barred the action prematurely, and the plaintiff suggested that full faith and credit compelled the state to provide a forum.⁶⁴ The Court rejected this argument, however, and distinguished *Hughes v. Fetter* on the ground that here the state was merely applying its domestic rule evenhandedly.⁶⁵

A final case illustrates the failure of full faith and credit to police choice of law problems, and its limitation to ensuring that the local law of one or the other state will be applied. *Nevada v. Hall*⁶⁶ involved an automobile accident in California between a California resident and an employee of the University of Nevada, which is an instrumentality of the state. The California trial court did not recognize Nevada's waiver of sovereign immunity to liability in tort actions.⁶⁷ The court reasoned that when Nevada engaged in a course of conduct in California, it was simply not sovereign.⁶⁸

The California decision was challenged as a denial of full faith and credit to the Nevada sovereign immunity law.⁶⁹ The Supreme Court upheld

58. 294 U.S. 532 (1935).

59. *Id.* at 544-46.

60. *Id.* at 550.

61. *Id.* at 547-48.

62. 345 U.S. 514 (1953).

63. *Id.* at 515.

64. *Id.* at 516-17.

65. *Id.* at 518-19.

66. 440 U.S. 410 (1979).

67. *Hall v. University of Nev.*, 8 Cal. 3d 522, 526 & n.10 (1972), 503 P.2d 1363, 105 Cal. Rptr. 355, 358 (1972).

68. *Id.* at 524, 503 P.2d at 1364, 105 Cal. Rptr. at 356. Rptr. 355, 356 (1972).

69. 440 U.S. at 414.

the California decision, but reasoned differently.⁷⁰ Specifically, the Court noted that holding Nevada amenable to suit was consistent with California domestic law.⁷¹ First, California had a policy of full compensation that was manifested by both its substantive law and its procedural law that provided for long arm jurisdiction over nonresident motorists.⁷² Second,

[i]n further implementation of that policy, California has unequivocally waived its own immunity from liability for the torts committed by its own agents and authorized full recovery even against the sovereign. As the California courts have found, to require California either to surrender jurisdiction or to limit respondents' recovery to the \$25,000 maximum of the Nevada statute would be obnoxious to its statutorily based policies of jurisdiction over nonresident motorists and full recovery.⁷³

The full faith and credit clause, the Court concluded, did not require this result.⁷⁴

As framed by the state court below, the issue was unmistakably one of full faith and credit. The state court had held that Nevada simply was not entitled to sovereign immunity because it acted outside of its sovereign boundaries. This rationale would have allowed full recovery even if California had retained its own sovereign immunity for its own purposes. The full faith and credit issue stems from California's unwillingness to apply the sovereign immunity law of either state, on the ground that while in California, Nevada was not sovereign.

The Supreme Court obviated the full faith and credit objection by noting that application of California's domestic law of sovereign immunity would result in the same outcome. "[T]his Court's decision in *Pacific Insurance Co. v. Industrial Accident Comm'n* clearly establishes that the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy."⁷⁵ The Court's resolution of the full faith and credit issue merely served to raise another issue. Surely the Court did not mean to state that local policy might always be applied

70. *Id.* at 414-27.

71. *Id.* at 421-24.

72. *Id.* at 424. °

73. *Id.*

74. *Id.* The Court cited Justice Stone's interpretation of *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145 (1932), which appeared in *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 504 (1939), for the analysis that *Clapper* merely held that foreign law must be applied if there is no contrary local policy. Justice Stone had concurred in *Clapper* on the ground that New Hampshire ought to have an opportunity to interpret local policy and refuse to apply Vermont law; full faith and credit, he argued, did not prevent this result. *Id.* at 423 n.23; see *Alaska Packers*, 294 U.S. at 548-49. By citing, in *Nevada*, Justice Stone's *Clapper* interpretation which appeared in the 1930's cases, *Alaska Packers* and *Pacific Employers*, the Supreme Court seems to be resurrecting *Clapper* with a new gloss. Full faith and credit is satisfied whenever the refusal to apply foreign law is accompanied by the application of local public policy.

75. 440 U.S. at 421-22.

to the exclusion of other states' rules. To the contrary, the policy interest that the Court cited was compensation for persons injured on California highways.⁷⁶ Although chastised by the dissent for not making this point more explicit,⁷⁷ the Court did not hold that California was free from all constitutional impediments when applying its sovereign immunity law to tort suits.⁷⁸ Rather, it only held that *full faith and credit* was not offended when a bona fide local policy was applied; due process issues were not discussed.

It was unnecessary to discuss other impediments to the application of California law because, on the facts of *Nevada v. Hall*, the relevance of California policy seemed clear: the injury took place in California and the injured party resided there. One might have expected California law to have been held applicable as a choice of law matter. *Nevada v. Hall* thus stands for the proposition that if there are sufficient contacts to justify application of local law under the due process clause, then application of local law also satisfies full faith and credit. Other cases also suggest that full faith and credit poses no choice of law requirements beyond the requirements of due process.⁷⁹ If, however, forum contacts are more attenuated, due process problems may arise. Full faith and credit merely limits the choice, in most cases, to two alternatives: local and foreign law. Due process sometimes requires a state to select foreign law.

III. THE TENSION BETWEEN DUE PROCESS AND FULL FAITH AND CREDIT

The due process clause, which dominates choice of law theory, governs those circumstances in which a state ousts the local law of another state by the application of its own law. This is the usual choice of law problem; in fact, to characterize an issue as "choice of law" is to say that the choice is between two states' laws and thus that the evil to be avoided is the unfair ouster of the law of one state by another. The other conflicts context in which due process has been prominent involves limits on state court adjudicative jurisdiction, also an ouster problem. The problem in state court adjudicative jurisdiction is that by adjudicating the case the state ousts other states' adjudicative authority, thereby forcing other states not only to give up the right to litigate but also to enforce the resulting judgment.⁸⁰

Due process issues are intrinsically more difficult than full faith and credit issues. It is clear that a state has the right to apply its local rule or use its local decision processes in purely local situations, and in cases

76. *Id.* at 421-24.

77. *Id.* at 428-29 (Blackmun, J., dissenting).

78. *Id.* at 424 n.24 (suggesting result was limited to accidents outside the state).

79. *See, e.g.*, *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308, 322 n.6 (1981).

80. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292-93 (1980) (states have sovereignty rights and interests in trying cases in their own courts).

that are purely local, no other state has a right to intervene. But there is no bright line separating cases in which it is permissible to apply local law from cases in which it is not. Any litigation has many relevant variables and this allows for a large number of permutations depending on whether these variables point toward one state or another. "Foreignness" is a matter of degree, depending on how many of the relevant variables point toward other states. Cases fall on a spectrum, or perhaps we should say a scatter diagram, from purely local to purely foreign situations, so that any line proves arbitrary. Due process is difficult to apply because of this line drawing problem. Full faith and credit is easier to apply because it permits relatively bright line distinctions: Absent adequate justification, the state must use either its own rule or the rule of the competing state.

The roles of due process and full faith and credit have not been clearly delineated because due process, as applied to conflict of law problems, contains an element of "credit" in the ordinary meaning of the word. Every time a state applies its own laws to the exclusion of the laws or decision processes of another state, it is simultaneously extending the reach of its own laws and refusing to extend the reach of another state's laws. Full faith and credit language has been used when a state commits the latter of these sins without committing the former. What distinguishes due process from full faith and credit is that due process is invoked in cases of overreaching. This overreaching aspect is the distinctive attribute of due process. Refusal to apply the other state's law is not distinctive; it is an issue common to both full faith and credit and due process. Because of this element, which it shares with full faith and credit, due process has been said to require states to respect the sovereignty of other states.⁸¹

There is a paradox here. What seems to be violative of one clause amounts to satisfaction of the other. By applying its own law, a state can avoid full faith and credit objections, but that application triggers due process scrutiny. This paradox led Brainerd Currie to reject the reasoning in *Hughes v. Fetter* altogether, although he reached the same result by other (and more dubious) means.⁸² What is troublesome is that one clause encourages the very evil that the other is designed to prevent.

The tension in the themes is not a defect in theory; it is a consequence of tension in the Constitution itself. The Constitution is a combination of centrifugal and centripetal forces. All federal systems have such problems. On the one hand, each state must recognize that other states are separate sovereignties. Cases with foreign elements may not be treated automatically as though they arose at home. On the other hand, each state must recognize that it is not wholly independent. There will

81. See *id.* at 291-92.

82. See Currie, *The Constitution and the "Transit" Cause of Action* (pts. 1 & 2), 73 HARV. L. REV. 36, 44-66, 286 (1959), reprinted in B. CURRIE SELECTED ESSAYS ON THE CONFLICT OF LAWS 290-311 (1963) (arguing that the constitutional difficulty with the statute was that it differentiated, for choice of law purposes, between in-state and out-of-state accidents).

be cases in which a state must lend its aid to foreign suits. Refusing to become involved is not the proper response to the presence of foreign elements in the case. Foreign elements may require that a case not be treated as purely local; but the proper alternative is enforcement of the policies of the competing state. If deference to the other state is the reason for not applying forum law, then consistency compels that the rationale of deference be carried to its logical conclusion: application of the foreign law.

Due process has come to represent the centrifugal force. The states must recognize each other's independent sovereignty. "Does the island of Tobago rule the world?" asked the British lord.⁸³ The question answers itself; each state must act with the awareness that its own powers are limited. On matters of state law, decentralized decisionmaking is protected, and no state has the right to bring all legal issues under its law or bring all legal disputes before its courts.

Full faith and credit represents the centripetal force that binds the states together. The states may not be identical, but neither are they wholly different. The full faith and credit clause differentiates the attitudes that states must have toward one another from the attitudes they must have towards foreign countries.⁸⁴ Both due process and full faith and credit involve deference to other states, but the former protects the right to affirmative assistance, while the latter protects the right to be left alone. There are two ways that a state might avoid implementing the policies of other states: shutting them off and squeezing them out. That protection is needed on both scores is a function of the different ways that states seek to maximize their own power, and of the differences between judgments and laws.

IV. JUDGMENTS AND LAWS

Credit due judgments differs from credit due laws because the two contexts lead to different strategies for the maximization of state power. Power is a compound notion; one needs to know not only who seeks to exercise power, but also over whom it will be exercised. This is particularly true in the interstate context in which a state may expand its powers either at the expense of the individual litigants or at the expense of other states—or both. When a state makes a conflict of laws decision concerning either adjudicative jurisdiction, choice of law, or judgments, one of the adversaries in the proceeding undoubtedly will be dissatisfied. Thus every deci-

83. See *Buchanan v. Rucker*, 103 Eng. Rep. 546, 547 (K.B. 1808). A picture of the courthouse on the island of Tobago can be found on the frontispiece of W. REESE & M. ROSENBERG, *CASES AND MATERIALS ON CONFLICT OF LAWS* (7th ed. 1978).

84. See generally Brilmayer, Book Review, 82 MICH. L. REV. 892 (1984) (reviewing R. CASAD, *CIVIL JUDGMENT RECOGNITION AND THE INTEGRATION OF MULTIPLE-STATE ASSOCIATIONS: CENTRAL AMERICA, THE UNITED STATES OF AMERICA, AND THE EUROPEAN ECONOMIC COMMUNITY* (1981)).

sion includes a component of fairness to individuals. But whether it exercises or refuses to exercise power vis-à-vis the individuals, the forum also might disregard the sovereign interests of other states.

How can a failure to exercise power be as objectionable as the exercise of power? That it unavoidably offends one of the adversaries is obvious. But it also may offend the other state. Power is more than the simple force necessary to effectuate a decision; it also includes will—the ability to make a decision that calls for enforcement. Force is merely the mechanical implementation of a decision, and thus necessarily entails maximizing power only at the expense of the individual. What increases power at the expense of other states is the second element, will. In applying force to effectuate someone else's decision, the decisionmaker gains at the expense of the individual but loses with regard to the entity that made the decision. The strategically preferable posture is to make the decision that will be enforced, for then the decisionmaker gains at the expense of both the individual and the competing states.

We should therefore expect states to attempt to exert power over individuals, but only to the extent that states maintain some control over the content of the decision being enforced. If a state does not maintain control over that content, it finds itself either enforcing decisions it finds repugnant (at worst) or wasting time (at best). Mechanical implementation of another state's rules or judgments does not further a forum's own objectives, and possibly may even frustrate them. Sometimes, however, the Constitution requires states to do exactly that.

At the outset of litigation, typically, very few decisions have been made. Once judgment is entered, however, most of the decisionmaking power is foreclosed by *local preclusion policies*. Thus, a state may seek to assert jurisdiction at the outset of the litigation, but lack motivation to assert jurisdiction once the case has been reduced to judgment in another state.⁸⁵ The exceptions would occur when many issues remained to be resolved even after a final order has been entered⁸⁶ and when the major issues in the cases had been prejudged at the outset of the suit.⁸⁷

Limitations on overreaching are therefore most necessary at the outset of litigation, when the assertion of jurisdiction is most likely to constitute an abuse of power. Limitations on the failure to assert jurisdiction are necessary at the judgments phase, when most of the decisionmaking power has already been exercised, for at that point failure to assert jurisdiction increases forum power at the expense of the state in which the judgment

85. When judges enforce judgments from their own states, or adhere to precedent, there is present an element of subservience to the rendered court's decision process. However, the court is simultaneously affirming its own authority. If it departs from either *res judicata* or *stare decisis* it would authorize future courts to disobey its own mandate.

86. See, e.g., R. CRAMTON, D. CURRIE & H. KAY, *supra* note 19, at 858-78.

87. See, e.g., *Hughes v. Fetter*, 341 U.S. 609, 610 (1951) (choice of law issue already clearly settled in favor of the other state's laws).

was rendered. But since both states would enforce even arguably erroneous prior decisions, the sheer disinclination to enforce judgments at the behest of sister states is an inadequate reason and unavailing. It is precisely to control such unilateral expansion of strategic positions that there are constitutional limitations in the conflict of laws.

V. CONCLUSION

The two problems of deference to other states' interests—ouster and discrimination—cut across a variety of conflicts issues. Ouster, which may be classified as a problem of due process, dominates adjudicative jurisdiction and choice of law, when the states themselves typically agree that much decision power remains to be exercised. At later stages, when states agree as a matter of local law that most issues have been resolved, an additional tool becomes available with which to restrain the disregard of other states. Since the state would violate its own foreclosure rules to reach questions that were already decided, the issue can be easily treated by prohibition against discrimination. At that point, it is not just a question of whether the state would have had a right, *ab initio*, to impose its view of the proper outcome; it is also a question of whether the state is disregarding shared standards of foreclosure, and imposing that view in violation of both domestic and foreign standards.

Full faith and credit got the easy job, and due process got the hard one. The due process inquiry of whether a case is local enough to be treated as local, or foreign enough that it must be treated as foreign, is surely difficult. The full faith and credit determination that special norms may not be employed to treat cases as neither foreign nor domestic is relatively easy, for then the court need only check that one domestic standard or the other was applied.

Perhaps it is coincidence that these two roles were assigned to these two constitutional provisions. It is no coincidence, however, that the Constitution limits state power in both of these ways. Our federal system strikes a middle ground between uniformity and independence. State boundaries are neither irrelevancies nor licenses to disengage.