good.[167] Public officials are shrouded by privilege when their acts are in pursuit of their public duties.[168] Finally, there is a privilege covering testimony at a judicial or quasi-judicial proceeding which interferes with a contract or business opportunity.[169]

VI. Conclusion

The law of tortious interference is currently in a developmental state comparable to the law of products liability. In both, whole new areas of law have been opened. It is hoped that this article has been enlightening as to the destiny of tortious interference. It is ordained to become the most predominant business tort—the new watchdog of morality in the market place.

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167. Blank v. Palo Alto-Stanford Hosp. Center, 234 Cal. App. 2d 377, 44 Cal. Rptr. 572 (1965); Hughes v. Superior Court, 186 P.2d 756 (Cal. App. 1947); Middlesex Concrete Prod. and Excavating Corp. v. Carteret Indus. Ass'n, 37 N.J. 507, 181 A.2d 774 (Sup. Ct. 1962).

168. Hancock v. Burns, 158 Cal. App. 2d 785, 323 P.2d 456 (1958); Bullock v. Joint Class "A" School Dist. No. 241, 75 Idaho 304, 272 P.2d 292 (1954); Mefford v. City of Dupontonia, 49 Tenn. App. 349, 354 S.W.2d 823 (1961).

169. This privilege has been declared to be absolute by some courts. J.D. Construction Corp. v. Isaacs, 95 N.J. Super. 122, 230 A.2d 168 (1967). *But see* Arlington Heights Nat'l Bank v. Arlington Heights Fed. Sav. and Loan Ass'n, 37 Ill. 2d 546, 229 N.E.2d 514 (1967) (holding privilege qualified).

MUTUALITY IN CONFLICT—FLEXIBILITY AND FULL FAITH AND CREDIT

Jeffrey E. Lewis†

The intrastate preclusive effect of a constitutionally valid judgment is governed by the judgment state's[1] law of res judicata.[2] The interstate preclusive effect of such a judgment is governed by the national policy of full faith and credit. When interstate judgment preclusion is sought, the enforcement state[3] has traditionally imported and utilized F-1's law of res judicata when deciding the question of enforcement vis-a-vis non-enforcement, and the question of range of effect. To some extent this importation and utilization is mandated by the full faith and credit clause,[4] but to what extent this mandate is inexorable is still not clear. May F-2 engage in a reasoned choice of law decision rather than a mechanistic application of the law of F-1, at least as to some facets of judgment preclusion? To what extent is F-1's law of res judicata incorporated into the judgment for purposes of full faith and credit, and thereby made binding upon the enforcement state? If F-1 requires mutuality for the assertion of collateral estoppel,[5] must F-2 also require mutuality, or may F-2 allow the assertion of collateral estoppel in the absence of mutuality according to its own local law of res judicata? And how should the converse situation be treated? These problems center on the broader question of flexibility within the mandate of the full faith and credit clause.[6]

I. Full Faith and Credit: Has the Supreme Court Left Room For Flexibility?

The traditional rule is well represented by the *Restatement (Second)*

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1. The state where the judgment in question was rendered; Forum-1 or F-1.

2. *Res judicata* is used here in its broadest sense to include all aspects of preclusion by judgment.

3. The state where preclusive effect is sought for a sister state judgment; Forum-2 or F-2.

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

5. Collateral estoppel is one branch of *res judicata* and refers to the preclusive effect that a judgment may have with respect to issues actually and necessarily litigated in a prior proceeding when drawn into a question in a subsequent suit upon a different cause of action. The rule of mutuality requires that the party asserting collateral estoppel be bound by the judgment equally with the person against whom the estoppel is asserted.

6. The general question was considered in Carrington, *Collateral Estoppel and Foreign Judgments*, 24 Ohio St. L.J. 381 (1963). *See also* Note, 68 Colum. L. Rev. 1590 (1968).

Conflict of Laws;[7] wherein it is stated that the local law of the state where the judgment was rendered determines what persons are bound and what issues are determined by a valid judgment. Comments to these sections indicate that, as between the states, this rule is one of constitutional law.[8] There is a plethora of judicial pronouncements which apply or invoke or mention the traditional rule, but the Supreme Court of the United States, as final arbiter of all disputes under the full faith and credit clause,[9] has never directly held that the command of the Constitution is so extensive and unqualified. Whether the full faith and credit clause and the statutory implementation[10] permit F-2 to apply its own rule on the mutuality question is an open issue.

When faced with the claim that F-2 has failed to give full faith and credit to an F-1 judgment, the Supreme Court has usually answered either one of two questions: (1) May F-2 give the judgment less effect than would the law of F-1? (2) May F-2 give the judgment greater effect than would the law of F-1?

The majority of decisions under the judgments portion of the full faith and credit clause arise in the context of the first question mentioned above. Usually the petitioner claims that F-2 has violated the clause in giving the judgment less effect than would F-1. Thus most court pronouncements requiring that F-2 give the judgment the "same" preclusive effect as would F-1 mean that F-2 may give the judgment no less effect than would F-1.

For example, in *Magnolia Petroleum Co. v. Hunt*[11] the Supreme Court used a frequently repeated phrase: "From the beginning this Court has held that these provisions have made that which has been adjudicated in one state *res judicata to the same extent* in every other."[12] In *Magnolia* the Court actually decided that the failure of Louisiana to bar the plaintiff from obtaining a second judgment under the Louisiana Workman's Compensation Act was violative of full faith and credit. Under Texas law, the Texas judgment barred further recovery; Louisiana must rule likewise. That is, F-2 must bar further recovery because F-1 would do so. In *Hancock National Bank v. Farnum*[13] the Supreme Court held that a Kansas judgment against a corporation, which under Kansas law is binding on the stockholders, must be given the same conclusive effect in Rhode Island. Rhode Island cannot allow a stockholder in the Rhode Island proceeding to relitigate the merits of the claim. F-2 must bar a defense on the merits as would F-1. In *McGee v. In-*

7. RESTATEMENT (SECOND) CONFLICT OF LAWS §§ 94-95 (1971).
8. RESTATEMENT (SECOND) CONFLICT OF LAWS, Explanatory Notes, § 94, comment *a* at 279, § 95, comment *a* at 282 (1971).
9. Magnolia Petroleum Co. v. Hunt, 320 U.S. 430 (1943).
10. "Such Acts, records and judicial proceedings [of any State, Territory, or Possession of the United States] . . . 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 . . . from which they are taken" Judiciary and Judicial Procedure Act, 28 U.S.C. § 1738 (1964).
11. 320 U.S. 430 (1943).
12. *Id.* at 438 (emphasis added).
13. 176 U.S. 640 (1900).

ternational Life Insurance Co.,[14] the Supreme Court ruled that the refusal of the Texas courts to enforce a California judgment was a violation of the full faith and credit clause. The judgment was valid under California law, but the Texas court refused to enforce it, holding that it was void under the fourteenth amendment because service of process outside California could not give the courts of that State jurisdiction over the defendant. The Supreme Court ruled that there was no violation of due process and that the California judgment must therefore be accorded full force and effect in Texas. Most full faith and credit decisions in some way involve a claimed due proess limitation.

The due process limitation on full faith and credit has caused the court to hold that F-2 not only may give less effect to the judgment than did F-1, but that it must give less effect. A judgment rendered without the requisite jurisdiction is violative of due process and as such is not entitled to full faith and credit.[15] The judgment is and must be void in both F-1 and F-2. Such problems illustrate the operation of the fourteenth amendment but not the compulsion of full faith and credit.

There are five other situations of limited applicability in which the Supreme Court has permitted F-2 to give less effect to a judgment than would the law of F-1:

(1) A judgment based on a cause of action which is penal in nature, although valid and enforceable in the state where rendered, is not entitled to full faith and credit when put into issue in a sister state.[16]

(2) A judgment which is valid and enforceable in the state where rendered may nevertheless be denied enforcement in a sister state if barred by the latter's statute of limitations.[17]

(3) A judgment which is valid and enforceable in the state where rendered may nevertheless be denied enforcement in a sister state when the parties are foreign corporations and the cause of action upon which judgment was based arose outside of F-2.[18] The basis of this exception is *forum non conveniens*.[19]

(4) A judgment which is valid and which bars any subsequent action on the same cause of action in F-1, may nevertheless be given no res judicata effect,

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14. 355 U.S. 220 (1957).

15. *See* Hansberry v. Lee, 311 U.S. 32 (1940); Pennoyer v. Neff, 95 U.S. 714 (1877).

16. In *Huntington v. Attril*, 146 U.S. 657 (1892), the Supreme Court concluded that a New York judgment was entitled to full faith and credit because the statute upon which it was based was not penal in nature. It is not clear whether the *Huntington* case means that full faith and credit is not due a judgment in a sister state which is based on a penal cause of action. In *Milwaukee County v. M.E. White Co.*, 296 U.S. 268 (1935), the court expressly left this question undecided, although it did hold that a judgment for state taxes was not penal in nature.

17. Watkins v. Conway, 385 U.S. 188 (1966); M'Elmoyle v. Cohen, 38 U.S. (13 Pet.) 312 (1839).

18. Anglo-American Provision Co. v. Davis Provision Co., 191 U.S. 373 (1903).

19. This exception is very narrow and of questionable modern validity. *See* Roche v. McDonald, 275 U.S. 449 (1928); Kenney v. Supreme Lodge of the World, Loyal Order of Moose, 252 U.S. 411 (1920); Fauntleroy v. Lum, 210 U.S. 230 (1908).

except as to issues litigated, if said judgment was not on the merits. For example, where the F-1 judgment dismissing the complaint was based on laches on the part of the plaintiffs, F-2 could nevertheless entertain an action based on the same cause of action.[20]

(5) A judgment which is valid and enforceable in the state where rendered, F-1, may be denied enforcement in a sister state, F-3, if a subsequent and inconsistent judgment has been rendered in another action between the same parties in a different state forum, F-2, if the law of F-2 makes the subsequent judgment controlling over the earlier judgment.[21]

There are no Supreme Court decisions which deal specifically with an attempt by F-2 to apply its mutuality rule where estoppel is asserted with respect to an F-1 judgment when F-1 requires no mutuality. Broad judicial statements that no less effect may be given are made in the context of "effect vs. no effect," and not "effect vs. less effect." Furthermore this "no-less-effect" mandate has always concerned the preclusive effect of the judgment between the parties to the F-1 proceeding. Historically, this is true because the erosion of the mutuality rule is relatively recent. In addition, it is clear that the issue as to whether a third person, a stranger to the F-1 proceeding, may assert an estoppel is usually of remote and hypothetical concern at the time the judgment is rendered. The court has said that a party to a judgment obtains an interstate vested right to use that judgment; the court has not said that a non-party obtains an interstate vested right to use that judgment. The decisions would seem, then, to leave this issue open, at least with respect to the narrow issue of mutuality in the assertion of collateral estoppel.

May F-2 give a judgment greater effect than would the law of F-1? This has been answered negatively in several different but limited contexts.

In *Board of Public Works v. Columbia College*[22] the Supreme Court said: "No greater effect can be given to any judgment of a court of one State in another State than is given to it in the State where rendered."[23] However, the court actually decided a different issue. It held that a Virginia decree, which under Virginia law was interloctuory and not subject to appeal, could not be given a final and conclusive effect in the District of Columbia. A Virginia decree which is entitled to no effect at home cannot be given some effect in the District of Columbia; this is different than the issue of "some effect vs. greater effect." A situation similar to the interlocutory F-1 decree is the F-1 judgment which is invalid under the law of F-1. In *Thompson v. Whitman*[24] the Supreme Court upheld the New York court's refusal to make a New Jersey judgment

20. Warner v. Buffalo Drydock Co., 67 F.2d 540 (2d Cir. 1933), *cert. denied*, 291 U.S. 678 (1934); *accord*, Glencove Granite Co. v. City Trust, Safety Deposit & Sur. Co., 118 F. 386 (3rd Cir. 1902); Equity Corp. v. Groves, 30 Del. Ch. 68, 53 A.2d 505 (1947); Western Coal and Min. Co. v. Jones, 27 Cal. 2d 819, 167 P.2d 719 (1946).

21. Sutton v. Leib, 342 U.S. 402 (1952); Morris v. Jones, 329 U.S. 545 (1947); Treinies v. Sunshine Min. Co., 308 U.S. 66 (1939).

22. 84 U.S. (17 Wall.) 521 (1873).

23. *Id.* at 529.

24. 85 U.S. (18 Wall.) 457 (1873).

conclusive and a bar to the action in New York. The court noted that the judgment was void under New Jersey law for lack of jurisdiction and could be collaterally attacked. In this context the court commented that, "[the full faith and credit clause and the statute] had the effect of rendering the judgments of each State equivalent to domestic judgments in every other State, or at least of giving to them in every other State the same effect, in all respects, which they have in the State where they are renderd."[25]

The F-1 judgment may be void or interlocutory and thus entitled to no greater effect in F-2; such situations represent an attempt by F-2 to give a judgment some effect when F-1 gives it no effect. This is different from the instance in which F-2 desires to give greater preclusive effect to a judgment which is already entitled to at least some preclusive effect in F-1.

Another instance of a negative response to F-2's attempt to give a judgment greater effect is when the judgment was based on *quasi in rem* jurisdiction. This point was made in *Minichiello v. Rosenberg*;[26] neither F-1 nor F-2 can give collateral estoppel effect to a judgment rendered against a nonresident defendant, over whom no *in personam* jurisdiction could constitutionally be obtained, and over whom *quasi in rem* jurisdiction was obtained by attachment of a liability insurance policy issued to the defendant by an insurer doing business in F-1. To give collateral estoppel effect to this type of judgment would be a violation of due process; thus, F-2 would be compelled to recognize the limited nature of the F-1 *quasi in rem* judgment. Whether this would be the rule with respect to *quasi in rem* judgments generally, the court did not say. The authorities are in conflict,[27] and the Supreme Court appears never to have considered the problem; whatever the answer might be, it is clear that any mandate upon F-2 is supplied by the due process clause and not the full faith and credit clause.

It appears that Supreme Court pronouncements on the requirements of the full faith and credit clause do not foreclose the possibility that F-2 may constitutionally give a judgment an extended collateral estoppel effect beyond the effect it would be accorded under the mutuality rule of F-1. The decisions in which the Court has responded with a negative answer to F-2's desire to give the judgment greater effect are distinguishable, since the law of F-1 gave those judgments no effect at all. Where the limited jurisdiction of the F-1 court required a negative answer, the due process clause was the controlling constitutional influence.[28] The Supreme Court has, in fact, in-

25. *Id.* at 462.
26. 410 F.2d 106 (2d Cir. 1968), *cert. denied*, 396 U.S. 844 (1969).
27. Combs v. Combs, 649 Ky. 155, 60 S.W.2d 368 (1933); *contra*, Harnischfeger Sales Corp. v. Sternberg Dredging Co., 189 Miss. 73, 191 So. 94, *decree corrected*, 195 So. 322 (1940); Carrington, *Collateral Estoppel and Foreign Judgments*, 24 OHIO. ST. L.J. 381, 384 (1963); CRAMPTON & CURRIE, CONFLICT OF LAWS, 645-646 (1968); Taintor, *Foreign Judgment in Rem: Full Faith and Credit v. Res Judicata in Personam*, 8 U. PITT. L. REV. 223 (1942).
28. Decisions to the effect that the collateral estoppel effect of a judgment is included within the full faith and credit clause are not dispositive of the issue, since the

dicated that the full faith and credit clause does have sufficient flexibility to allow F-2 to give extended collateral effect to an F-1 judgment: "Full faith and credit thus generally requires every State to give to a judgment *at least* the *res judicata* effect which the judgment would be accorded in the State which rendered it."[29]

It would thus seem that the possibility of greater collateral effect as a result of F-2's decision not to import and utilize the F-1 mutuality rule has not been foreclosed; but is such a greater effect consistent with the purposes and policies inherent in the constitutional concept of full faith and credit? There are three state court decisions suggesting that such a question need not be considered on the theory that full faith and credit does not apply to the collateral estoppel effect of a judgment.

II. Full Faith and Credit: New York and Nevada

In *Hinchey v. Sellers*[30] the defendants asserted an estoppel based on an earlier New Hampshire proceeding[31] wherein it had been determined that an insured car was used without the permission of the insured. The defendants asserted this collateral estoppel even though they were not parties to the New Hampshire proceeding; this was possible under New York law,[32] and apparently also under New Hampshire law.[33] The ultimate issue of permission in the New Hampshire proceeding was different than the ultimate issue of permission in the New York proceeding, but the operative and evidentiary facts necessary to prove both issues of permission were identical, and they were litigated fully in New Hampshire. The New York court allowed the requested estoppel with respect to these operative or evidential facts in the face of clear authority in New Hampshire to the contrary.[34] The Court of Appeals reasoned that no adjudication by the New York courts could impair the New Hampshire judgment on the ultimate issue of permission as

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question remains, does the clause prohibit greater effect or lesser effect. *See* United States v. Silliman, 167 F.2d 607 (3d Cir. 1948).

29. Durfee v. Duke, 375 U.S. 106, 109 (1963) (emphasis added). Justice Robert H. Jackson seems to have had this in mind: "States, under their voluntary policy, may extend recognition when they could not constitutionally be required to do so . . . ." Jackson, *Full Faith and Credit —The Lawyer's Clause of the Constitution*, 45 Colum. L. Rev. 1, 30 (1945).

30. 7 N.Y.2d 287, 165 N.E.2d 156, 197 N.Y.S.2d 129 (1959).

31. Hinchey v. National Surety Co., 99 N.H. 373, 111 A.2d 827 (1955).

32. Israel v. Wood Dolson Co., 1 N.Y.2d 116, 134 N.E.2d 97, 151 N.Y.S.2d 1 (1956); Good Health Dairy Prod. Corp. v. Emery, 275 N.Y. 14, 9 N.E.2d 758 (1937).

33. Hinchey v. Seller, 7 N.Y.2d 287, 165 N.E.2d 156, 197 N.Y.S.2d 129 (1959).

34. In King v. Chase, 15 N.H. 9 (1844), the Supreme Court of New Hampshire held that collateral estoppel does not apply to evidentiary findings of facts, but only to findings of ultimate fact. In Laconia Nat'l Bank v. Lavallee, 96 N.H. 353, 77 A.2d 107 (1950), the Supreme Court of New Hampshire cited with approval its earlier ruling in *King* and also cited with approval the Restatement of Judgments: "The difference between matters in issue and matters in evidence determines the extent to which the former action constitutes an estoppel to the maintenance of the subsequent action. . . . Matters in evidence may be controverted and form the basis upon which a matter in issue is decided but they are not the same. Matters in issue once decided cannot be litigated again. Matters in evidence may be." Restatement of Judgments § 68, comment *p* at 336 (Supp. 1948).

decided in that earlier proceeding. The court extended the collateral estoppel effect of the New Hampshire judgment to evidentiary facts, an application that was not permissible under the law of New Hampshire. The court's language strongly suggests that it believed that issues of fact preclusion are not covered by the full faith and credit clause.

In November of 1965 an American Airlines aircraft crashed while approaching the Greater Cincinnati Airport near Covington, Kentucky, *en route* from LaGuardia, New York City. Fifty-eight persons were killed and, of the many actions instituted following the crash, *Creasy v. American Airlines, Inc.*,[35] the first to reach judgment, was filed in a Texas federal district court. By 1968 there were over 20 actions pending in the New York courts arising out of this same aircraft disaster, most of which had been set for a joint trial by order of the Appellate Division.

Two other actions had not been subject to the joint trial order and American sought to have them included in the order. The plaintiffs responded by invoking the *Creasy* judgment and seeking summary judgment on the liability issue. The Special Term granted summary judgment, and in so doing utilized the New York rule which allowed this offensive assertion of collateral estoppel in the absence of mutuality.[36] In seeking application of the Texas mutuality rule rather than the New York rule, American relied in part on the full faith and credit clause. The court rejected this argument:

> What is here involved is a policy determination by our courts that "one who has had his day in court should not be permitted to litigate the question anew" . . . , and, further, refusal "to tolerate a condition where, on relatively the same set of facts, one fact-finder, be it court or jury" may find a party liable while another exonerates him leading to the inconsistent results which are always a blemish on a judicial system. . . . It is in order to carry out these policy determinations in the disposition of cases in this jurisdiction that an evidentiary use is being made of a particular issue determination made in the Texas action.[37]

The *Hart* court's distinction between the evidentiary use to which a sister state judgment may be put and direct enforcement of such a judgment was the theoretical basis for its conclusion that the full faith and credit clause was inapplicable. Freed from a mandatory application of Texas law, the New York court was able to extend the effect of the Texas judgment. Like the Court of Appeals in *Hinchey*, this court seized upon the distinction between direct and collateral preclusion to avoid application of the law of the state where the judgment was rendered. In the *Hart* decision, the court

35. 418 F.2d 180 (5th Cir. 1969).

36. Hart v. American Air Lines, Inc., 61 Misc. 2d 41, 304 N.Y.S.2d 810 (Sup. Ct. 1969). The same result was reached in *Bartlett v. Short Line Bus Sys.*, 69 Misc. 2d 818, 330 N.Y.S.2d 945 (Sup. Ct. Special Term 1971), *aff'd*, 38 N.Y. App. 2d 906, 331 N.Y.S.2d 340. The offensive assertion of collateral estoppel in the absence of mutuality was permitted with respect to a New Jersey judgment without any reference to New Jersey law. There was no discussion of full faith and credit or choice of law problems.

37. Hart v. American Air Lines, Inc., 61 Misc. 2d 41, 44, 304 N.Y.S.2d 810, 813-14 (Sup. Ct. 1969).

failed to consider the fact that the judgment in question was rendered by a federal court; the Supreme Court has said that the full faith and credit clause and its statutory implementation are inoperative in such a situation.[38] The *Hart* court's discussion of the applicability of the full faith and credit clause is thus of questionable validity; New York need not apply the Texas mutuality rule because federal court judgments are not included within full faith and credit.

Clark v. Clark[39] might also be cited for the proposition that the full faith and credit clause is inapplicable to the collateral estoppel branch of res judicata. The Supreme Court of Nevada said:

> . . . in deciding the preclusive effect to be given the final judgment of the Florida court, we are not to be governed by the Florida law of *res judicata* or estoppel, or by the effect of those doctrines upon the husband's ability to procure a divorce in that state, had he litigated his case there. It seems that we are at liberty to follow Nevada law as to the scope of the doctrines of *res judicata* and estoppel, particularly in cases dealing with status where important state interests and public interests are involved.[40]

This dictum expresses an interpretation of the full faith and credit clause which nearly extinguishes any effect that it might have on interstate judgment recognition. The court in fact did not depart so drastically from the traditional interpretation of full faith and credit; rather it concluded that full faith and credit did require Nevada to, "recognize the Florida judgment as it stands—a final determination that the husband and wife may live separately, with support provided, and resting upon the conclusion that the husband had been guilty of cruelty to his spouse."[41]

The court did indeed give the Florida judgment substantial force and effect although it refused to accept the defendant's argument that Nevada should follow the Florida compulsory counterclaim rule. One distinguished commentator has suggested that such a result is proper and permissible:

> The attractions of the compulsory counterclaim rule are substantially dissipated when it is applied to nonresident defendants whose relation to the forum may be very attenuated in light of emerging concepts of personal jurisdiction. . . . [I]t would seem proper for courts to recognize the extra harshness of the total litigation concept as applied to interstate situations and to mitigate it by the use of a more conservative forum rule.[42]

There is a conflict in the decisions with respect to a state's obligation to give effect to the federal compulsory counterclaim rule,[43] but the federal-state

38. Stoll v. Gottlieb, 305 U.S. 165 (1938). For a general discussion, *see* Vestal, *The Constitution and Preclusion/Res Judicata*, 62 MICH. L. REV. 33 (1963) [hereinafter cited as Vestal].

39. 80 Nev. 52, 389 P.2d 69 (1964).

40. *Id.* at 71-72.

41. *Id.* at 71.

42. Carrington, *supra* note 6 at 390-91.

43. Cummings v. Dresher, 18 N.Y.2d 105, 218 N.E.2d 688 (1966) (Federal Rule 13(a) given effect); Horne v. Woolever, 170 Ohio St. 178, 163 N.E.2d 378 (1959); Jocie

problem does not involve full faith and credit.[44]

Although the three state court decisions just discussed might be considered some precedent for the inapplicability of the full faith and credit clause to collateral estoppel, Supreme Court opinions provide no basis for such a conclusion.[45] The Supreme Court has never suggested that collateral preclusion is of any less significance for full faith and credit purposes than direct preclusion. The Court has never considered a distinction on the basis of the direct as opposed to the collateral effect of a judgment. That claim preclusion (that is, direct preclusion or bar and merger) should be within the scope of full faith and credit and fact preclusion (collateral estoppel) outside its scope is an empty distinction; the policy and purpose of the full faith and credit clause compel inclusion of the latter within its mandate.

III. Flexibility and Policy

Mr. Justice Reed described the purpose of the full faith and credit provision in this manner:

> This clause of the Constitution brings to our Union a useful means for ending litigation. Matters once decided between adverse parties in any state or territory are at rest. Were it not for this full faith and credit provision, so far as the Constitution controls the matter, adversaries could wage again their legal battles whenever they met in other jurisdictions. Each state could control its own courts but itself could not project the effect of its decisions beyond its own borders.[46]

And Mr. Chief Justice Stone observed,

> [the] clear purpose of the full faith and credit clause [is] to establish throughout the federal system the salutary principle of the common law that a litigation once pursued to judgment shall be as conclusive of the rights of the parties in every other court as in that where the judgment was rendered, so that a cause of action merged in a judgment in one state is likewise merged in every other. . . . Because there is a full faith and credit clause a defendant may not a second time challenge the validity of the plaintiff's right which has ripened into a judgment and a plaintiff may not for his single cause of action secure a second or a greater recovery.[47]

There is little legislative history to elucidate the meaning of full faith and credit,[48] so the Supreme Court of the United States has had the bur-

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Motor Lines, Inc. v. Johnson, 231 N.C. 367, 57 S.E.2d 388 (1950); *contra*, Phoenix Ins. Co. v. Haney, 235 Miss. 60, 108 So. 2d 227 (1959).

44. Still v. Gottlieb, 305 U.S. 165 (1938). *See* Vestal, *supra* note 38.

45. *See* test at notes 11-29, *supra*. *See also* United States v. Silliman, 167 F.2d 607 (3d Cir. 1948).

46. Riley v. New York Trust Co., 315 U.S. 343, 348-49 (1942).

47. Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 439 (1943).

48. *See* Childs, *Full Faith and Credit: The Lawyers Clause*, 36 Ky. L.J. 30 (1947); Corwin, *The Full Faith and Credit Clause*, 81 U. Pa. L. Rev. 371 (1933); Costigan, *The History of the Adoption of Section I of Article IV of the United States Constitution, and a Consideration of the Effect on Judgments of that Section and of Federal Legislation*, 4 Colum. L. Rev. 470 (1904); Nadelman, *Full Faith and Credit to Judgments and Public Acts, A Historical-Analytical Reappraisal*, 56 Mich. L. Rev. 33 (1957); Page, *Full Faith*

den of divining and enunciating the policy it represents. The descriptions of Justices Reed and Stone probably contain all elements of this policy of nationwide res judicata.

What flexibility then lies in the full faith and credit provisions in the context of this constitutional doctrine of interstate res judicata? The constitutional concern for preservation of the integrity and finality of a sister state judgment, for preservation of judicially established rights and obligations, necessitates at a minimum the importation and utilization of the F-1 law of res judicata[49] insofar as it is needed to protect that concern. To this extent, and for this purpose, the sister state judgment must be fully, completely, and entirely recognized. To permit the interstate nature of a litigation involving the preclusive effect of a sister state judgment to do injury to the F-1 judgment would be to take the "full" out of the constitutional language and to debilitate the unifying influence of that provision.

Yet it may be that these constitutional concerns do not prohibit F-2 from giving less effect to the judgment than would the law of F-1 in at least one context.[50] If F-1 gives a collateral estoppel effect between the parties to the first litigation as to issues actually and necessarily litigated, then under full faith and credit it seems clear that no less effect could be given by F-2. The F-1 collateral estoppel effect when mutuality is present must, at a minimum, be recognized. But if F-1 requires no mutuality for the assertion of collateral estoppel, and F-2 follows the traditional mutuality rule, what insult is there to F-1, and the F-1 litigants, if F-2 requires mutuality? For example, suppose a verdict for Plaintiff I against Defendent in F-1 is based upon a specific finding of negligence on the part of Defendant. Suppose, then, that exactly the same issue arises in an F-2 litigation with a different plaintiff, Plaintiff II, and the same defendant. Under the law of F-1, Plaintiff II, a stranger to the prior proceeding, may assert collateral estoppel (assuming that Defendant had a full and fair opportunity to litigate with respect to the liability issue), but under the law of F-2 Plaintiff II would be required to litigate that issue against Defendant. If F-2 were to permit this second litigation the policy of full faith and credit would remain intact. Such a litigation would not involve relitigation between the parties to the F-1 proceeding. Plaintiff I is in no way forced to relitigate; he is no way harassed, and the force and effect of the judgment between the original parties remains unimpaired. The Defendant's obligation to Plaintiff I is in no way altered. Thus, the integrity of the F-1 judgment would not be affected as the full res judicata effect between Plain-

and Credit: The Discarded Constitutional Provision, 1948 WIS. L. REV. 265; Radin, *The Authenticated Full Faith and Credit Clause: Its History*, 39 ILL. L. REV. 1 (1944); Ross, *"Full Faith and Credit" in a Federal System*, 20 MINN. L. REV. 140 (1935); Sumner, *The Full Faith and Credit Clause—Its History and Purpose*, 34 ORE. L. REV. 224 (1955).

49. Including both direct (bar and merger) and indirect (collateral estoppel) preclusion.

50. *But see* United States v. United Airlines, Inc., 216 F. Supp. 709 (E.D.Wash., D. Nev. 1962), *aff'd* as to issue of mutuality of collateral estoppel *sub nom.*, United Airlines, Inc. v. Wiener, 335 F.2d 379 (9th Cir. 1964), in which F-2 applied the "no-mutuality" rule of F-1 without discussion of the full faith and credit issue. *Cf.* cases cited note 43, *supra*.

tiff I and Defendant would be recognized. Plaintiff II was not a party to the F-1 proceeding and therefore cannot argue that he obtained a vested right when the judgment was rendered for Plaintiff I. Plaintiff II is not being harassed and is not being subjected to a second or multiple outlay of energy and resources. Neither Plaintiff I nor Plaintiff II is being required to litigate more than once, nor is F-1 being subjected to the harm of a misallocation of judicial resources.

Clearly, it is F-2's policy to permit this litigation—the first litigation in its own courts. There is, of course, the possibility of a variance in outcome; defendant might be exonerated in F-2, but this possibility alone cannot justify a mandatory application of F-1 law. There is no reason why, on the merits, the first judgment is right and the second wrong, and there can be no principle of preference in that regard. Such a difference in outcome is also possible within any state which requires mutuality. If such a difference in outcome is permissible intrastate, then the fact that state borders have been crossed makes no difference. One might ask what of the forum shopping problem? Plaintiff II will not choose F-2 in such a situation. Defendant has no control in the choice of forum, except that he might remove himself from a "no-mutuality state" to a "mutuality state" for the protection of the latter's more restrictive rule. The possibility of such forum shopping is at best slight, particularly in light of the reach of modern long-arm statutes. The rare situation in which forum shopping might be a problem would be considered by F-2 in making a choice of law; it might decide for that reason not to apply its own more restrictive rule. It would seem, therefore, that the full faith and credit clause should not prohibit F-2 from applying its mutuality rule even though F-2 does not require mutuality.

It is also clear from a policy-centered application of the full faith and credit clause that where one state requires mutuality and the other does not, a greater collateral estoppel effect may be given by F-2 than permitted under the law of F-1. The conclusiveness of the judgment would be preserved; the judicially established rights and obligations would remain unimpaired; the prestige and the integrity of the F-1 court would remain without diminution; there would be no threat of inconsistency and multiplicity. In fact, the policies of full faith and credit would be further enforced. The language of the constitutional and legislative provisions supports such an analysis. To say that "precisely the same effect" is synonymous with "full faith and credit" or "same full faith and credit" is to ignore the significance of the adjective "full" and the adverb "same." The language used is not "exact faith and credit," or "same faith and credit." "Full" connotes complete or entire or whole; it does not mean same or exact. If "full" were interpreted to mean exact or same, not only would it be given a meaning contrary to its historical and common usage, but the adverb "same" in the legislative language would be rendered superfluous. Except in a few instances,[51] this leaves open

51. See text at notes 22-29, *supra.*

the possibility that a state with a legitimate interest may give a sister state judgment greater effect according to its own law of res judicata; a state which has abandoned the requirement of mutuality in the assertion of collateral estoppel may extend the preclusive effect of a sister state judgment even though the law of the sister state would require mutuality.

The only instance in which a court has made a direct determination that F-2 may give an F-1 judgment collateral estoppel effect in the absence of mutuality, in the face of an F-1 rule requiring mutuality, without violating the full faith and credit mandate, is *Williams v. Ocean Transport Lines, Inc.*[52] decided by the Third Circuit Court of Appeals. This court concluded that the statutory full faith and credit provision permits a federal court in a federal admiralty case[53] to give a federal diversity judgment[54] greater collateral estoppel effect than would be law of the first forum state. The court found the full faith and credit mandate to be applicable, but flexible enough to permit this extended collateral estoppel effect. Although the decision was based on section 1738 rather than the constitutional provision,[55] this makes no difference since the former is at least as broad as the latter.[56] Without considering the correctness of the conclusion that there is a full faith and credit issue when a federal judgment is being considered by a second federal court in a federal question case,[57] it is significant that the court was convinced that section 1738 permits the extended collateral estoppel effect. The court noted that the law of New Jersey, the first forum, could not be interpreted to have abandoned the mutuality rule, and it determined that because of the substantial federal interest in avoidance of multiplicity, it had power to decide for itself whether or not a greater collateral preclusionary effect would be given.

IV. The Choice of Law Decision

Assuming that the full faith and credit clause has sufficient flexibility to allow F-2 to apply its own rule as to mutuality of estoppel, regardless of the content of the F-1 rule on that issue, F-2 is faced with a choice of law decision.[58] It is impossible to describe a typical choice of law problem.

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52. 425 F.2d 1183 (3d Cir. 1970).
53. Subject matter jurisdiction based on 28 U.S.C. § 1333.
54. Subject matter jurisdiction based on 28 U.S.C. § 1332.
55. The constitutional requirement of full faith and credit has no application to the federal courts. It relates only to the recognition of state court judgment by other states. *See, e.g.*, Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522 (1931). Nevertheless, the statutory full faith and credit provision, 28 U.S.C. § 1738, does apply to state court judgments at issue in a federal court; *see, e.g.*, American Surety Co. v. Baldwin, 287 U.S. 156, 166 (1932).
56. Williams v. Ocean Transp. Lines, Inc., 425 F.2d 1183, 1189 (3d Cir. 1970).
57. The court's conclusion that the statute applies to federal judgments, *supra* note 52 at 1189 is unsupported by the cases cited in the opinion, and is directly contradicted in Turnbull v. Payson, 95 U.S. 418 (1877) and Heiser v. Woodroof, 327 U.S. 726 (1946). These issues are extensively treated in Vestal, *Res Judicata/Preclusion by Judgment: The Law Applies in Federal Courts*, 66 Mich. L. Rev. 1723 (1968), and Vestal, *The Constitution and Preclusion/Res Judicata*, 62 Mich. L. Rev. 33 (1963).
58. A choice of law decision must satisfy the fourteenth amendment requirement of due process and the full faith and credit clause with respect to the "laws" of a sister

Instead, it may be helpful and instructive to enumerate the range of cases in which a mutuality conflict might be presented to F-2.[59] There are a number of contact factors that may be considered as relevant to the choice of law decision; the following four seem to be the most significant, and for sake of simplicity and manageability, they will be the basis of our enumeration:

1. The domicile, residence, place of business or incorporation, or nationality of the party asserting the estoppel.
2. The domicile, residence, place of business or incorporation, or nationality of the party against whom the estoppel is being asserted.
3. The forum, F-2.
4. The state where the judgment in question was rendered, F-1.[60]

One further condition is necessary for this analysis to be finite in scope. The conflict will be assumed to be between only two states, F-1 and F-2, with factors (1) and (2) above distributed between those two states. This limitation might properly be considered arbitrary; nevertheless, the analysis should offer sufficient illustration to provide general guidelines for application to the many factor combinations not specifically treated.

The conflict between the New York and Texas mutuality rules in *Hart v. American Airlines, Inc.*,[61] presents a good model for our hypothetical. In *Hart*, the New York court found that New York had a paramount interest in the application of its no-mutuality rule[62] to the Texas judgment; it found that Texas had no legitimate claim to the application of its mutuality rule. The critical distinction seemed to be the New York residency of the plaintiffs, the decedents, and their families. American was licensed to do business in both New York and Texas, and was incorporated in Delaware. In an earlier decision in which other plaintiffs, nonresidents of New York, sought summary judgment on the issue of liability against American on the basis of the Texas *Creasy* judgment, the Special Term had determined that the Texas rule of mutuality should be applied and not the New York rule.[63] This first decision was distinguished by the Special Term in its second decision:

> [T]he controlling factor in the [first] decision was the non-domiciliary status of the plaintiffs therein involved and the unwillingness of the court to apply the New York law of collateral estoppel with respect to a Texas determination on behalf of 'non-domiciliary dependents

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state. Precedent is strong that a state desiring to apply its own law must have a legitimate interest in doing so. *See* Currie, *The Constitution and Choice of Law*, 26 U. CHI. L. REV. 9 (1958); Carroll v. Lanza, 349 U.S. 408 (1955); Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493 (1939); Alaska Packers Ass'n v. Industrial Accident Comm'n, 942 U.S. 532 (1935).

59. This methodology was used by Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L REV. 227 (1958).

60. The only other contract favor of any arguable significance is the place where the cause of action arose. This contract has little to do with a conflict on the collateral estoppel issue between two sister states.

61. 61 Misc. 2d 41, 304 N.Y.S.2d 810 (Sup. Ct. 1969).

62. In *B.R. DeWitt, Inc. v. Hall*, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967), the court declared that the mutuality rule was a "dead letter".

63. Hart v. American Airlines, 36 U.S.L.W. 2736 (Sup. Ct. N.Y., May 1968), *aff'd*, 31 A.D.2d 896, 297 N.Y.S.2d 587 (1968).

> of a deceased non-domiciliary "bread winner" ' having no significant contacts with New York. While such result will undoubtedly be effective to discourage "forum shopping" by non-residents, it does not, as defendant argues, preclude the application of the New York doctrine of collateral estoppel in an action brought by New York dependents of deceased New York residents.[64]

The court went on to observe that the plaintiffs in the second *Hart* decision occupied, "much the same relationship to the state of Texas as the non-resident . . . plaintiffs [in the earlier decision did] to New York, and the unavailability of the New York rule on collateral estoppel to the (non-resident) *Hart* plaintiffs is equally relevant in holding the instant resident plaintiffs outside the scope of the Texas rule on that issue."[65] Borrowing in part from the facts of the *Hart* cases we can set up the following table, designating New York and Texas as the two concerned states and assigning to them the actual content of their mutuality rule: New York does not require mutuality in the assertion of collateral estoppel against a party who has had a full and fair opportunity to litigate the issue in the first proceeding; Texas does require mutuality for the assertion of collateral estoppel. In addition, we will assume that the defendant in F-2 is the party against whom the estoppel is asserted, and that the plaintiff in F-2 is the party asserting the estoppel in the absence of mutuality. The analysis would be the same if the contrary were true. With four factors of significance, there are sixteen possible combinations, sixteen different cases, as illustrated in Table 1 below:

Table I

Case Number	F-1	Domicile of Defendant	Domicile of Plaintiff	F-2
1	N.Y.	N.Y.	N.Y.	N.Y.
2	Tex.	N.Y.	N.Y.	N.Y.
3	N.Y.	Tex.	N.Y.	N.Y.
4	N.Y.	N.Y.	Tex.	N.Y.
5	N.Y.	N.Y.	N.Y.	Tex.
6	Tex.	Tex.	N.Y.	N.Y.
7	N.Y.	Tex.	Tex.	N.Y.
8	N.Y.	N.Y.	Tex.	Tex.
9	Tex.	N.Y.	N.Y.	Tex.
10	N.Y.	Tex.	N.Y.	Tex.
11	Tex.	N.Y.	Tex.	N.Y.
12	N.Y.	Tex.	Tex.	Tex.
13	Tex.	Tex.	Tex.	N.Y.
14	Tex.	N.Y.	Tex.	Tex.
15	Tex.	Tex.	N.Y.	Tex.
16	Tex.	Tex.	Tex.	Tex.

64. Hart v. American Airlines, Inc., 61 Misc. 2d 41, 44, 304 N.Y.S.2d 810, 813 (Sup. Ct. 1969).

65. *Id.*

Of the sixteen combinations, one case, No. 16, presents factors all domestic to Texas and another case, No. 1, presents factors all domestic to New York. They present no choice of law problem. In addition, six other cases involve a combination of factors that involve no choice of law problem. In Cases 3, 4, 7, 9, 14, and 15 there is no change in forum, as F-1 and F-2 are identical; therefore the law of the forum should be applied despite the non-residency of one or both of the parties. The parties having litigated both actions within the same state, be it Texas or New York, that state had the paramount interest in the application of its own local rules of res judicata in determining the effect to be given to the local judgment. These no-conflict cases are illustrated below in Table II.

Table II

Case Number	F-1	Domicile of Defendant	Domicile of Plaintiff	F-2
1	N.Y.	N.Y.	N.Y.	N.Y.
3	N.Y.	Tex.	N.Y.	N.Y.
4	N.Y.	N.Y.	Tex.	N.Y.
7	N.Y.	Tex.	Tex.	N.Y.
9	Tex.	N.Y.	N.Y.	Tex.
14	Tex.	N.Y.	Tex.	Tex.
15	Tex.	Tex.	N.Y.	Tex.
16	Tex.	Tex.	Tex.	Tex.

The remaining eight cases do present potential conflicts, since in each of them the forum has a different rule with respect to the requirement of mutuality than does the state where the judgment was rendered. These cases are presented in Table III below.

Table III

Case Number	F-1	Domicile of Defendant	Domicile of Plaintiff	F-2
2	Tex.	N.Y.	N.Y.	N.Y.
5	N.Y.	N.Y.	N.Y.	Tex.
6	Tex.	Tex.	N.Y.	N.Y.
8	N.Y.	N.Y.	Tex.	Tex.
10	N.Y.	Tex.	N.Y.	Tex.
11	Tex.	N.Y.	Tex.	N.Y.
12	N.Y.	Tex.	Tex.	Tex.
13	Tex.	Tex.	Tex.	N.Y.

What are the policies behind the rule which requires mutuality for assertion of collateral estoppel, and the conflicting rule which requires no such mutuality? Before making a reasoned choice of law decision, these policies must be taken into account, and then the respective state's interest in the

effectuation of these policies must be evaluated in the context of the distribution of the four decisive factors. Or as the New York Court of Appeals has suggested:

> [I]t is necessary first to isolate the issue, next to identify the policies embraced in the laws in conflict, and finally to examine the contacts of the respective jurisdictions to ascertain which has a superior connection with the occurrence and thus would have a superior interest in having its policy or law applied.[66]

The principal rationale given for the abandonment of the requirement of mutuality is that it leads to a minimization of litigation with respect to issues already judicially established.[67] In these times of congested court calendars and delay in justice, the minimization of litigation, which abandonment of mutuality accomplishes, is attractive. Interestingly enough, a similar argument can be made in favor of the mutuality rule. Insofar as the New York approach extends the effect of a judgment beyond the parties for the benefit of others, the litigation takes on most serious aspects for a defendant faced with multiple liability. Such a defendant might prudently decide to litigate the first proceeding to the hilt, even though it may involve a relatively small claim that ordinarily would require little investment of the court's and the litigant's resources and energy.[68] Abandonment of mutuality might inordinately expand the length and the intensity of the F-1 proceeding. In addition, the time and energy saved in F-2 not requiring mutuality may be substantially reduced if the issue as to the defendant's full and fair opportunity to litigate in F-1 becomes seriously disputed. Another rationale given for the abandonment of mutuality is that this avoids the inconsistency in outcome which is always possible under the more limited collateral estoppel rule. On the other hand, the jurisdictions which have retained mutuality will be quick to point out the unfairness inherent in the failure to require mutuality. Preclusion becomes one-sided; the stranger is allowed the benefit of a judgment with respect to which he invested no resources or energy. The philosophy that the right to assert the estoppel should be earned is central to the requirement of mutuality. An additional consideration is that the mutuality rule assures that the collateral effect of the judgment will be foreseeable at the time of the litigation, at least intrastate.

The policies expressed by the mutuality rule may be summarized as follows: (1) Protecting a party from the one-sided use of a judgment; requiring that the right to assert an estoppel be earned; (2) Avoiding unduly protracted litigation in F-1 resulting from the far-reaching and often unforeseeable

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66. Dym v. Gordon, 16 N.Y.2d 120, 123, 209 N.E.2d 792, 795, 262 N.Y.S.2d 463, 466 (1965).

67. *See* Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313 (1971); B.R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967).

68. *See* Greenebaum, *In Defense of Mutuality of Estoppel*, 45 IND. L.J. 1 (1969); Moore & Currier, *Mutuality and Conclusiveness of Judgments*, 35 TULANE L. REV. 301 (1961).

collateral consequences of a judgment in the absence of mutuality. The policies expressed by the no-mutuality rule likewise may be summarized: (1) Avoidance of relitigation of issues already judicially established; conservation of judicial energy and resources by avoiding multiple litigation; (2) Allowing a party to benefit from a judgment so as to avoid the misallocation of resources and a potential inconsistency in outcome.

Faced with a choice of law problem involving both foreign and domestic factors, a court must determine whether the states involved have an interest in the effectuation of the policies embodied in their respective laws which are in putative conflict. If the court concludes that the forum state has a legitimate interest in the application of its policies, then the forum law should be applied. This would be true even though the foreign state might also have a legitimate interest in the application of its policies.[69] If the forum state has no legitimate interest in the application of its policies, then the law of the foreign state should be applied.[70]

In Cases 2, 6, 11, and 13, as illustrated in Table IV below, the question presented is whether New York should follow its rule and allow the plaintiff to assert collateral estoppel in the absence of mutuality, or whether it should follow the Texas rule and allow the defendant to litigate the issue with respect to which the estoppel is asserted.

Table IV

Case Number	F-1	Domicile of Defendant	Domicile of Plaintiff	F-2
2	Tex.	N.Y.	N.Y.	N.Y.
6	Tex.	Tex.	N.Y.	N.Y.
11	Tex.	N.Y.	Tex.	N.Y.
13	Tex.	Tex.	Tex.	N.Y.

In Case 2 both the plaintiff and the defendant are domiciliaries of New York; three of the four factors are New York contacts. New York has an interest in extending the benefit of the judgment to the New York plaintiff; such an extension conserves the plaintiff's resources and protects the plaintiff from

69. When both F-1 and F-2 have a legitimate interest in the application of their policies, a true conflict cannot be resolved. The interests of one state will necessarily be frustrated. To require F-2 to frustrate its legitimate interest so as to effectuate those of F-1 is a self-sacrifice that is without justification. As Brainerd Currie once observed: "The sensible and clearly constitutional thing for any court to do, confronted with a true conflict of interests, is to apply its own law. In this way it can be sure at least that it is consistently advancing the policy of its own state. It should apply its own law, not because of any notion or pretense that the problem is one relating to procedure, but simply because a court should never apply any other law except when there is a good reason for doing so." *See* note 59, *supra* at 261.

70. *See* Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171. Many courts have adopted this choice of methodology, *e.g.*, Reich v. Purcell, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967); Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

the possibility of an adverse result inconsistent with the F-1 judgment. New York prefers to give the defendant but one day in court on a particular issue, and the Texas policy to the contrary is not involved when the defendant is a New Yorker. The New York interest in minimizing relitigation is directly involved because any litigation which is permitted will impose a burden on New York courts. The Texas interest in avoiding an undue protraction of the F-1 litigation is prospective, hypothetical, and contingent. This would seem to be a case in which F-2, New York, as a restrained and enlightened forum, could properly apply its own rule so as to effectuate its domestic policies without frustrating the policies of Texas. No real conflict is presented.[71]

In Case 6 the factors are evenly split between Texas and New York; the defendant is a Texas domiciliary and the plaintiff is from New York. As such, the interests of Texas and New York are equally applicable insofar as the mutuality issue affects the individual litigants. The Texas interest in avoiding a protracted litigation is at best one step removed from actuality, while the New York interest in avoiding unnecessary relitigation in New York is immediate and real. This case presents a true conflict with respect to the interests of the litigants; no resolution can assure effectuation of the policies of both states. Since New York is the forum, it has the choice to make; a decision to frustrate its own policies, to prefer the policies of Texas, would not be justified where its interests are at least as strong. Therefore New York could properly apply its own law to extend the benefit of the judgment to its plaintiff.[72]

In Case 11 the factors are also evenly split, but this time the defendant is a New York domiciliary and the plaintiff a Texas domiciliary. The Texas policy which would require the Texas plaintiff to litigate already adjudicated issues has as its justification the desire to protect the party to be estopped. But when the latter party's own state offers no such protection, the Texas policy has no valid claim for effectuation. With respect to the policies of protracted litigation and unnecessary relitigation, the Texas interest is hypothetical and prospective, while the New York interest is immediate and real. As such, New York may apply its own rule so as to effectuate its own policies without interfering with Texas policies. No real conflict is presented.[73]

In Case 13 the only contact that New York has is that it is the forum. Both litigants are domiciliaries of Texas. When the forum has no other contact with the state than this, the possibility of forum shopping is apparent. Unless the cause of action sued upon arose in New York, this is a *forum non conveniens*. The Texas interest with respect to the litigants is clearly superior. Texas policy against a one-sided use of the Texas judgment by one Texan

71. One of the principle advantages of the governmental interest analysis methodology is that it leads to the identification of spurious or false conflicts. Although the policies of two interested states may be contradictory and thus apparently in conflict, one of the states may nevertheless have no interest in the effectuation of its policy under the particular circumstances. The conflict is illusory; no real conflict is presented and therefore the proper resolution is the application of the law of the only interested state.

72. *See* note 69, *supra.*

73. *See* note 71, *supra.*

against another Texan would be directly frustrated if the New York rule were applied. New York has little interest in benefiting the Texas domiciliary when its own state would not do so. New York interest in avoiding the litigation would not seem sufficient in the absence of any other contacts with New York. The problem of forum shopping, the possibility that litigants might seek out the New York forum for the benefit of its extended collateral estoppel doctrine, is an affirmative reason why New York should refuse to apply its own law.[74] The problem of forum shopping would seem to cancel out the desire to avoid this particular litigation. The New York court should effectuate Texas policy by applying the Texas mutuality rule.[75] No real conflict is presented.[76]

In Cases 5, 8, 10, and 12, as illustrated in Table V below, the question is different than that faced in the four cases just analyzed. The question is whether Texas should follow its mutuality rule, or whether it should follow New York law which has abandoned the mutuality requirement.

Table V

Case Number	F-1	Domicile of Defendant	Domicile of Plaintiff	F-2
5	N.Y.	N.Y.	N.Y.	Tex.
8	N.Y.	N.Y.	Tex.	Tex.
10	N.Y.	Tex.	N.Y.	Tex.
12	N.Y.	Tex.	Tex.	Tex.

In Case 5 the only contact that Texas has is that it is the forum. Both litigants are domiciliaries of New York, Texas has no more interest in the application of its mutuality rule in this case than did New York in Case 13. There is scant threat of forum shopping since the plaintiff would not seek out the Texas forum; the mutuality rule would be no benefit; it would be a detriment. The possibility that the defendant might forum shop by leaving New York for a mutuality state is of little consequence given the extensive reach of modern long-arm statutes. Texas would have no interest in providing a forum for already litigated issues when the parties' own state would not do so. To the extent that the mutuality issue affects the individual litigants, Texas would only be interfering in New York policy without effectuating its only policy. Just as New York in Case 13, Texas is a *forum non conveniens* in Case 5. Texas should therefore apply the New York rule. This can be done without frustrating the policies of Texas. No real conflict is presented.[77]

74. Forum shopping is an evil which any court making a choice of law decision must consider. Vertical forum shopping (between state and federal courts) was the target of the Supreme Court's famous decision in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Any choice of law methodology should be designed so as to discourage horizontal forum shopping as well.

75. *See* text at notes 60-64, *supra.*

76. *See* note 71, *supra.*

77. *Id.*

In Case 8 the contacts are evenly split. The defendant, against whom the estoppel is asserted, is a resident of New York. The plaintiff is a resident of Texas. Insofar as the mutuality issue affects the litigants, Texas has no interest in applying its mutuality rule. The Texas rule would burden a Texas domiciliary and would benefit a New York domiciliary in a way that New York would not extend such a benefit. In addition, the Texas policy against protracted litigation in F-1 has no relevance when New York is F-1. Likewise, the New York policy of protecting its courts from unnecessary litigation is not involved. The application of New York law in this case will accomplish the policies of both states without frustrating the interests of either. No real conflict is presented.[78]

In Case 10 the contacts are again evenly split, but the factor allocation is significantly different. The defendant is a domiciliary of Texas and the plaintiff is a domiciliary of New York. Although the Texas interest in avoiding protracted litigation in F-1 is not involved, and although the New York interest in avoiding unnecessary litigation in F-2 is not involved, the interests of these states, in so far as the mutuality issue affects the individual litigants, are in conflict. Texas clearly has an interest in the application of its mutuality rule to prevent a one-sided use of the New York judgment. The New York interest in shielding the New York plaintiff from litigating issues already determined judicially in New York is also directly involved. The conflict cannot be resolved; the policies of one state will necessarily be frustrated. Just as in Case 6, the forum, Texas, would be well advised to effectuate its own policies by applying its mutuality rule.[79]

In Case 12, as in Case 2, both plaintiff and defendant are domiciliaries of the forum; three of the factors are Texas contacts. The Texas interest in the application of its rule is not involved insofar as the avoidance of protracted litigation in F-1 is concerned, but its interest could be no stronger when both litigants are Texans. Texas has an interest in seeing that the Texas defendant be allowed to litigate the issues in question again. Since Texas law would not extend the benefit of the prior litigation to the Texas plaintiff, the New York rule which would allow such an extension has little claim for application. The New York policy against relitigation is not involved when the relitigation will take place in another forum which sanctions such relitigation. Texas should therefore apply its mutuality rule, thus effectuating its own policies without frustrating the policies of New York. Just as in Case 2, no real conflict is presented.[80]

The analysis of the preceding eight choice of law cases indicates that the following conclusions may serve as guidelines for solution of actual cases before the courts:

(1) The "mutuality state" (Texas) has no interest in effectuation of

78. *Id.*
79. *See* note 69, *supra.*
80. *See* note 71, *supra.*

its policy against one-sided use of judgments when the defendant is a non-resident and when the law of the defendant's domicile offers no such protection.

(2) The "no-mutuality state" (New York) has no interest in giving the benefit of an estoppel to the plaintiff, when that plaintiff is a non-resident and when the law of the plaintiff's domicile offers no such benefit.

(3) The "mutuality state" (Texas) has no interest in effectuation of its policy against protracted litigation in F-1, when F-1 is the "no-mutuality state." Even when F-1 is the "mutuality state," its interest is prospective and hypothetical and thus one step removed from actual involvement, and therefore its interest is insufficient to produce a real conflict.

(4) The "no-mutuality state" (New York) has no interest in effectuation of its policy of avoiding litigation in F-2 of already established issues, when F-2 is the "mutuality state."[81]

The results of the foregoing policy-centered analysis are depicted by the following table:

Table VI

Case Number	F-1	Domicile of Defendant	Domicile of Plaintiff	F-2	Law Applied	Type of Effect[82]	Conflict
2	Tex.	N.Y.	N.Y.	N.Y.	F-2	Greater	No
5	N.Y.	N.Y.	N.Y.	Tex.	F-1	Same	No
6	Tex.	Tex.	N.Y.	N.Y.	F-2	Greater	Yes
8	N.Y.	N.Y.	Tex.	Tex.	F-1	Same	No
10	N.Y.	Tex.	N.Y.	Tex.	F-2	Less	Yes
11	Tex.	N.Y.	Tex.	N.Y.	F-2	Greater	No
12	N.Y.	Tex.	Tex.	Tex.	F-2	Less	No
13	Tex.	Tex.	Tex.	N.Y.	F-1	Same	No

Six of the eight cases present no conflict; the policies of one state can be effectuated without impairment of the policies of the other. Resolution of three of the six no-conflict cases, Cases 5, 8, and 13, resulted in the ap-

81. One of the main criticisms of the government interest analysis methodology is the ad hoc nature of the approach. The formulation of guidelines based on such an analysis may reduce the uncertainty and confusion that may sometimes result; *e.g.*, see the difficulties experienced by the New York Court of Appeals as it used this method in guest statute cases: Neumeier v. Kuehner, 31 N.Y.2d 121, 335 N.Y.S.2d 64, 286 N.E.2d 454 (1972); Tooker v. Lopez, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969); Dym v. Gordon, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965); Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963). In *Tooker v. Lopez*, Chief Judge Fuld, in a concurring opinion, took the opportunity to formulate guidelines for resolving guest statute cases based on the court's prior experience. Judge Fuld wisely warned that such guidelines "will not always be easy of application, nor will they furnish guidance to litigants and lower courts in all cases. They are proferred as a beginning, not as an end, to the problems of sound and fair adjudication in the troubled world of the automobile guest statute." Tooker v. Lopez, *supra* at 533. *See also* Reese, *Choice of Law, Rules or Approach*, 57 CORNELL L. REV. 315 (1972) and Reese, Chief Judge Fuld and Choice of Law, 71 COLUM. L. REV. 548, 562 (1971), in which the formulation of guidelines is approved.

82. The degree of effect given to the F-1 judgment (greater, less, or same) by F-2 is compared to the effect that would be given under the F-1 local rule.

plication of the law of F-1 on the mutuality issue. Resolution of the other three, Cases 2, 11, and 12, resulted in the application of the law of F-2 on the mutuality issue. Two of the eight cases, Cases 6 and 10, presented true conflicts, which by their very nature cannot be resolved. The effectuation of the policies of one state would necesarily result in the frustration of the policies of the other state. The law of the forum, F-2, was applied in those situations. The results of this policy-centered analysis methodology may be compared with those of the traditional rule, as embodied in the *Restatement of Conflicts*, which calls for the mechanistic application of the law of the state which rendered the judgment.

In the cases in which there were true conflicts, Cases 6 and 10 (See Table VI), the traditional rule requires F-2 to effectuate the policies of F-1 at the expense of its equally applicable and significant policies.

In the three no-conflict cases in which F-2 law was applied, Cases 2, 11, and 12 (See Table VI), the traditional rule would require F-2 to apply the law of F-1. This would result in the effectuation of the policies of a state with no interest in such effectuation, and the frustration of the policies of the only interested state.

Thus, in five of the eight cases involving putative conflicts, the traditional rule leads to an arbitrary and indefensible result because of its failure to take into account the interests of the states in effectuation of their policies. The traditional rule evolved under the assumption that the command of the full faith and credit clause was inexorable and inflexible. This Article has challenged that assumption on the theory that if F-1 has no stake in the application of its rule on the mutuality issue, then the full faith and credit clause should not require its application. There is sufficient leeway in the mandate of full faith and credit for a reasoned choice of law decision on the mutuality issue. There may likewise be leeway with respect to other facets of the local rules of res judicata. Suggesting that a policy-centered application on the full faith and credit clause is possible and desirable, this Article serves the champertous purpose of inviting litigants and ultimately courts to seriously reconsider the long-held assumption that the constitutional command is insensitive to the needs and interests of the several states which it serves.

SURVEY OF IOWA LAW
IOWA TAX LAW AND PROCEDURE—1973

Edward R. Hayes†

The 1973 Iowa Legislature adopted a number of changes in tax laws, most of which were minor in nature. Significantly, the legislature provided for gradual phase-out of the remaining tax on personal property, and for expansion of property tax relief for elderly and disabled residents with a unique rent control feature for some of them. As part of an election reform law, an income tax "check-off" scheme to provide funds for political candidates was enacted. Nine tax cases were decided by the supreme court in the period covered by this survey (October 1972 through September 1973); several others are pending. A federal statute eliminated cities, power to impose a charge on passengers boarding planes at municipal airports.[1] Several cases from the Board of Tax Review and district courts, and a number of Attorney General opinions, round out current developments in this subject.

I. Federal Tax Liens

The *Code* provisions for filing and release of federal tax liens have required the federal notices of liens to be filed with the county recorder, to affect all property of the taxpayer except vehicles; as to vehicles the notice was to be filed with the treasurer. To avoid this complication, the law was changed to require all federal notices of attachment of lien to be filed with the recorder; the recorder is to report the filing to the treasurer within the next working day so that the lien can be noted on motor vehicle certificates of title. Liens that have been filed with the treasurer are not valid against bona fide purchasers without knowledge unless they had been noted on the certificate of title at time of purchase, and the purchaser is entitled to receive a new certificate with no notice of the lien on it.[2]

II. Income Taxes

There was no enactment updating the *Iowa Code's* reference to the *Internal Revenue Code of 1954*. Thus, federal concepts of income and deductions under the Code of 1954, as it was amended through January 1, 1972,

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1. In 1972 Des Moines and Cedar Rapids instituted such charges. *See* Hayes, *Survey of Tax Law and Procedure*—1972, 22 Drake L. Rev. 550 (1973). The ban on such charges is contained in Act of June 18, 1973, Pub. L. No. 93-44, 87 Stat. 88, 93rd Cong. 1st Sess. (1973).

2. Ch. 225 [1973] Iowa Laws 476, *amending* Iowa Code § 335.18(3) (1973).