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Constitutional Mandate of Lex In Foro Loci Delicti

*Maurice R. Franks**

IT IS THE WRITER'S HYPOTHESIS that a state is constitutionally required to apply its own law to a travel tort which has occurred within its territorial jurisdiction and which is sued upon in its courts. In other words, the interest analysis test — application of the law of the state having the strongest interest in a particular issue — may not be used *in foro loci delicti* (in the forum of the place of the tort).

Background

Traditionally, the tort choice of law rule has been that the tort should be judged by the law of the place where it was committed (*lex loci delicti*).¹ In contrast, the choice of law rule favored today is that the forum court shall apply the law of the state which has the most significant relationship with the injury and with the parties.^{1a}

In 1914, Justice Holmes articulated the traditional vested rights approach in *Western Union Telegraph Co. v. Brown*:

Whatever variations of opinion and practice there may have been, it is established as the law of this court that when a person recovers in one jurisdiction for a tort committed in another, he does so on the ground of an obligation incurred at the place of the tort that accompanies the person of the defendant elsewhere, and that is not only the ground but the measure of maximum recovery.²

In 1952, Cheatham and Reese presaged the impending departure from *lex loci delicti*.³ In 1954, Judge Fuld of the New York Court of Appeals, the same man who later was to write the majority opinion in *Babcock v. Jackson*,⁴ wrote the opinion in the case of *Auten v. Auten*.⁵ Although that was strictly a contract case, the court adopted there the "grouping of contracts" or "center of gravity" approach that is presently replacing *lex loci* in tort situations as well.

In 1961, the New York Court dealt a severe blow to *lex loci delicti* with the decision of *Kilberg v. Northeast Airlines, Inc.*⁶ In that case, a New York citizen flying from New York City was killed in an airplane crash in Massachusetts. Recovery was threatened by a Massachusetts

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¹ *Alexander v. Pennsylvania Co.*, 48 Ohio St. 623, 30 N.E. 69 (1891); see J. H. BEALE, *CONFLICT OF LAWS* (1916).

^{1a} *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

² 234 U.S. 542, 547 (1914).

³ Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959 (1952).

⁴ *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

⁵ *Auten v. Auten*, 308 N.Y. 155, 124 N.E.2d 99, (1954).

⁶ *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

provision limiting damages. The court, while requiring the plaintiff to sue on the Massachusetts wrongful death statute, refused to enforce its provision limiting damages to \$15,000 and, instead, applied New York law. The court reasoned that it was "unfair and anachronistic" to subject a traveling New York citizen to the law of a state through which he might never have intended to pass and that Massachusetts, the fortuitous place of the tort, had no "controlling concern or interest in the amount of tort recovery."

But the final blow to *lex loci delicti* came in 1963, when this same court threw out all pretense of adherence to the doctrine. Judge Fuld, writing the majority opinion in that now famous landmark decision respecting tort cases involving multi-state contacts, *Babcock v. Jackson*, stated:

The traditional choice of law rule, embodied in the original Restatement of Conflict of Laws (§ 384), and until recently unquestioningly followed in this court . . . has been that the substantive rights and liabilities arising out of a tortious occurrence are determinable by the law of the place of the tort. . . . It had its conceptual foundation in the vested rights doctrine, namely, that a right to recover for a foreign tort owes its creation to the law of the jurisdiction where the injury occurred and depends for its existence and extent solely on such law.

. . . . Although the Kilberg case did not expressly adopt the "center of gravity" theory, its weighing of the contacts or interests of the respective jurisdictions to determine their bearing on the issue of the extent of the recovery is consistent with that approach.⁷

He then determined that New York's interest in the driver-guest relation between two New York citizens was greater than that of Ontario, the place of the tort, and proceeded to apply New York's more generous law of compensation to a guest. In Ontario a motor vehicle driver was not liable for his guest's injuries.

The New York interest analysis approach has been adopted in many states.⁸ However, not all courts agree with such a conclusion.

⁷ *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

⁸ As of this writing, the rule in *Babcock v. Jackson* is the law in Alaska, *Armstrong v. Armstrong*, 441 P.2d 699 (Alas. 1968); Arizona, *Schwartz v. Schwartz*, 103 Ariz. 562, 447 P.2d 254, 258 (1968); California, *Reich v. Purcell*, 67 Cal.2d 31, 432 P.2d 727, 730, 63 Cal. Rptr. 31, 34 (1967); District of Columbia, *Meyers v. Gaither*, 232 A.2d 577 (D. C. Cir. 1967); Florida, *Hopkins v. Lockheed Aircraft Corp.*, 201 So.2d 743, 745 (Fla. 1967) (adopts *Babcock* but rejects Kilberg); Illinois, *Graham v. General U. S. Grant Post* 2665, 97 Ill.App.2d 139, 239 N.E.2d 856, 861 (1968); *Wartell v. Formusa*, 34 Ill.2d 57, 213 N.E.2d 544 (1966); Indiana, *Witherspoon v. Salm*, 142 Ind.App. 655, 237 N.E.2d 116 (1968); Iowa, *Puerste v. Bemis*, 156 N.W.2d 831, 833 (Iowa 1968); Kentucky, *Wessling v. Paris*, 417 S.W.2d 259, 260 n.1 (Ky. 1967); Maine, *Beaulieu v. Beaulieu*, 265 A.2d 610 (Maine 1970); Minnesota, *Schneider v. Nichols*, 280 Minn. 139, 158 N.W.2d 254, 257 (1968), *Kopp v. Rechtzigel*, 273 Minn. 441, 141 N.W.2d 526, 528 n.2 (1966); Mississippi, *Mitchell v. Craft*, 211 So.2d 509 (Miss. 1968); Missouri, *Kennedy v. Dixon*, 439 S.W.2d 173, 184 (Mo. 1969), *Toomes v. Continental Oil Co.*, 402 S.W. 321, 322 n.1 (Mo. 1966); New Hampshire, *Clark v. Clark*, 107 N.H. 351, 222 A.2d 205 (1966), *Johnson v. Johnson*, 107 N.H. 30, 216 A.2d 781, 782 (1966); New Jersey, *Maffatone v. Woodson*, 99 N.J. Super. 559, 240 A.2d 693, 695 (Super. Ct. 1968); New

(Continued on next page)

The rule in *Babcock* expressly has been rejected in Arkansas,⁹ Delaware,¹⁰ Louisiana,¹¹ Maryland,¹² and Michigan.¹³ Four other states, while not expressly rejecting *Babcock*, appear still to follow *lex loci delicti*.¹⁴ The less logical rationale of *Kilberg* has been expressly rejected even in certain states that have adopted the *Babcock* test of interest analysis; among these Florida,¹⁵ Missouri,¹⁶ Oklahoma,¹⁷ and Texas.¹⁸

Most frequently cited among the decisions refusing to adopt interest analysis in tort situations is the Delaware case of *Friday v. Smoot*.¹⁹ Chief Justice Wolcott, writing for the court, recognized the potential unfairness of *lex loci delicti* in some instances but, referring to both the certainty of the rule and the significant rights that would be effected by a change from the rule, deferred any change to the legislature.

The usual arguments against interest analysis are based on considerations of certainty and public policy, as specified by dissenting Judge Van Voorhis in *Babcock*:

(Continued from preceding page)

York, *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); See also *Dym v. Gordon*, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965); *Macey v. Rozbicki*, 18 N.Y.2d 289, 221 N.E.2d 380 (1966); Oregon, *Casey v. Manson Constr. & Eng'r Co.*, 247 Ore. 274, 428 P.2d 898, 902-903 (1967); Pennsylvania, *Kuchnic v. McCrory*, 422 Pa. 620, 222 A.2d 897, 899, n. 4 (1966); *Griffith v. United Airlines, Inc.*, 416 Pa. 1, 203 A.2d 796, 805 (1964); Rhode Island, *Woodward v. Stewart*, 104 R.I. 290, cert. dismissed 393, U.S. 957, 243 A.2d 917, 922 n.11 (1968); Texas, *Marmon v. Mustang Aviation, Inc.*, 430 S.W.2d 182, 190, 194 (Tex. 1968) (adopts *Babcock* but rejects *Kilberg*); Wisconsin, *Zellinger v. State Sand & Gravel Co.*, 38 Wis.2d 98, 156 N.W.2d 466, 469 (1968); *Heath v. Zellmer*, 35 Wis.2d 578, 151 N.W.2d 664 (1967); *Wilcox v. Wilcox*, 26 Wis.2d 617, 133 N.W.2d 408, 412 (1965).

Kilberg appears to be the law in California, Reich v. Purcell, *supra*; The District of Columbia, *Meyers v. Gaither, supra*; Illinois, *Graham v. General U. S. Grant Post 2665, supra*; Iowa, *Fuerste v. Bemis, supra*; New Jersey, *Marshall v. Geo. M. Brewster & Son, Inc.*, 68 N.J. Super. 399, 172 A.2d 458, 462 (Super. Ct. 1961); New York, *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961); Oregon, *Casey v. Manson Constr. & Eng'r Co., supra*; Pennsylvania, *Kuchnic v. McCrory, supra*; *Griffith v. United Airlines, Inc., supra*; Rhode Island, *Woodward v. Stewart, supra*; Wisconsin, *Wilcox v. Wilcox, supra*; Mississippi, see *Browning v. Shakelford*, 196 So.2d 365 (Miss. 1967) (concurring opinion by Ethridge, J.).

⁹ *McCinty v. Ballentine Produce, Inc.*, 241 Ark. 533, 408 S.W.2d 891, 893 (1966).

¹⁰ *Friday v. Smoot*, — Del. —, 211 A.2d 594 (1965).

¹¹ *Johnson v. St. Paul Mercury Ins. Co.*, 256 La. 289, 236 So.2d 216 (1970).

¹² *White v. King*, 244 Md. 348, 223 A.2d 763, 766 (1966).

¹³ *Abendschein v. Farrell*, 382 Mich. 510, 170 N.W.2d 137 (1969).

¹⁴ *Landers v. Landers*, 153 Conn. 303, 216 A.2d 183 (1966); *McDaniel v. Sinn*, 194 Kan. 625, 400 P.2d 1018 (1965); *Shaw v. Lee*, 258 N.C. 609, 129 S.E.2d 238 (1963); *Oshiek v. Oshiek*, 244 S.C. 249, 136 S.E.2d 303 (1964). But see *Lowe's North Wilkesboro Hdwre. v. Fidelity Mut. Life Ins. Co.*, 319 F.2d 469 (4th Cir. 1963) (North Carolina conflicts law).

¹⁵ *Hopkins v. Lockheed Aircraft Corp.*, 201 So.2d 743, 747 (Fla. 1967).

¹⁶ *Girth v. Beaty Grocery Co.*, 407 S.W.2d 881, 882 (Mo. 1966). But see *Toomes v. Continental Oil Co.*, 402 S.W.2d 321, 322 n.1 (Mo. 1966).

¹⁷ *Cherokee Laboratories v. Rogers*, 398 P.2d 520 (Okla. 1965).

¹⁸ *Marmon v. Mustang Aviation, Inc.*, 430 S.W.2d 182, 190, 194 (Tex. 1968).

¹⁹ *Friday v. Smoot*, — Del. —, 211 A.2d 594 (1965). See *Griffith v. United Airlines, Inc.*, 416 Pa. 1, 203 A.2d 796 (1964) (dissenting opinion).

Attempts to make the law or public policy of New York State prevail over the laws and policies of other States where citizens of New York State are concerned are simply a form of extra-territoriality which can be turned against us wherever actions are brought in the courts of New York which involve citizens of other States. This is no substitute for uniform State laws or for obtaining uniformity by covering the subject by Federal Law . . . Importing the principles of extraterritoriality into the conflicts of laws between the States of the United States can only make confusion worse confounded.²⁰

Indeed, it has been said that "[a] New York lawyer with a guest statute case has more need of a ouija board today than a copy of Shepard's citations."²¹

But such criticisms are not of a constitutional nature. It is to the constitutional ramifications of interest analysis that this article now will turn.

General Constitutional Ramifications

Interest analysis is subject to the constitutional limitations imposed by the commerce clause,²² the full faith and credit clause,²³ the privileges and immunities clause of article IV,²⁴ and the equal protection clause.²⁵

An attack based on the commerce clause was considered cursorily and rejected in the recent Wisconsin case of *Conklin v. Horner*.²⁶ But in the recent Rhode Island case of *Woodward v. Stewart*²⁷ the court acknowledged the existence of other constitutional limitations on the tort choice of law. Particularly, the court cited the full faith and credit, due process and equal protection clauses as requiring a forum court to "have some rational basis" for the application of its own laws.

The full faith and credit clause merely requires that, "if a state gives *some* faith to the public acts of another state . . . then it must give full faith and credit to those public acts."²⁸ A state's common law is entitled to the same faith and credit as are its statutes.²⁹

²⁰ Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 286, 240 N.Y.S.2d 743 (1963).

²¹ Rosenberg, *Two Views on Kell v. Henderson*, 67 COLUM. L. REV. 459, 460 (1967).

²² U. S. Const. art. I, § 8.

²³ *Id.* Art. IV, § 1 Art. IV, which refers to the privileges and immunities of *state*, as opposed to *national*, citizenship, should not be confused with the privileges and immunities clause of amend. XIV, which protects only privileges and immunities of *United States* citizenship.

²⁴ U. S. Const. art IV, § 2.

²⁵ *Id.* amend. XIV, § 1.

²⁶ "We see no burden upon interstate movement as the result of the choice of Wisconsin law." *Conklin v. Horner*, 38 Wis.2d 468, 157 N.W.2d 579, 585 (1968); *cf. note, Conflict of Laws—Torts—Law of Forum Applies to Accident Involving Only Out-of-State Motorists*, 22 VAND. L. REV. 203 (1968). For an interesting application of the commerce clause, *see Bibb v. Navajo Freight Lines*, 359 U. S. 520 (1959).

²⁷ 104 R.I. 290, 243 A.2d 917, 921 (1968) *cert. dismissed*, 393 U.S. 957.

²⁸ *Order of United Commercial Travelers v. Wolfe*, 311 U.S. 586, 625 (1947).

²⁹ *Leflar, Constitutional Limits on Free Choice of Law*, 28 LAW & CONTEMP. PROB. 706 (1963).

Full faith and credit is sometimes also a matter of due process. Concerning this, Justice Brandeis wrote in the 1952 decision of *Bradford Elec. Co. v. Clapper*:

A State may, on occasion, decline to enforce a foreign cause of action. In so doing, it merely denies a remedy, leaving unimpaired the plaintiff's substantive right, so that he is free to enforce it elsewhere. But to refuse to give effect to a substantive defense under the applicable law of another State, as under the circumstances here presented, subjects the defendant to irremediable liability. This may not be done.³⁰

In *Pearson v. Northeast Airlines, Inc.*,³¹ which grows from the same facts as *Kilberg*, the United States Court of Appeals for the Second Circuit, sitting *en banc*, held that the doctrine of *Kilberg* violates neither the full faith and credit clause nor the due process clause. The court reasoned that the defendant airline had no vested property right under the Massachusetts rule of limiting damage awards for wrongful death and, therefore, there could be no due process deprivation. The United States Supreme Court denied certiorari.

Neither the full faith and credit clause nor the due process clause is applicable to a tort choice of law problem *unless the forum is in a different state from the situs of the tort*. Only in such a situation is there any foreign *lex loci delicti* to which faith, credit or comity might be given. Interest analysis has withstood attacks based upon the full faith and credit clause and upon the due process clause.

Conversely, neither the privileges and immunities clause of article IV nor the equal protection clause is applicable to a tort choice of law problem *unless the forum is in the same state as the situs of the tort*. The law of privileges, immunities and equal protection is substantially different from the law of full faith, credit and due process.

The interest analysis approach has not yet been subjected to an attack based upon the privileges and immunities clause of article IV or upon the equal protection clause. Manifestly, such a challenge best can be presented *in foro loci delicti*. The constitutional implications of interest analysis in that singular situation now will be examined.

Lex in Foro Loci Delicti

The recent New Jersey case of *Maffatone v. Woodson*³² is illustrative. A New York resident borrowed the car of another New Yorker and drove several passengers into New Jersey, where the accident occurred. One of the passengers was killed. In a wrongful death action

³⁰ 286 U.S. 145, 160 (1932); *accord*, *Pacific Ins. Co. v. Comm'n*, 306 U.S. 466 (1939); Hilpert & Cooley, *The Federal Constitution and the Choice of Law*, 25 WASH. U. L. Q. 27 (1939).

³¹ 307 F.2d 131, *rev'd on rehearing en banc*, 309 F.2d 553, 556, 561 (2d Cir. 1962), *cert. denied*, 372 U.S. 912 (1963). *But see In re Kemmler*, 136 U.S. 436, 448-49 (1890); *Anderson v. State*, 80 Okla.Crim. 90, 126 P. 840, 846 (1912).

³² 99 N.J. Super. 559, 240 A.2d 693 (1968).

against the *owner* of the car, the New Jersey forum applied the New York statute which holds a vehicle owner liable for the negligence of any driver using a vehicle with the owner's permission. The New Jersey court made its choice of laws on the basis of New York's "most significant contacts with the affected parties to the litigation and the specific issues raised . . ."^{32a} Thus the New Jersey court applied the *Babcock* test and held that, owing to the presence of substantial New York contacts, the agency law of New York would be applied. Other instances can be found of the *Babcock* interest analysis test being applied *in foro loci delicti*.³³ But generally the courts have applied their own local law in similar fact-and-forum situations, so reaching the constitutional result, despite unconstitutional reasoning, merely by holding that there are substantial forum contacts.³⁴

According to this writer's thesis, the *Babcock* test may not be used *in foro loci delicti*. The clear import of the United States Constitution is that when a resident of one state travels in another, he does so *on equal footing with the citizens of the state in which he travels*. He is entitled to be treated no differently than were he a local resident. Accordingly, if the sojourner's vehicle chances to collide with the vehicle of another citizen of his own home state,³⁵ the courts of the state of the accident must treat these two foreigners no differently than they would treat two local citizens. Thus, if a citizen of, say, Nebraska chances to be sued in, say, Louisiana for a travel tort which occurred in Louisiana, the Nebraska defendant must be accorded all the defenses that would be available to a resident of Louisiana, including the defense of contributory negligence.³⁶ Likewise, the Nebraska plaintiff must be treated as if he were a citizen of Louisiana and may not be subjected to the Nebraska guest passenger statute.³⁷ This view is based on the privileges and immunities clause of article IV and on the equal protection clause of amendment XIV.

The Legislative Meaning

Article IV had its genesis in the Articles of Confederation,³⁸ and was intended to cover the travel situation.³⁹ But the leading case so

^{32a} *Id.* at —; 240 A.2d at 695-6.

³³ *See, e.g.,* *Lowe's North Wilkesboro Hdwre. v. Fidelity Mut. Life Ins. Co.*, 319 F.2d 469 (4th Cir. 1963).

³⁴ *Heath v. Zellmer*, 35 Wis.2d 578, 151 N.W.2d 664 (1967).

³⁵ *Mitchell v. Craft*, 211 So.2d 509 (Miss. 1968). Leflar goes one step further and suggests: "Thus, if two or more interest-connected states have identical or compatible rules of law, and the law of the third state is different, it would be possible to choose as governing the laws of the two states as an undifferentiated but coordinated unit, as against the law of the third state. . . . The constitutional permissibility of this would be difficult to attack." Leflar, *supra* note 29.

³⁶ In this hypothetical situation, compare *Robins v. Sandoz*, 177 Neb. 894, 131 N.W.2d 648 (1964), with *Roberts v. Meche*, 204 So.2d 592 (La. App. 1967).

³⁷ Neb. Rev. Stat. § 39-740 (1967).

³⁸ Articles of Confederation, art IV.

³⁹ *Corfield v. Coryell*, 6 F. Cas. 546 (No. 3230) (C.C.E.D. Pa. 1823).

holding, *Corfield v. Coryell*,⁴⁰ was overruled by the politically motivated decision in *Dred Scott v. Sanford*.⁴¹

During the reconstruction debates, Congress wished to undo the effect of the *Dred Scott* decision primarily because of certain regrettable travel incidents in the south, notably, the unfortunate experience of Massachusetts Judge Samuel Hoar while traveling in South Carolina in 1844,⁴² and later, travel experiences of carpetbaggers after the Civil War.⁴³ It was the intention of Congress to reinstate the protection of the original understanding of the privileges and immunities clause of Article IV as it existed before the *Dred Scott* decision. This was accomplished by incorporating those rights originally guaranteed by Article IV, Section 2, into the equal protection clause of the Fourteenth Amendment. That newer clause is even broader than Article IV in that it applies to all "persons" rather than just to state "citizens."

During the debates on the fourteenth amendment, Representative Hiram Price, Republican from Iowa, remarked, in essence, that the Constitution had failed to protect the rights of citizens traveling in foreign states and that it was necessary that the Constitution be reconstructed to guarantee the protection of all citizens while traveling.⁴⁴ Representative Frederick E. Woodbridge, Republican from Vermont, a learned man in the law said:

It is intended to enable Congress to give to all citizens the inalienable rights of life and liberty, and to every citizen in whatever State he may be that protection to his property which is extended to the other citizens of the State.⁴⁵

Moreover, during the 1866 debates on the Civil Rights bill, Senator Lyman Trumbull clearly indicated that this travel protection was intended to cover the tort situation. Coming from Trumbull, the remarks are significant. A former Justice of the Illinois Supreme Court, Senator Trumbull understood the law. And, at the very time of these remarks, Trumbull was chairman of the Senate Judiciary Committee which only a short time before had reported out the fourteenth amendment. Referring to an order issued under presidential authority by Major General Sickles, Trumbull said: "It is a very significant order."⁴⁶ The order read in part:

All injuries to the person or property committed by or upon freed persons shall be punished in the manner provided by the

⁴⁰ *Id.*

⁴¹ *Dred Scott v. Sanford*, 19 How. 393 (1856), cf. Bischoff, *Dred Scott after a Century*, 6 J. PUB. L. 411 (1957); Mendelson, *Dred Scott's Case—Reconsidered*, 38 MINN. L. REV. 16 (1953).

⁴² CONG. GLOBE, 42nd Cong., 1st Sess., S. 500 (April 6, 1871) Joint Committee on Southern Disorders).

⁴³ *Id.* S. 228 (April 13, 1871).

⁴⁴ CONG. GLOBE, 39th Cong., 1st Sess., H. 1269 (March 8, 1866).

⁴⁵ *Id.* H. 1088 (Feb. 28, 1866).

⁴⁶ *Id.* S. 1759 (April 4, 1866).

laws of South Carolina for like injuries to the persons or property of citizens thereof.⁴⁷

But perhaps the best evidence of legislative meaning may be found in the remarks of Representative John A. Bingham of Ohio. Bingham was a member of the Joint Committee on Reconstruction, a Special Judge Advocate at the trial of the Lincoln conspirators, and later one of the House managers of the 1868 impeachment of President Johnson. But most important of all, Congressman Bingham was the draftsman of the very section of the fourteenth amendment here in question. Said Bingham of his handiwork:

Is it not essential to the unity of the people that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States? Is it not essential to the unity of the Government and the unity of the people that all persons, whether citizens or strangers, within this land, shall have equal protection in every State in this Union in the rights of life and liberty and property?⁴⁸

Can there be any doubt that the original understanding of the privileges and immunities clause of article IV, as incorporated into the equal protection clause of amendment XIV, covers the travel situation, and that when a resident of one state travels in another, he does so on equal footing with the citizens of the state in which he travels? Can there be any doubt that the sojourner is entitled to be treated no differently than were he a local resident?

Avins writes:

The Privileges and Immunities Clause at least requires an understanding of what were deemed to be the privileges and immunities of citizenship a century ago, and the Due Process Clause may likewise require an analysis of what the courts had decided to be due process in 1866. But the Equal Protection Clause has a plain meaning.

The first key concept in this clause is, "No state shall*** within its jurisdiction***." This immediately limits the subject of the clause to things a state can do only within its jurisdiction. It is obvious that a state can confer benefits on persons not within its jurisdiction. It can send them money, for example.⁴⁹

As "it must be kept in mind that the clause cannot be invoked unless the action of a state denies the equal protection of the laws to persons 'within its jurisdiction,'" ⁵⁰ the present writer's thesis at first sight would appear inapplicable other than *in foro loci delicti*. In the strict *Babcock* situation, the parties were not traveling "within" the jurisdiction of the forum state, New York, when the tort occurred. They can assert no claim to equal protection of *lex loci delicti*. The transitory forum is not under any *direct* mandate of either the privileges and immunities clause or the equal protection clause.

⁴⁷ *Id*

⁴⁸ *Id.* H. 1090 (Feb. 23, 1866).

⁴⁹ Avins, *Equal "Protection" of the Laws: The Original Understanding*, 12 N.Y.L.F. 385, 425 (1966).

⁵⁰ 16 AM. JUR. 2d *Constitutional Law* § 516, at 901 (1964).

Likewise, the writer's thesis is inapplicable to any situation other than the travel tort. Cases involving rights of status or contract, including the contract of marriage and its relationship to the doctrine of interspousal immunity, are not subject to the privileges and immunities clause or the equal protection clause.

In the 1855 case of *Conner v. Elliott*, Justice Curtis said of a Louisiana marriage relationship:

Rights, attached by the law to contracts, by reason of the place where such contracts are made or executed, wholly irrespective of the citizenship of the parties to those contracts, cannot be deemed "privileges to a citizen," within the meaning of the constitution.⁵¹

The *Conner* decision preceded the fourteenth amendment, and was discussed approvingly in Congress during the reconstruction debates.⁵² It would appear that the *Conner* interpretation of the privileges and immunities clause of article IV was incorporated into the equal protection clause of amendment XIV. That interpretation excludes rights of status or contract.

Similarly, the two constitutional provisions here being considered do not relate to political rights such as voting. As Senator Garrett Davis, an attorney and a Whig Democrat from Kentucky, remarked ". . . the first clause of the second section of the fourth article of the Constitution . . . of course . . . does not include political rights."⁵³

In summary, article IV, section 2, had its genesis in the Articles of Confederation⁵⁴ and was intended to cover the travel situation. After the Civil War, it was the intention of Congress to reinstate the protection of the original understanding of the privileges and immunities clause of article IV as it existed before the *Dred Scott* decision. This was accomplished with the equal protection clause of amendment XIV.

Although the two clauses do not apply unless one is traveling "within its jurisdiction", and do not apply to status, contract, or political rights, there can be no doubt that Congress wished to create travel equality. Such was the manifest legislative meaning.

The Judicial Understanding

After the *Dred Scott* decision, the next major judicial interpretation of article IV, section 2, was not until after the Civil War. In the very same year the fourteenth amendment was ratified, Justice Field wrote the opinion in *Paul v. Virginia*.⁵⁵ That opinion operated to restore

⁵¹ *Conner v. Elliott*, 18 How. 591, 593 (1855). Accordingly, the writer feels that the holding in *Auten v. Auten*, 308 N.Y. 155, 124 N.E.2d 99, 50 A.L.R.2d 246 (1954) is constitutional.

⁵² See, e.g., CONG. GLOBE, 42nd Cong., 1st Sess., S. 499 (April 6, 1871).

⁵³ *Id.* 41st Cong., 1st Sess., S. 1511 (Feb. 23, 1870).

⁵⁴ For an excellent discussion of the history of art. IV, § 2, see *Blake v. McClung*, 172 U.S. 239 (1898).

⁵⁵ 8 Wall. 168 (1868).

the *Corfield* understanding of article IV privileges and immunities. Wrote Justice Field:

It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free egress into other States, and egress from them; it insures them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this. Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.⁵⁶

Four years after the *Paul* decision, the Supreme Court had occasion to consider the landmark *Slaughter House Cases*.⁵⁷ Justice Miller, writing for the Supreme Court, was careful to point out that the "sole purpose" of the constitutional provision in question was to require each and every state to grant to citizens of other states the same privileges and immunities, no matter how qualified or restricted, as were granted to its own citizens when the former are within the state's jurisdiction. For example, in *Cole v. Cunningham*, the court held that article IV protects access to a state's courts and communicates "all the privileges and immunities which the citizens of the same state would be entitled to under like circumstances. . . ."⁵⁸ Additionally, both the article IV provision and the amendment XIV clause have been used to require non-discriminatory tax treatment for foreign corporate actions.⁵⁹ And, in 1934, the Maryland Court of Appeals struck down a state statute which provided a different measure of damages for wrongful death when the deceased child and his destitute parents were both residents of the state than when they were not both residents of the state.⁶⁰

The concepts of privileges and immunities and of equal protection have not changed much in the last century. Professors Currie and Schreter concede:

If the validity of a contract is determined by the law of the place of contracting; if the consequences of a tort are determined

⁵⁶ *Id.* at 180.

⁵⁷ 16 Wall. 36 (1872).

⁵⁸ *Cole v. Cunningham*, 133 U.S. 107, 114 (1890).

⁵⁹ *Southern Railway Co. v. Greene*, 216 U.S. 400 (1910).

⁶⁰ *State v. Cohen*, 166 Md. 682, 172 A. 274, 278 (1934). For a most remarkable equal protection decision from the Wisconsin court, see *Bourestom v. Bourestom*, 231 Wis. 666, 285 N.W. 426 (1939).

by the law of the place of harm; if matters of procedure are determined by the law of the forum—then problems of invidious discrimination apparently cannot arise.

. . . It happens that we espouse a conflict-of-laws method which brings these troublesome problems to light. . . . Whenever we make the statement that a state should apply its protective laws when the person claiming the benefit of the protective policy is a citizen, or resident, of the state, we should like to be understood as adding that it should apply those laws also for the protection of such other persons as are entitled under the Constitution to parity of treatment with local citizens. . . .

Perhaps the best advertised of the privileges and immunities of citizenship is the right to travel freely among the states. The Supreme Court has vindicated this right of "ingress and egress," but never in terms of article IV. In *Crandall v. Nevada* a tax upon every person leaving the state was held in conflict with the implied right of a citizen to travel in connection with the affairs of the national government; and in *Edwards v. California* a statute making it a criminal offense to bring an indigent nonresident into the state was held in conflict with the commerce clause.⁶¹

The conflict of laws method that Currie espouses concededly may be unconstitutional in certain specific situations. One such situation is where the forum is in the same state as the situs of the tort.

But the trend well may be back in the constitutional direction.

Professor Leflar admits:

Most of the states are becoming accustomed to the fact that a large proportion of the human beings who at any given moment are working or playing within their borders will have ties with other states as well. An effect of this is that the states are less concerned than they once were with protection of the local citizen as distinguished from the "stranger," and more inclined than they once were to promulgate and enforce laws that apply to both equally, well beyond the minimum equalities prescribed by the federal constitution. Visitors as well as residents may be protected by "good" local laws. The domicile of parties in one state or another has less significance today, and may well have far less in another generation, than it once had as a basis for locating true governmental interests.⁶²

The present writer maintains that traveling visitors must accept the equal protection not only of Leflar's "good" local laws, but of *all* local laws not involving rights of status or contract. The United States Supreme Court, however, in certain situations has granted limited recognition to the interest analysis approach. It is to that *obiter dicta contra* that this article now will turn.

⁶¹ Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, 69 YALE L. J. 1323, 1325 (1960); see, *Crandall v. Nevada*, 6 Wall. 35 (1867); *Edwards v. California*, 314 U.S. 160 (1940).

⁶² Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U.L. REV. 267, 293-94 (1966); accord, *Conklin v. Horner*, 38 Wis.2d 468, 157 N.W.2d 579 (1968).

Obiter Dicta Contra

The two constitutional provisions here being considered do not apply to status, contract, or political rights. Interest analysis, therefore, seems perfectly proper in contract situations.⁶³ In the 1946 contract case of *Vanston Committee v. Green*, the Supreme Court applied a grouping of contracts test.⁶⁴ That application seems to have been correct.

Likewise proper have been the applications of interest analysis in federal tort situations. In 1961, Chief Justice Warren wrote the opinion in *Richards v. United States*. He said:

The question to be decided in this case is what law a Federal District Court should apply in an action brought under the Federal Tort Claims Act where an act of negligence occurs in one State and results in an injury and death in another State. . . . Recently there has been a tendency on the part of some States to depart from the general conflicts rule in order to take into account the interests of the State having significant contact with the parties to the litigation. We can see no compelling reason to saddle the Act with an interpretation that would prevent the federal courts from implementing this policy in choice-of-law rules where the State in which the negligence occurred has adopted it.⁶⁵

Similarly, in *Laurietzen v. Larsen*, the Supreme Court applied Danish law in a seaman's suit filed under the Jones Act.⁶⁶

Now it is elementary that neither the Jones Act nor the Federal Tort Claims Act⁶⁷ is a state law. But article IV, section 2, refers only to privileges and immunities of state citizenship.⁶⁸ And amendment XIV, section 1, demands only the equal protection of state laws.⁶⁹ Not only are the Supreme Court cases applying interest analysis correct, but the constitutional exceptions here presented could not even have been raised in those cases.

Nor are the holdings in *Kilberg*, *Pearson* and *Babcock* necessarily wrong when limited to their facts. The privileges and immunities clause of article IV and the equal protection clause of amendment XIV were singularly inapplicable in *Kilberg*, *Pearson* and *Babcock*, as those cases were not filed *in foro loci delicti*.

The writer has confined his hypothesis to interstate travel torts where suit is filed *in foro loci delicti*. And the answer to any possible objections to the present writer's hypothesis already has been stated

⁶³ *Conner v. Elliott*, 18 How. 591 (1855).

⁶⁴ *Vanston Bond Holders Protective Committee v. Green*, 329 U.S. 156, 161-62 (1946).
On statutes of limitations and borrowing statutes, see *Canadian Northern Ry. Co. v. Eggen*, 252 U. S. 553, 562 (1920).

⁶⁵ 369 U.S. 1, 2 (1961).

⁶⁶ 46 U.S.C. § 688 (1964).

⁶⁷ 28 U.S.C. §§ 2671-80 (1964).

⁶⁸ *State v. Cohen*, 166 Md. 682, 172 A. 274, 278 (1934).

⁶⁹ Avins, *supra* note 49, at 425; 16 AM. JUR. 2d *Constitutional Law* § 516, at 901. See also *Mertz v. Mertz*, 271 N.Y. 466, 471, 3 N.E.2d 597, 598, 108 A.L.R. 1120 (1936).

very succinctly by a very eminent judge in a very important case: "[I]t is not amiss to point out that the question here posed was neither raised nor considered in those cases and that the question has never been presented . . ."70

Conclusions

Some might object that compliance with the clear constitutional mandate would wreak havoc upon the currently fashionable approach to conflicts. It is doubtful that acceptance of this writer's view would have one tenth the impact that was felt when Judge Fuld released his decision in *Babcock*. But such policy considerations are irrelevant.⁷¹

Those who merely disagree with results, but who have no anti-theoretical constitutional reasoning to offer, respectfully are advised to exercise their amendment I rights to urge Congress to avail itself of its article V prerogatives. Alternatively, Congress could legislate a choice-of-law code.⁷²

Others might ask whether the equal protection clause demands equal protection of the laws of the forum or equal protection of the laws of the place of the tort. All the present writer safely can opine is that the equal protection clause prohibits choice of law discriminations in travel tort situations based on the state of origin of the parties. Even if the forum constitutionally is free to choose between *lex fori* and *lex loci delicti* (which, incidentally, must of necessity be identical in *foro loci delicti*), the forum may not apply *lex domicilii* unless *lex domicilii* happens also to be *lex fori*, in which case the forum arguably is giving to persons "within its jurisdiction the equal protection of its laws."

In any event, the *Babcock* test may not be used in *foro loci delicti*. The clear import of the United States Constitution is that when a resident of one state travels in another, he does so on equal footing with the citizens of the state in which he travels. He is entitled to be protected there no differently than he would be were he a local resident.

⁷⁰ *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

⁷¹ U. S. Const. art VI.

⁷² Lefflar, *supra* note 29 at 731. See also CONG. GLOBE, 39th Cong., 1st Sess., H. 1088 (Feb. 28, 1866) (fourteenth amendment) (remarks of Representative Woodbridge).