Full Faith and Credit in Three Federations

W.M.C. Gunnow

Federal Court of Australia

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The Honorable Mr. Justice W.M.C. Gummow*

The purpose of this Paper is to compare and contrast the operation of two federal constitutional mechanisms in the United States, Canada, and Australia. Both concern civil rather than criminal law. The first mechanism is the service and execution of the process and enforcement of the judgments of the courts of the states and provinces. The second is "choice of law" and conflicts between the laws of the various states and provinces in their substantive operation upon common subject matter in civil cases. A particular concern is with statutes (a) that adopt for their operation connecting factors differing from those of common-law choice of law analogues and (b) whose operation extends to events and circumstances occurring or found within the federation, but outside the territory of the enacting legislature.

The relevant Australian constitutional provisions were drawn a century ago and avowedly with the United States Constitution in mind. There is no relevant express provision in the Canadian Constitution, but in considering the implications of the Canadian federal structure, the Supreme Court of Canada considered the American and Australian experiences.

* A Judge of the Federal Court of Australia. On March 28, 1995, Justice Gummow was recommended for appointment as Justice of the High Court of Australia. He was confirmed and took the oath of office on April 18, 1995.

1. Special considerations apply where the laws of several states operate to render the same conduct a criminal offence. That subject is discussed by Mr. M.J. Leeming, with reference to authorities such as Heath v. Alabama, 474 U.S. 82 (1985), in his article "Resolving Conflicts Between State Criminal Laws" 12 Australian Bar Review 107 (1994-5). It is outside the scope of this paper. However, one point should be noted. The decisions dealing with the application of full faith and credit to statutes, in addition to service of process and enforcement of judgments, largely commenced only a century ago. See Kurt H. Nadelmann, Full Faith and Credit to Judgments and Public Acts, 56 Mich. L. Rev. 33, 73-74 (1957). The reasons for this may have included the greater devotion of state legislative activity in earlier times to the criminal law, rather than to economic and other regulatory activity, and the narrower views once taken in the United States as to the extra-territorial competence of state legislatures.


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THE CONSTITUTIONAL PROVISIONS

It is best to begin with the constitutional texts of the United States and Australia. Article IV, section 1 of the United States Constitution states: "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.""4

The Australian constitutional provisions are contained in sections 51 and 118, as follows:

51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:-

...  

(xxiv) The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States:

(xxv) The recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States:

118. Full faith and credit shall be given, throughout the Commonwealth, to the laws, the public Acts and records, and the judicial proceedings of every State.5

Neither in Canada nor in Australia is there any express adoption of the part of section 1 of the Fourteenth Amendment of the United States Constitu-


4. Congress has acted only in a limited fashion. Title 28, U.S.C. § 1738 (1988), which took this form in 1948, states:

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

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


tion that provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."6 On its face, Section 7 of the Canadian Charter of Rights appears to be drawn more narrowly by excluding any reference to property. However, in place of "due process of law" there is the phrase "fundamental justice."7 This constitutional provision has been treated as a substantive concept by the Supreme Court of Canada and used to strike down various laws in fields other than those with which this paper is concerned.8 In Australia, many issues of due process that elsewhere would be regarded as constitutional are left to the common law.9 There is, for example, no implication from the nature of the judicial power of the Commonwealth and the separation of powers effected by the Constitution which prevents the Parliament from declaring that a person is guilty of a crime against federal law by reason of having committed a past act that, when done, was not a crime.10 In the United States, before the adoption of the Fourteenth Amendment full faith and credit held the field.11 The coexistence of constitutionally mandated full faith and credit and due process has assumed an important role in recent United States jurisprudence. This coexistence also is significant in contrast with that of the other federations. In Allstate Insurance Co. v. Hague12 Justice Brennan explained that in deciding what he called "choice-of-law cases" the Supreme Court had taken a similar approach when applying the Full Faith and Credit Clause and the Due Process Clause. In his concurring opinion, Justice Stevens wrote that even though the Full Faith and Credit Clause and Due Process Clause had been treated as though they were indistinguishable, the two constitutional provisions protected different interests

7. CAN. CONST. § 7. The Section states, "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Id.
8. PETER HOGG, CONSTITUTIONAL LAW OF CANADA §§ 33.4(b), 44.10 (3d ed. 1992). There is a suggestion in Morguard that Section 7 may have a role in the development of a full faith and credit doctrine. Morguard, 3 S.C.R. at 1110.
9. The content of the common law is in some flux. For example, while the common law of Australia does not recognize the right of an accused to be provided with counsel at public expense, a court may stay a prosecution that would result in an unfair trial for want of legal representation: Dietrich v. The Queen, 177 C.L.R. 292 (Austl. 1992).
11. Lea Brilmayer, Credit Due Judgments and Credit Due Laws: The Respective Roles of Due Process and Full Faith and Credit in the Interstate Context, 70 IOWA L. REV. 95, 96-97 (1984) ("[T]he Supreme Court became involved in policing state assertions of long arm jurisdiction, citing full faith and credit, before the fourteenth amendment was even adopted.").
and required separate consideration. Full faith and credit directs each state, "when acting as a forum for litigation having multistate aspects or implications, [to] respect the legitimate interests of the other States and avoid infringement upon their sovereignty." Due process protects the interest of litigants in a fair adjudication of their rights. Another view of the distinction is that due process has come to represent centrifugal forces in the federation because the powers of each state are limited, preventing any one from applying its own law to all legal issues and from bringing all legal disputes before its courts, while full faith and credit represents the centripetal force in the federation.

What is Full Faith and Credit? Is it "Choice or Law?"

The phrase "faith and credit" appears to have first entered the decisions of the English courts of common law by means of what now would be considered a branch of the law of res judicata and issue estoppel, concerning decisions of courts operating within one domestic legal system, but each with a distinct field of subject matter jurisdiction.

Faith and credit was used to describe the effect given in other English courts to issues previously determined by proceedings in ecclesiastical courts. One example concerned an action for trespass brought in the Queen's Bench by a parson claiming to have been wrongfully deprived of his living by an ecclesiastical tribunal. Another was the trial in 1776 of the Duchess of Kingston for bigamy. In that case, the accused argued that the court should give faith and credit to an earlier decision of an ecclesiastical court against the marriage in a suit for jactitation of marriage. However, as indicated by the unanimous opinion of the judges, the effect given to the earlier ecclesiastical decision was evidentiary in nature; it did not provide a plea in bar. Accordingly, other evidence was admissible to show, for example, that the earlier proceeding had been tainted by fraud.

13. Id. at 320-32. In Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 824 (1985), Justice Stevens said that the majority opinion wrongly failed to consider separately the fairness of the Kansas Court's decision, and the potential impact of the Kansas choice of law on the concerns of other interested states.
14. Id. at 322.
15. Id. at 325.
16. Brilmayer, supra note 11, at 110. In Breavington v. Godleman, 169 C.L.R. 41, 132 (Austl. 1988), Justice Deane understated the United States position in saying that section 118 of the Australian Constitution was "uncomplicated by the competition of a possibly overlapping due process clause."
Id. (citation omitted).
19. Id. at 540.
It may be that the expression "full faith and credit" adopted in the Articles of Confederation, and later in the United States Constitution, was designed to provide greater substance. In this vein, Story indicated that "full" was adopted to emphasize that "positive and absolute verity" was to be attributed to the judgments of each state.20

It is one thing to give absolute verity to a judgment in which a dispute as to law or fact has been reduced to a specific outcome. It is another in the very course of the judicial determination to resolve one or more issues, not by reference to the law administered by a specialist court nor by the general law of the forum, but by the law of another forum.

As a matter of daily experience in a common law system, this may come about for one or more of several reasons. First, the statutory law of the forum may pick up the law of another jurisdiction. An example is the adoption by each of the Australian States of statutes passed by the federal Parliament to provide the corporate law of the Australian Capital Territory, creating a uniform cooperative scheme for corporate law in Australia.21 Secondly, the common law rules of choice of law may, if not displaced by statutory law of the forum, select a foreign law as the lex causae of one or more issues. It may be that, in its terms, the foreign law purports to govern the disposition by the forum of the dispute in question, but if that law is applied as the lex causae by the forum, it is not by its own force, but by reason of the operation of the choice of law rules of the forum in one of the ways outlined above. It should be noted that, the existence in Australia of a unified common law means that choice of law issues arise at the interstate level only when one state has legislated and the other has not or, in contrast with the United States system, when both have legislated.

In many instances, the courts of two jurisdictions, by reason of their respective choice of law rules, each apply only their domestic law as the lex causae without regard to the law of the other. Such practice may encourage forum shopping and also may lead to concurrent proceedings in different jurisdictions. The second situation is the concern of the developing law as to forum non conveniens. Further, the law as to res judicata and issue estoppel with respect to foreign judgments,22 with or without local registration

20. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1304 (1833). See also the early authorities referred to by Justice Deane in Breavington, 169 C.L.R. at 129. See generally Nadelmann, supra note 1 at 44.


systems, attempts to specify the degree of preclusive effect in one jurisdiction of a judgment in another. As indicated above, such preclusion was the initial concern of full faith and credit within the United States' federal system. However, such situations are not choice-of-law problems as described in the last paragraph.

The expression "conflict of laws" frequently is used to describe the common law choice-of-law rules as described above. The term "conflict" is an unhappy one when used in this context. The point was well made in Dicey's Conflict of Laws:23

The name ["conflict of laws"] is not altogether satisfactory. It covers only that part of the subject which deals with the choice of law to the exclusion of the issue of jurisdiction, which is in our view an essential part of the subject. The only 'conflict' possible is, moreover, that in the mind of the judge who has to decide which system of law to apply to the facts before him, and in many cases the proper choice must be so simple that the term is quite out of place as a description of his mental attitude. There is much to be said for preferring the simpler 'choice of law', the term 'choice' sufficiently indicating the existence of the possibility of applying one or other system of law to the facts of the case under consideration. Retention of the title 'conflict of laws' is justified merely by the obvious inconvenience of changing the name, which through the example of Story has won a certain degree of authority.24

The learned editors distinguished "jurisdiction" from "choice of law." The term "jurisdiction," particularly when used in a federal judicial system, has several distinct meanings. Its primary meaning is the amenability of the defendant to the court's writ, which, without legislative extension, does not run beyond the territorial limits of the local sovereign authority. The term also may be used to identify authority to adjudicate upon particular subject matter and to grant relief of a particular kind.25 In the exercise of jurisdiction in this sense, the common law choice-of-law rules may have a decisive operation in some cases, for example, supplying a foreign lex causae. Finally, there is the distinct non common laws concept of federal jurisdiction, the

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24. Id. at 7. A passage to the same effect appeared in the 1927 4th edition at page 11. This was the first edition to appear after the death of Dicey in 1922. The substance of the passage set out above appears in the 1993 12th edition at page 33; this edition is under the general editorship of Mr. Lawrence Collins.

25. The distinction between these meanings of jurisdiction is clearly drawn in Flaherty v. Girgis, 162 C.L.R. 574, 598 (Austl. 1987).
authority to adjudicate derived from the Constitution. The Constitution identifies this authority by reference to subject matter and parties. Some actions arising in federal jurisdiction (e.g. actions between states) have no parallel in common law. It should give one pause to apply the common law choice-of-law rules to those actions without common law parallels.

There may be differences among the choice-of-law rules accepted by the jurisdictions that have some connection to the dispute in question. Thus, the choice of law made by the forum usually will depend upon the classification by the forum of the claim or issue in question (e.g. as one in tort or contract) and the characterization of the facts so as to select the appropriate connecting factor (e.g. this tort was committed in Quebec). The foreign law then selected may itself classify the claim or issue differently or select a different connecting factor. Again, does the choice of the lex causae carry with it the selection of the choice-of-law rules of that foreign law? These may prefer the law of a third jurisdiction as the lex causae. Such differences in classification or characterization and the rules as to renvoi have been said to demonstrate the operation of rules of choice of law “in the second degree,” to be resolved by what truly are “conflict rules.”

When used in a federal system, “conflict” has a meaning quite different to any with which choice of law is concerned. The failure to appreciate this and the blurring of the distinction has caused much mischief. Within one jurisdiction of a federation, the laws of several legislatures may operate and clash in doing so. The conflict between national and state or provincial law is resolved by the primacy given federal law by express provision in Australia (section 109 of the Constitution) and by express or implied statements of federal supremacy in the United States and Canada.

In Australian constitutional law the term “repugnancy” has been used to identify the clash between Imperial and local laws, and “inconsistency” (expressed in section 109 of the constitution) between federal and state laws; the Australian Capital Territory now has self government and the criterion is that a provision of Territory law will be consistent with federal law “to the extent” that it is “capable of operating concurrently with it.” This adds a

27. The Canadian courts have not applied the “covering the field” doctrine, which assists federal legislative supremacy in Australia and the United States. HOGG, supra note 8, § 16.4(a).
28. Until the adoption by the Australian Parliament in 1942 of the Statute of Westminster 1931 (Imp.), it was a colonial legislature whose laws might be rendered void by the Colonial Laws Validity Act 1865, section 2, as “repugnant” to laws of the Imperial Parliament. In Canada, which then did not include Newfoundland, the 1931 statute immediately had been operative with respect to both the federal and provincial legislatures. This was the effect of sections 2 and 7. The Australian States were finally emancipated from the 1865 Act only by the Australia Acts 1986.
further dimension to the operation of contrariety in the Australian legal system. In the United Kingdom, any apparent clash between a law of the British Parliament and the supremacy of European Union law established by section 2 of the European Communities Act 1972 (U.K.) is decided by asking whether the British law is "incompatible" with the relevant European law.\(^{30}\)

There may be a clash between the laws of the states in the federation. This may arise by reason of the direct operation of the law of one state in the territory of another. It may also arise where the "laws of two or more States which, by their terms or in their operation, affect the same persons, transactions or relationships."\(^{31}\) We have it on the recent authority of the United States Supreme Court that the Founding Fathers acted in the expectation that the Full Faith and Credit Clause "would be interpreted against the background of principles developed in international conflicts law."\(^{32}\) However, the courts and legislatures of the Canadian and Australian colonies before federation, and of the states before the adoption of the United States Constitution, were not called on to grapple with a particular aspect of the distribution of powers in a federal system, the existence of concurrent, but limited, legislative authorities in a group of law areas.

Because of this concurrence, full faith and credit is important, not only with regard to the significance to be given to judgments within the federation but also, on a larger scale, with respect to conflicting laws of the several component states.

Professor Laycock illustrates this point in the following statement:

"To simultaneously apply the conflicting law of two states is impossible; to require each state to apply the law of the other is absurd; and to let each state apply its own law repeals the Clause. Sister-state law cannot be equal in any of these senses. The requirement that each state apply the same law is comprehensible only on the assumption that there are occasions when the law of a sister state applies and occasions when it does not. The Full Faith and Credit Clause thus assumes the existence of choice-of-law rules, but it does not specify what those rules are."\(^{33}\)

However, it may be confidently suggested that it is unlikely that the constitutional mandate requires a second state to give to the laws of the home state a.


greater measure of faith and credit than is required by the home state itself.

Thus, if the law of the home state does not purport to have a direct operation in the territory of the second state nor in its operation to affect the same persons, transactions, or relationships as are reached by the laws of the second state, where is the conflict in the constitutional sense? Why should the constitution give to the law of the home state a greater reach than the legislature claimed for it? This is an aspect of full faith and credit to which it will be necessary to return later in this paper, particularly with reference to the respective operations of the laws of Alaska and California that were in issue in Alaska Packers Association v. Industrial Accident Commission of California.34

There is much to be said for the explanation of the relationship between full faith and credit and general choice-of-law rules given by Professor D. St. Leger Kelly in his valuable monograph Localizing Rules in the Conflict of Laws.35 Professor Kelly refers to the application by the forum of statutory provisions of a sister state to cases that are not expressed to cover as involving the granting to that legislation of greater faith and credit than section 118 demands. He continues:

[S]ection 118 requires animadversion to the claims made by sister state law, since only then can adequate content be given to the terms ‘faith’ and ‘credit’ in the constitutional provision. General choice of law rules, on the other hand, delimit the scope of the application of sister state laws in the forum not by reference to the express or implied claims to application made by these laws, but upon independent forum determination of the appropriateness of dealing with cases involving both forum and foreign incidents by treating them either as totally foreign cases or as totally forum ones.

...  

34. 294 U.S. 532 (1935).
The learned author later wrote:

Once a claim to application is made by sister-state law, full faith and credit must become relevant. Indeed, it may be that it is only when such a claim is made that full faith and credit is a relevant factor. To give full faith and credit to sister-state law only when forum choice of law rules point to the sister-state is to give full faith and credit to one’s own law rather than to that of the sister state, a fact which the unity of the common law in Australia has so far concealed.


Professors Sykes and Pryles also prefer a construction of § 118 as a curb on certain types of extra-territorial statutes, so that the sister-state statute may be denied an overextensive effect: SYKES & Pryles, AUSTRALIAN PRIVATE INTERNATIONAL LAW 330-34 (3d ed. 1991).
What must not be asserted, however, is that general choice of law rules in their other regarding sense, that is, simply as indicating the applicability of a system other than that of which they form part, are in themselves an object of section 118. It is hardly conceivable that the forum should be required to take account of section 118 merely because, had the case been brought in a sister state forum, the latter (owing to a difference in the general choice of law rules of the two states) would have applied a different decisional rule from that applied in the forum. If the sister state law makes no claim to application itself, the fact that the courts of that state would refer a given case to a third state does not of itself make the law of that state relevant before the actual forum. Only the law of that third state can determine whether it seeks application to a given case and, subject to one qualification, it is only when that claim is made that full faith and credit can become relevant. How could it be claimed that the forum has denied full faith and credit to the law of a third state when that law would not be applied to the instant case by the courts of that state? Moreover, so far as the second state is concerned, its choice of law rules, in their other regarding aspect, themselves make no claim to application anywhere but in the courts of that state.36

Where there is no constitutional conflict between state laws, and the common-law choice-of-law rules create inconsistent results, opportunity for forum shopping will exist despite the existence of section 118. Thus, there is a related but distinct issue. It has attracted the attention of the judges forming the minority in a series of recent cases in the High Court of Australia commencing with Breavington v. Godleman.37 This case concerns the impact upon the common-law choice-of-law rules as they exist in the various states of the national legal structure created by a federal constitution. Is it an implication of that federal structure that the common-law rules must be adjusted so that, matters of procedure aside, the same substantive legal consequences will flow from a particular act or omission within the national jurisdiction, regardless of the particular state forum in which the relevant dispute is adjudicated?

Take, for example, a common-law choice-of-law rule that requires the plaintiff to make out a substantive case not only under the common law and statutory law of that jurisdiction in the federation in which the relevant acts or omissions occurred, but also under the common law and statutory law of the forum. Does the existence of a national legal system mandate, as a matter of constitutional law, a choice-of-law rule that requires compliance only with the lex loci delicti? If the answer is affirmative, the result will be to alleviate somewhat the perceived evil of forum shopping. However, the circumstance

36. KELLY, supra note 35.
that the statutes of the forum and the relevant other jurisdiction are inconsistent involves no more than that the common law has imposed a double-barreled *lex causae*. That situation, in my view, is not the type of case in which the full faith and credit clause is called upon to resolve any conflict in the laws of the states.

It is appropriate at this stage to refer further to certain peculiarities of the Australian federal system, an appreciation of which assists in perceiving the different regimes that apply as to service and execution of process and as to choice of law in full faith and credit doctrine.

In particular, differences in the nature of the United States and Australian federal systems, comparatively subtle though some of them may appear, provide an important context in which rather different approaches have been taken to the choice-of-law aspect of full faith and credit. Such differences appear not only between the decisions of the Supreme Court of the United States and the High Court of Australia, but also within the courts themselves. I turn to consider these differences.

**The Australian Federal System**

First, unlike the situation in Canada and the United States, all components of the Australian federal system are purely common law based. For better or worse, the French never settled any part of this continent. Second, as a practical (and, in my view, doctrinal) matter, there is no distinct common law in one or the other state.

Nearly forty years ago, Sir Owen Dixon spoke of the Australian judge, federal or state, as administering “the common law as an entire system” and, adapting and contrasting a famous passage in the judgment of Justice Holmes in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 38 said that an Australian judge was not bound “to resist the impression that there is one august corpus, to understand which clearly is the only task of any court concerned.” 39

The High Court of Australia expressly declares the common law of Australia (including the common law rules as to choice of law), not the common law of the state or territory whence the appeal came or in which a federal court sat. 40 The Parliament of the Commonwealth requires courts

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38. 276 U.S. 518, 533 (1928).
exercising federal jurisdiction to apply "the common law of Australia."\textsuperscript{41} To quote again from Sir Owen Dixon, speaking in the United States in 1943: "You will see that, under the Australian conception, while on the one hand there is neither need nor room for the doctrine of \textit{Swift v. Tyson},\textsuperscript{42} on the other hand the basal principle of \textit{Erie Railroad Co. v. Tompkins},\textsuperscript{43} is contradicted."\textsuperscript{44}

The modern view in the United States is that for the purposes of full faith and credit, state law is embodied in case law as well as in statutes.\textsuperscript{45} However, given the general operation of an Australian common law, there is no occasion for full faith and credit to operate upon decisions as to the common law of the courts of the several states; any conflict between decisions upon the common law is for ultimate resolution in the High Court of Australia.

Third, while, as in the United States, reference is made from time to time to the states as sovereign entities for the purposes of the application \textit{inter se} of private international law rules (a significant point to which I will return) the Australian states are more directly the objects of federal jurisdiction. Paragraph 75(iv) of the Constitution creates as a head of federal jurisdiction matters between states and between residents of different states. This paragraph also expressly includes matters between a state and a resident of another state,\textsuperscript{46} litigation that in the United States will take place in state courts and involve issues of "sovereign immunity." These were considered in \textit{Nevada v. Hall}.\textsuperscript{47} Fourth, in their accrued or pendent jurisdiction (developed from the root provided by Chief Justice Marshall in \textit{Osborn v. United States Bank}),\textsuperscript{48} federal courts often construe significant state legislation;\textsuperscript{49} in any event all such legislation receives its most authoritative

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\textsuperscript{41} \textit{Judiciary Act} 1903 (Ch), § 80, as amended by the \textit{Law and Justice Legislation Amendment Act} 1988 (Ch). As originally enacted, "the common law of England" was to apply; see \textit{Adams v. Eta Foods Ltd.} 19 F.C.R. 93, 95 (1987). It should also be noted that § 77 of the Constitution authorizes laws to invest federal jurisdiction not only in federal courts, but in the courts of the states, and that § 80 of the Judiciary Act applies to all courts exercising federal jurisdiction.

\textsuperscript{42} 41 U.S. (16 Pet.) 1 (1842).
\textsuperscript{43} 304 U.S. 64 (1938).
\textsuperscript{44} \textit{Sources of Legal Authority} in \textit{Jesting Pilate} 198, 202 (1965).
\textsuperscript{47} 440 U.S. 410 (1979).
interpretation by the High Court, which is a "national," but federal, court of final and general appeal.

One consequence of these four factors is that in Australia there is no doctrine of federal court abstention (or, indeed, abstention between the courts of the states) by reason of unclear state law, whereby, for example, a federal court stays its proceeding for a ruling by a state court on a state law question.\textsuperscript{50}

Fifth, the occasion in American choice of laws for disputation as to matters of divorce and family law, provided by the existence of separate state domiciles, no longer exists in Australia. Litigation pertaining to marriage, divorce, matrimonial property, and much other family law is controlled by federal legislation, the \textit{Family Law Act 1975} (Cth); this states as the connecting factors Australian citizenship, domicile, or residence (section 39) and provides for the effect of decrees throughout Australia (section 103).

Sixth, it is common for counsel to have a right of appearance in the courts of several states (and in any federal court) and to exercise that right. This state of affairs may become the norm with the coming into force of the \textit{Mutual Recognition Act 1992} (Cth). Pursuant to it a lawyer registered in one state ordinarily will be entitled, upon giving notice to the regulatory authority in another state, to registration there. This is federal legislation passed upon references by the state legislatures pursuant to section 51(\textsuperscript{xxxvii}) of the Constitution.

Seventh, the state Parliaments have substantial powers to legislate with extra-territorial effect,\textsuperscript{51} and the assertion of "long arm" jurisdiction is not restrained by federal or state constitutional guarantees of due process.\textsuperscript{52} None of these factors, save perhaps the sixth, characterizes the legal system in the United States.

\textsuperscript{50} The position in the United States is outlined in CHEMERINSKY, \textit{FEDERAL JURISDICTION} §§ 12.1 to 12.3 (2d ed. 1994).

\textsuperscript{51} Union S.S. Co. of Austl. Pty Ltd. v. King, 166 C.L.R. 1, 13-14 (Austl. 1988). This is not so in Canada and was not the position as generally understood in 1900 in the Australian colonies. In Macleod v. Attorney-General for New South Wales [1891] A.C. 455, 458, the Privy Council appears to have restricted colonial laws, or at least the criminal law, from extra-territorial operation. \textit{See} QUICK & GARRAN, \textit{supra} note 2, at 354-55. The Canadian position is considered later in this Paper.

SERVICE OF PROCESS AND ENFORCEMENT OF JUDGMENTS

Paragraph 51(xv) of the Australian Constitution was implemented by the fifth statute passed by the first federal Parliament, the State Laws and Records Recognition Act 1901 (Cth). This statute, as amended by reliance upon the ample power in relation to territories in section 122 of the constitution, is the State and Territorial Laws and Records Recognition Act 1901 (Cth).53

Of more importance for present purposes is the Service and Execution of Process Act 1901 (Cth), replaced by the Service and Execution of Process Act 1992 (Cth). For nearly a century, this legislation has placed Australia in a very different position to that in the United States and Canada with regard to the first of the fields with which this paper is concerned, service of state process and enforcement of state judgments.54

Article 4, section 1 of the United States Constitution empowers the Congress to legislate to prescribe the “effect” in other states of the “public acts, records, and [judicial] proceedings” of a state. The limited response by the Congress to this investment of legislative authority, particularly with reference to service of process and enforcement of judgments, has drawn much adverse comment in United States literature.

An early and notable example is an article by Professor W.W. Cook.55 The thesis of the learned author was that if a reasonable interpretation were given to the powers of legislation granted to the Congress, it would support the passage of legislation establishing a scheme similar to that found in Australia in the 1901 Act. Professor Cook described the substance of the Australian scheme as follows:

1. The civil and criminal process of each State can be served throughout the Commonwealth. In the case of civil process, if the defendant does not appear, and it is made to appear to the court from which the writ issued, or to a judge thereof, that the writ was personally served, or that reasonable efforts were made to effect personal service on the defendant and that it came to his knowl-

53. Section 18 of this Act is as follows:

All public acts records and judicial proceedings of any State or Territory, if proved or authenticated as required by this Act, shall have such faith and credit given to them in every Court and public office as they have by law or usage in the Courts and public offices of the State or Territory from whence they are taken.


edge, the court may, on the application of the plaintiff, order that
the plaintiff shall be at liberty to proceed in the suit, provided it
falls within certain enumerated classes. Obviously it would not be
fair to permit a plaintiff to try any suit whatever in any court from
which he chose to obtain a writ of summons. The statute therefore
enumerates the classes of actions in which it seemed to the
Commonwealth Parliament fair to allow him to compel even a
non-resident of the state to submit to the jurisdiction of the court.

. . . .

2. A judgment duly rendered in one State may be enforced in other States
without suing on it and obtaining a new judgment. This method of
enforcing foreign judgments is well known to civil law countries. The
statute provides a simple method for registration of the judgment with
courts of similar jurisdiction in other states in which execution is
desired. After such registration the judgment has the force and effect
of a judgment of the court in which it is so registered. Due provision
is made to guard against abuses. The statute provides for the
registration not only of judgments for money but also for those which
either order or forbid the doing of acts.56

The result, as Professor Cook saw it, was that the Australian legislation
enabled litigants to enforce their legal rights throughout the Commonwealth
"with a simplicity and directness unknown to our law."57

Justice Jackson turned to the subject in 1944 in his well-known lecture
"Full Faith and Credit—the Lawyer's Clause of the Constitution."58 He
pointed to the role in Canada of the federal government in the appointment of
provincial as well as federal judges and to the existence in Canada and
Australia of a single national court of appeal in all cases and in all fields.59
That was an over-simplification because it did not allow for what was then, but
is no longer, the authority of the Judicial Committee of the Privy Council to
entertain appeals brought directly from provincial and state courts, but the
general point was properly made that in Canada and Australia the court
structure was integrated to a degree that made conflict between courts much
less likely to occur than in the United States. Indeed, in a real sense the

56. Id. at 426-8 (citations omitted).
57. Id. A Canadian commentator has described the position in Australia as "curious,"
apparently because there is a shortage of reported cases construing the legislation. Swan, The
Canadian Constitution, Federalism and The Conflict of Laws, 63 CAN. BAR REV. 271, 282-283,
288 (1985). This paucity is a measure of the success of the legislation, not an indication that the
legal system is undeveloped.
58. Robert H. Jackson, Full Faith and Credit—The Lawyer's Clause of the Constitution, 45
COLUM. L. REV. 1 (1945).
59. Id. at 19-20.
Canadian court structure is more closely integrated than that in Australia. Speaking of the provincial superior courts, Justice Estey said in Attorney-General of Canada v. The Law Society of British Columbia:

They cross the dividing line, as it were, in the federal-provincial scheme of division of jurisdiction, being organized by the provinces under section 92(14) of the Constitution Act and are presided over by judges appointed and paid by the federal government (sections 96 and 100 of the Constitution Act). 60

Justice Jackson also referred to the Service and Execution of Process Act 1901 (Cth) as follows:

With provisions to safeguard against abuse and injustice, process of state courts in appropriate classes of cases is authorized to be served anywhere in Australia and their judgments may upon registration be executed in any state. 61

This legislation has made it unnecessary in Australia to resolve issues of domestic recognition and enforcement of process and judgments by reference to the general imperative of section 118 of the Constitution. The significance of the continuing contrast with the position in the United States 62 cannot be over emphasized. It should be remembered that Australia has “but a limited number of separate territorial jurisdictions or law areas and there is a basic homogeneity or similarity in the common law and the statute law in force in the various States and Territories.” 63

The contrast with Canada is not so sharp, but in that federation an explicit constitutional imperative of full faith and credit is lacking. However, change is coming.

The common-law rules of private international law for the recognition of foreign judgments, as understood by reference to English authority, 64 provided the basis in Canada for the registration system in various provincial legislation. In Morguard Investments Ltd. v. De Savoye 65 the Supreme Court

61. Jackson, supra note 58, at 20.
64. The leading English case was Emanuel v. Symon, [1908] 1 K.B. 302, 309. There, Lord Justice Buckley said that there were five cases in which an English court would enforce a foreign judgment on an action in personam. They included such connecting factors as citizenship, residence when the action began, voluntary appearance and contractual submission.
of Canada decided that the common law rules required reassessment of their operation within Canada. A judgment of the courts of one province that did not comply with the terms of the registration statute of a second province might nevertheless now be entitled to recognition under the common law rules. In particular, the court of the second province would ask whether there was "a real and substantial connection" with the province in which the judgment had been obtained. The reasoning of the Supreme Court has since been taken also as suggesting a more generous interpretation of the requirements for registration in the provincial legislation.

Matters recently have been taken considerably further by the decision of the Supreme Court of Canada in Hunt v. Lac d'Amiante du Quebec Ltee. The bill for what became the Business Concerns Records Act RSQ, c.D-12, was introduced into the Quebec legislature in 1958, apparently with the object of providing a local defence to the extraterritorial reach of United States antitrust legislation. Similar legislation was in force in Ontario. The immediate difficulty with the Quebec legislation was that on its face it applied generally, including to proceedings in other Canadian provinces. In Hunt the appellant, in British Columbia, sued certain Quebec companies, involved in the production and distribution of asbestos. He sought, pursuant to the British Columbia Rules of Court, discovery of documents by the Quebec companies but the Quebec court granted orders preventing the respondent companies from sending the documents out of Quebec. The Quebec statute prohibited the removal from Quebec of documents relating to any business concern in Quebec

68. [1993] 4 S.C.R. 289 (Can.). The writer is indebted to Madam Justice McLachlin for drawing attention to this important decision of her court.
where the removal was sought pursuant to any requirement of a judicial authority outside Quebec. The courts of British Columbia decided that the conflict between the public policies of that province and of Quebec were to be resolved by applying a doctrine of comity between provinces. This required deference to the statute of Quebec.

The Supreme Court of Canada held that the Quebec statute was “constitutionally inapplicable” to the present case. They held, despite the Quebec law, was obliged to produce for inspection in British Columbia the documents that it was obliged to discover under the law of British Columbia regardless of whether the documents were located inside or outside Quebec. This decision is authority for the following propositions. The first concerns the legislative powers of the federal Parliament. As to this Justice La Forest, who delivered the leading judgment, said:

I noted in Morguard . . . that a number of commentators had suggested that the federal Parliament had power to legislate respecting the recognition and enforcement of judgments, and in my view that suggestion is well founded. This issue is ultimately related to the rights of the citizen, trade and commerce and other federal legislative powers, including that encompassed in the peace, order and good government clause. But subject to these overriding powers, I see no reason why the provinces should not be able to legislate in that area, subject, however, to the principles in Morguard and to the demands of territoriality . . . .

Second, and irrespective of the existence of federal legislation, the integrating character of Canadian constitutional arrangements as they apply to interprovincial mobility calls for the courts in each province to give full faith and credit to the judgments of the courts of sister provinces; this “is inherent in the structure of the Canadian federation, and, as such, is beyond the power of provincial legislatures to override.” Third, this does not preclude the provinces from legislating with effect upon litigation in other provinces; however, the provinces must respect “the minimum standards of order and fairness addressed in Morguard.” Fourth, the reference in Morguard to a “real and substantial connection” to the forum that assumed jurisdiction and gave judgment was not meant as a rigid test.

Finally, it should be noted that in Hunt the constitutional doctrine of full faith and credit operated in advance of the rendition of any final judgment in the proceeding in British Columbia. The Supreme Court held that the

71. Id. at 45.
72. Id. at 42.
73. Id. at 41.
74. Id.
constitutional mandate, which required recognition of a judgment that had been rendered, could not be avoided "by a preemptive strike." Justice La Forest said:

The whole purpose of a blocking statute is to impede successful litigation or prosecution in other jurisdictions by refusing recognition and compliance with orders issued there. Everybody realizes that the whole point of blocking statutes is not to keep documents in the province, but rather to prevent compliance, and so the success of litigation outside the province that the province finds objectionable.76

Does this mean that compliance with the blocking orders made pursuant to Quebec law would not be a lawful excuse for noncompliance with orders whose ultimate authority rested in legislation of British Columbia? I will return to this question at the end of this Paper.

In Australia, the legislative system for recognition and enforcement has been taken further by the 1992 Act.77 Process issued in a state or territory may be served in another state or territory.78 There is no requirement for leave to serve ex juris and no limited list of cases where such service is permissible. The federal Parliament has thus placed a high degree of confidence in the integrity of the state systems. However, the person served may apply to the court of issue for an order staying the proceeding on the footing that a court of another state or territory has jurisdiction to determine all the matters in issue and is the appropriate court to determine them. In reaching that conclusion, the court considers such matters as the places of residence of the parties and of witnesses, the situation of the subject matter of the proceeding, the financial circumstances of the parties, any agreement between them as to the place of institution of the proceeding, the most appropriate law to apply, and the existence of related or similar proceedings elsewhere. A legal practitioner entitled to practice before a court in the place of issue has a right of audience before the court hearing the application for stay.79 If initiating process has been served under this system, a court of a state or territory that is not the place of issue "must not restrain a party in the proceeding from taking a step in the proceeding on the ground that the place of issue is not the appropriate forum for the proceeding."80

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76. Id. at 43.
78. Id. §§ 5, 15.
79. Id. § 20.
80. Service and Execution of Process Act § 21, 1992 (Cth). Provision also is made for initiating process in criminal proceedings (§§ 22-25), the service of subpoenas (§§ 28-46), the service of process of state tribunals, that are authorized to take evidence on oath or affirmation (§§ 47-80), and the execution of warrants (§§ 81-103). The 1992 Act applies to the exclusion
When the initiating process issues out of the supreme court of a state or territory rather than out of an inferior court, the provisions as to stay of proceedings in section 20 of the 1992 Act do not apply because the situation is governed by what is known as the cross-vesting scheme established by the Jurisdiction of Courts (Cross-Vesting) Act 1987 (Cth) and corresponding legislation in every state. The operation of the scheme has been analyzed by Professor Johnson.\(^8\) The scheme deals with vesting of jurisdiction and with transfer of proceedings. Each state supreme court is vested by laws of the other states with original and appellate jurisdiction with respect to “state matters,” although the intention of the legislation is that a proceeding should be commenced in the appropriate state. The legislation also provides for the transfer of proceedings between supreme courts. Transfer may be ordered not only where a proceeding in one such court is related to a pending proceeding in the other, but also where it is otherwise in the interests of justice that the proceeding be transferred.\(^2\) No appeal lies from a decision to transfer. Again, each component of the federation has evinced a high degree of confidence in the procedures applying in the other supreme courts.\(^3\) This may be compared with the institutional difficulties in the United States attending the consolidation of multistate litigation in the courts of the states, at a time when mass tort litigation involving numerous closely related lawsuits “has reached staggering levels.”\(^4\)

The enforcement of judgments is dealt with in Part VI of the 1992 Service and Execution of Process Act (sections 104-109).\(^5\) Generally, upon


\(^2\) In 1993, a mere 46 matters were transferred between supreme courts under this legislative scheme. As Miss Bankhead would have said, there may be less to cross-vesting than meets the eye. On the other hand, the Australian scheme may offer some guidance for the Uniform Transfer Act proposed by the Conference on Uniform State Laws. Ellen A. Peters, *State-Federal Judicial Relationships: A Report From the Trenches*, 78 VA. L. REV. 1887, 1889 (1992).

\(^3\) The legislation also provides its own choice-of-law rule. Where a supreme court is exercising cross-vested jurisdiction in respect of a right of action arising under the written law of another state, the court shall apply the law of that state. Service and Execution of Process Act § 11, 1992 (Cth). The considerable difficulties of interpretation to which section 11 gives rise are discussed by Mr. C. Moore in his article *Our Fragmented Federation: Forum Bias and Forum Shopping in Australia*, 22 FED. L. REV. 171, 186-91 (1994). The result of the operation of section 11 may be to require in a given case the application of a *lex causae* that differs both from that which would be required by the common law choice-of-law rules or by full faith and credit. None of the recent High Court decisions has concerned cross-vested jurisdiction.


\(^5\) Provision also is made in Part VII (sections 110-126) for the enforcement of fines imposed
registration in the court of another state or territory, a registered judgment has the same force and effect and gives rise to the same proceedings by way of enforcement as if it had been given, entered or made in the court of registration.86 However, a court may enforce a judgment only to the extent that the judgment is capable of enforcement in or by the court of rendition when the enforcement proceeding has begun.87 The court of registration may delay commencement of enforcement proceedings until a specified time or stay the proceedings for a specified period, subject to conditions. The conditions may relate to the prompt prosecution of an appeal against the judgment in the home state or territory.88

In light of the United States and Canadian experience, section 109 of the 1992 Service and Execution of Process Act is an important provision. If a judgment is registered under subsection 105(1), the courts of the state or territory of registration “must not, merely because of the operation of a rule of private international law, refuse to permit proceedings by way of enforcement of the judgment to be taken or continued.” The United States has fertile fields of jurisprudence concerned with the enforcement of state judgments in the courts of other states in the light of (1) the federal constitutional provisions as to due process and full faith and credit, (2) the common law rules of private international law as to recognition of foreign judgments, and (3) the operation in a number of states of the Uniform Enforcement of Foreign Judgments Act.89 The effect of section 109 of the Service and Execution of Process Act is to make it clear that the legislation provides its own system for enforcement, freed from common law restraints.

Also, the United States has a considerable body of authority concerned with the cognate, but distinct, subject of constitutionally mandated res judicata, including collateral estoppel. This is applicable when an unsuccessful plaintiff or its privies in an action in one state seek to sue again in a second state.90 In Australia, the issues that arise with respect to concurrent or successive actions in the courts of more than one state are dealt with by the courts exercising their inherent powers as superior courts of record to deal with abuses of process or by application of the doctrine of res judicata and its various branches.

87. Id. § 105(5).
88. Id. § 106.
90. See id. § 75-76. Different issues arise as to the preclusive effects of state court judgments upon proceedings in subsequent litigation in a federal court, for example, in a civil rights suit under 42 U.S.C. § 1983. ERWIN CHEMERINSKY, FEDERAL JURISDICTION, § 8.10 (2d ed. 1994).
I turn now further to consider the second aspect of full faith and credit with which this paper is concerned. It is commonplace that in the operation of full faith and credit upon statutes more difficult problems arise. Justice Jackson said these problems were of “extraordinary complexity and delicacy.”

CHOICE OF LAW AND FULL FAITH AND CREDIT IN AUSTRALIA

One method of resolving competition between foreign or international elements treats the full faith and credit provisions as a constitutional imperative directly applying that which the common law choice of law principles of private international law (as understood from time to time) identify as the lex causae. That, as I have already indicated, in my view is not a conclusion indicated by the constitutional text, at least in Australia. Although the practice also is widespread in the literature, it appears odd to discuss domestic and foreign choice of law doctrine interchangeably because one differs fundamentally from the other. The principles of private international law involve matters of comity between the courts of the forum and those of a foreign state. A federal constitution addresses the task of creating a body politic, the state integers of which will not have international personality. The states will, in terms of the federal constitution, hardly be treating each other as foreign bodies politic. Their relationship is expressly and impliedly provided for in that constitution. Secondly, the choice of law rules in their international dimension require more flexibility than those in the domestic sphere. They must cope with the lack of a shared federal legal system, common culture, and political structure. The point is well made by Professor Laycock: “Domestic choice of law need not be flexible enough to deal with totalitarian states, revolutionary states, legally unsophisticated states, or states with legal and cultural traditions fundamentally different from our own.”

Yet, in substance, the doctrine currently prevailing with a majority of the High Court represents the application in Australia to interstate choice of law of principles designed to deal with such situations. This also is the case in the United States, where much confusion appears to have been caused by treating the federal choice of law questions the same as foreign choice of law.

In a recent quartet of decisions, the High Court has been concerned with full faith and credit in the context of interstate torts. In Australia, the prevailing common law choice of law rule laid down by the common law for

91. Jackson, supra note 58, at 11.
92. Laycock, supra note 33, at 260.
interstate torts is formulated as a modification of the rule in *Phillips v. Eyre.* That formulation, by the majority of the High Court, is designed to define more precisely the issues that are referred for determination to the *lex fori* and the *lex loci delicti.* It is in the following terms:

A plaintiff may sue in the forum to enforce a liability in respect of a wrong occurring outside the territory of the forum if — 1. the claim arises out of circumstances of such a character that, if they had occurred within the territory of the forum, a cause of action would have arisen entitling the plaintiff to enforce against the defendant a civil liability of the kind which the plaintiff claims to enforce; and 2. by the law of the place in which the wrong occurred, the circumstances of the occurrence gave rise to a civil liability of the kind which the plaintiff claims to enforce.

To the American lawyer, it may appear curious that the Australian rule does not involve any selection of “the proper law of the tort.” Another consequence of the national preservation of a rule first propounded in an action brought in England regarding events in Jamaica is that the double actionability requirement encourages plaintiffs to seek the most favorable forum. Forum shopping has been encouraged by traditional tools of conflicts lawyers: characterization, *renvoi,* the distinction between substance and procedure, and the public policy reservation. These enable courts to apply the *lex fori,* whatever the choice of law rules for the selection of the *lex causae.* However, the approach adopted by the majority in *McKain* has been condemned as “go[ing] a long way towards converting the Australian legal system into a national market in which forum shoppers are encouraged to select between competing laws imposing different legal consequences in respect of a single occurrence.”

“[I]t is unclear why [such] forum shopping . . . should strike us as inherently distasteful while other types of jurisdiction shopping—from the establishment of corporate residence to the flight for freedom by political refugees—give us little pause.” Some writers have decried any single-minded focus on certainty, predictability, and uniformity of result because this distracts attention, in particular, from the framing of choice of law rules that seek to take into account and evaluate the content of competing substantive laws. However, if the choice of law process should have regard to the

94. (1870) L.R. 6 Q.B. 1 (Eng. Q.B.).
96. *Stevens,* 176 C.L.R. at 442 (Mason, C.J.), 462 (Deane, J.).
substantive outcomes it produces, then a system of law that maximizes recovery by plaintiffs by reason of their selection of the particular court in a federation in which they bring their action for a wrong done to them in that country is not necessarily a just system for defendants. Why should the commission of a wrongful act in, for example, Australia produce different legal consequences depending upon the court in which the action is brought to trial? Is there then a national system of law?99

The treatment of section 118 of the Australian Constitution as applying the choice of law rules to interstate disputes proceeds upon a particular view taken of the nature of the common law in the federal system erected by that constitution. This appears most plainly in the following passage from the majority judgment in McKain:

To describe the States, as Windeyer J. once described them [Pedersen v. Young (1964) 110 C.L.R. at p. 170], as “separate countries in private international law” may sound anachronistic. Yet it is of the nature of the federation created by the Constitution that the States be distinct law areas whose law may govern any subject matter subject to constitutional restrictions and qualifications. The laws of the States, though recognized throughout Australia, are therefore capable of creating disparities in the legal consequences attached in the respective States to the same set of facts unless a valid law of the Commonwealth overrides the relevant State laws and prescribes a uniform legal consequence. That may or may not be thought to be desirable, but it is the hallmark of a federation as distinct from a union. Far from eliminating the differential operation of State laws, section 118 commands that all the laws of all the States be given full faith and credit: the laws of the forum are to be recognized as fully as the laws of the place where the set of facts occurred. Section 118 would not be obeyed by refusing recognition to the laws of a forum State and by applying only the laws of the part of Australia in which the set of facts occurred. A disparity in legal consequences attached to a set of facts cannot be eliminated by refusing recognition to laws of the forum which create the disparity. In our respectful opinion, section 118 does not prescribe the selection of the lex loci delicti or other extraterritorial body of law as the exclusive body of law governing liability for extraterritorial torts. The selection of the applicable rules governing liability is the function of the common law; section 118 provides for recognition by the courts of the forum of the rules so selected.100


Of this passage the following nine comments may be made. First, the third sentence, despite the use of “therefore” to suggest a logical link with what precedes it, does not follow from the second, unless one gives a particular meaning to the phrase “subject to constitutional restrictions and qualifications;” yet, it is the identification of the governing constitutional restrictions and qualifications that is the very task in hand.

Second, the fourth sentence assumes that a federation has certain characteristics, some of which are so prominent as to be described as “hallmarks.” The Australian and United States Constitutions have specific provisions dealing with full faith and credit. However, as indicated earlier in this paper, they differ considerably in a number of relevant respects. The Canadian Constitution has no express provision as to full faith and credit. All would be recognized as significant examples of federations. Further, as Professor Zines has demonstrated, this is true even though the course of decision has led to departures from the evident intent of those who drew the Canadian and Australian Constitutions.

Fourth, section 117 of the Australian Constitution is an example of an express prohibition that will disable some laws of the states from creating disparities in legal consequences attached in the respective states to the same set of facts. In *Goryl v. Greyhound Australia Pty Ltd.* the High Court held that section 117 of the Constitution rendered section 20 of the Queensland Motor Vehicles Insurance Act 1936 (Qld) inapplicable to the claim of the plaintiff, a New South Wales resident. This was because section 20 subjected her, in Queensland, to a disability or discrimination that would not be equally applicable to her if she were a Queensland resident. Mrs. Goryl, a resident of New South Wales, was injured in New South Wales in a road accident while traveling in a bus owned by a Queensland corporation and on a ticket she had purchased in Queensland. She sued in a Queensland court alleging negligence and breach of contract. Section 20 purported to limit her recovery to an amount no greater than that which she might have recovered by action in her place of residence, New South Wales. A New South Wales statute

101. Lord Haldane believed that the Canadian Constitution is not of “the true federal model” because, unlike the Constitutions of the United States and Australia, the provinces do not retain their powers subject only to those that are assigned to the federation: A-G for the Commonwealth v. Colonial Sugar Refining Co., [1914] A.C. 237, 252-253 (P.C. 1913). This view would now find little favor.


103. “A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.” AUSTL. CONST. § 117; see Street v. Queensland Bar Ass'n, 168 C.L.R. 461, 491-92, 514, 546-48, 560, 572-73, 584-86 (Austl. 1989) (comparing the Privileges and Immunities Clause of the United States Constitution with AUSTL. CONST. § 117).

104. 179 C.L.R.463 (1994).
restricted the damages recoverable by action there to less than those recoverable in Queensland. Section 20 applied irrespective of whether the accident occurred within or outside Queensland and regardless of whether the vehicle or vehicles involved were insured in that state.\footnote{Id.}

The fifth comment concerns the statement in McKain that section 118 would not be obeyed by refusing recognition to the laws of a forum state and by applying only the laws of the lex loci delicti because section 118 obliges recognition of the laws of the forum as fully as the laws of the place where the facts occurred. This may be compared with the significant dictum of Justice Stone delivering the judgment of the Court in Alaska Packers Association v. Industrial Accident Commission of California.\footnote{Alaska Packers, 294 U.S. at 547.} His Honor said:

A rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own.\footnote{48 C.L.R. 565, 577, 587-88 (Austl. 1933).}

Sixth, on the other hand, the role given to section 118 in the final two sentences of the above passage leaves the provision with little to do. Given the nature of the federal structure to which I have earlier referred, would it not follow from the circumstance that all states would be applying the same common law in identifying the choice-of-law rules?

Seventh, section 118 undoubtedly has achieved some substantive operation. In Breavington Chief Justice Mason said:

\begin{quote}
[I]n Merwin Pastoral [Co. Pty Ltd. v. Moolpa Pastoral Co. Pty Ltd.]\footnote{Breavington v. Godleman, 169 C.L.R. 41, 81 (Austl. 1987).} Rich and Dixon JJ. and Evatt J. considered that the section prohibited a court of one State from refusing to give effect to a defence under the law of another State, when the law of that other State was the proper law of the contract then in question, on the ground that the law was contrary to public policy considerations of the forum. This approach to the interpretation of the section accords with that given to Art. IV, section 1 of the United States Constitution at that time.\footnote{Breavington v. Godleman, 169 C.L.R. 41, 81 (Austl. 1987).}
\end{quote}

\footnote{105. Id.}
\footnote{106. 294 U.S. 532, 547 (1935). This has been said to put up "a straw man," because "[t]he only reason to read the Clause in this absurd way is to escape the constitutional text altogether ...." Laycock, supra note 33, at 293-96. However, in the Queensland Court of Appeal, the straw man has been treated as representative of United States doctrine: Rothwells Ltd. (In Liq.) v. Connell, 119 A.L.R. 538, 548 (1993).}
\footnote{107. 119 A.L.R. 538, 548 (1993).}
\footnote{108. Alaska Packers, 294 U.S. at 547.}
\footnote{109. Alaska Packers Association v. Industrial Accident Commission of California, 294 U.S. at 547.}
In that regard, his Honor referred to Bradford Electric Light Co. v. Clapper.\textsuperscript{110} Merwin was accepted in Breavington as good authority by Chief Justice Mason and by Justices Wilson, Gaudron, Brennan, Deane, and Dawson.\textsuperscript{111}

Eighth, it surely is an odd result in a federation in which recognition and enforcement of judgments are so strictly controlled (in the sense that once a judgment is obtained in a particular state the greatest efficacy is given it across the nation) that the initial choice of forum and, thus, of the lex causae is left so open to plaintiffs. Truly, the choice of the forum will determine the legal consequences attaching to an act or omission that occurs in Australia. In a country with an integrated economy and a mobile population, is this a proper result of the high technique to be expected of a constitutional court?

The ninth comment is perhaps most important for the purposes of this Paper. The passage from McKain\textsuperscript{112} contains the implicit choice of a particular starting point for the consideration of the relationship between choice-of-law rules as understood at common law and the full-faith-and-credit provisions of the Constitution. Because the common law is the foundation of the legal systems of every part of the federation, it provides the starting point for considering the effect of the constitution. The assumption is that “[t]he common law comes first and federal measures operate in and upon the legal order ordained by the common law.”\textsuperscript{113} However, any exaltation of the common law in 1900 (or at any other date) as an ultimate or sufficient constitutional foundation may be but an illustration of what Holmes discerned in all men, “a demand for the superlative.”\textsuperscript{114} In significant respects, the common law has required (and still requires) qualification or abrogation by statute to render it acceptable.\textsuperscript{115} Further, invocation of “the common law” in truth may be made on the footing that it does or should bear a close relation to natural law. This is a matter of controversy.\textsuperscript{116}

\textsuperscript{110} 286 U.S. 145, 160 (1932).
\textsuperscript{111} Breavington, 169 C.L.R. at 96, 116, 134, 150.
\textsuperscript{112} See supra note 100 and accompanying text.
\textsuperscript{113} Breavington, 169 C.L.R. at 107 (Brennan, J.).
\textsuperscript{114} Oliver W. Holmes, Natural Law, 32 Harv. L. Rev. 40, 40 (1918).
\textsuperscript{116} See, e.g., B. Reynolds, Natural Law versus Positivism: The Fundamental Conflict, 13 Ox. J.L.S. 441 (1993); (“Natural law involves belief; it involves the attempted imposition of values on others and often the hijacking of the coercive nature of law to achieve this.”); Holmes, supra note 114, at 41 (“The jurists who believe in natural law seem to me to be in that naive state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere.”).
The rather different starting point taken in these cases by Justice Deane (with whose analysis Justices Wilson and Gaudron have broadly agreed) has led to a quite different result.

His Honor has emphasized four propositions. The first is the operation of the constitution as establishing a new national legal order embracing the law-making activities of the Commonwealth and the states, where previously there had been the Imperial Parliament and the legislatures of the colonies. Second, the laws made by the Parliament and administered by the executive exist independent of the awakening of the judicial power; "implicit in the notion of separation of judicial power from legislative and executive powers which represented a United States innovation in traditional British constitutional theory, is an assumption of the independent existence of laws by reference to which the lawfulness of particular conduct can . . . be objectively and contemporaneously ascertained." 117 Third, the diversity jurisdiction created by section 75(iv) of the constitution assumes the existence of a national law, with Commonwealth and state elements, that can be ascertained and applied by a court whose territorial jurisdiction extends indifferently to all parts of the Commonwealth. 118 Fourth, it cannot have been the intention of the framers of the constitution that, notwithstanding the identity of state laws as part of a national system of law to be applied in the exercise of federal jurisdiction, their content should be indefinite unless and until it was known in which distinct court system a proceeding in respect of a particular dispute would be brought.

The second proposition appears to be too widely expressed. There are a significant number of valid federal laws in which the new federal right and remedy are created in one breath, by providing that in certain specified circumstances a person may take proceedings in a particular court to obtain a specified remedy. 119

Further, legislation may create a new right in such a fashion that the enjoyment of the right is conditioned upon the making of an order by a specified court. An example is provided by section 31 of the Family Provision


118. In Australia, diversity is between "residents" of different states, a term that has been interpreted as excluding corporations. Australian Temperance & General Mutual Life Assurance Society Ltd v. Howe, (1992) 31 C.L.R. 290 (Austl. 1992). The absence of a federal diversity jurisdiction in Canada is a significant distinction between the Canadian and Australian federations, even though both, unlike the United States, have a final court of general appeal. See Laskin, "Comparative Constitutional Law—Common Problems: Australia, Canada, United States of America," (1977) 51 A.L.J. 450, 458.

Act 1982 (N.S.W.). This statute contains elaborate provisions under which the Supreme Court of New South Wales may treat certain property as part of the estate of a deceased person for the purpose of making family provision. Section 31 provides for a release by a person of rights to make an application in relation to a deceased person, but in terms such that the release is binding only if the Supreme Court has given its approval. The High Court held that the condition precedent, the fulfillment of which was necessary to render the agreement of release effective, was one that might be fulfilled only by an order of the Supreme Court under section 31. It followed that a federal court might not make such an order in its accrued or pendent jurisdiction.\textsuperscript{120} The Court rejected the argument based upon Railway Co. v. Whitten\textsuperscript{121} that the state law had two operations, to create the right and to provide a forum, and that the first was picked up in federal jurisdiction.

On a practical level, the cross-vesting legislation might enable the supreme court of another state to exercise jurisdiction under section 31. That, of course, is a statutory scheme. On the constitutional level (that with which the reasoning of Justice Deane is concerned) legislation of this type may cause a difficulty with the removal of the forum shopping activity by the imposition of a revised choice of law rule directing all courts to apply the law of the jurisdiction in the federation with which there is the predominant territorial connection. However, the legislation of that jurisdiction may be so drawn as to create rights that inherently are enforceable only in the courts of that home state.

Justice Deane's views are most succinctly encapsulated in the following passage in Thompson v. The Queen.\textsuperscript{122} What was in issue in that case was not choice of law in civil law, but locality in the criminal law. His Honor said:

In truth, however, the local laws of the various States and Territories of the Commonwealth cannot properly be treated as if they were discrete systems of law of independent nations. They are the components of a single national legal system: see Breavington v. Godleman [(1988) 169 C.L.R. at 120-122] and see, also, Sir Owen Dixon, "Sources of Legal Authority," Jesting Pilate (1965), pp. 198-200. The Constitution itself embodies that system of law. It assumes the substratum of the common law upon which it was founded. It empowers the Commonwealth Parliament to make laws with respect to the subject matters which it enumerates, including laws for the government of the Territories. It continues the constitutions and laws of the States to the extent that they are consistent with both the Constitution itself and valid laws of the Common-

\begin{footnotesize}
\begin{enumerate}
  \item 121. 80 U.S. (13 Wall.) 270 (1872).
  \item 122. 169 C.L.R. 1 (Austl. 1989).
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\end{footnotesize}
wealth made pursuant to its terms. When inconsistency would otherwise exist between the statutory laws of different elements of the Federation, the Constitution itself resolves it: in the case of inconsistency between a Commonwealth law and a State law, by the paramountcy of Commonwealth law under section 109; in the case of inconsistency between the laws of different States, by the confinement of the operation of State laws by reference to territorial (or predominant territorial) nexus under the constitutional structure and the mandatory full faith and credit directive of section 118. Subject to the Constitution itself and to valid statutory provisions, the substantive law of Australia is the common law which transcends internal State or Territorial boundaries and operates as "an entire system" (cf. Sir Owen Dixon, "The Common Law as an Ultimate Constitutional Foundation" Jesting Pilate . . .). So it is that, within the body politic created by the Constitution, one set of facts will fall to "be adjudged by only one body of law and thus give rise to only one legal consequence, regardless of where in the Commonwealth the matter [falls] for adjudication" (per Wilson and Gaudron J.J., Breavington [at 97-99]). That one body of law is the law of the Australian nation which speaks with a single voice as not as a babel of nine different Commonwealth, State or Territory voices all speaking at the same time but saying different things.\textsuperscript{123}

However, it is important to appreciate that Justice Deane's views do not depend upon, and indeed may be independent of, any perceived operation of section 118. The point appears in the following passage from his Honor's judgment in Breavington v. Godleman:

[T]he constitutional solution of competition and inconsistency between purported laws of different States as part of the national law must, where the necessary nexus for prima facie validity exists, be found either in the territorial confinement of their application or, in the case of multi-State circumstances, in the determination of predominant territorial nexus. That would have been the position under the provisions of the Constitution (in particular, sections 106, 107 and 108) even if those provisions had not included section 118.\textsuperscript{124} The presence of section 118 serves to make that position plain."\textsuperscript{125}

Justice Deane later said that "to give the words of section 118 their full effect seems . . . to involve no more than allowing the section to perform its

\textsuperscript{123} Id. at 34-35 (footnotes omitted) (emphasis added).

\textsuperscript{124} Sections 106, 107, and 108 of the Australian Constitution save state laws and constitutions (but expressly subject to the constitution) and vest in state parliaments the powers of the colonial legislatures, unless withdrawn from the states by the constitution.

\textsuperscript{125} 169 C.L.R. 41, 129 (Austl. 1988).
intended function of confirming the integration of State legislative powers and State laws within the national legal system which the Constitution established.126

These remarks may be compared with what was said by Sir Owen Dixon when speaking extra-judicially in 1943:

The colonies were and the States are distinct jurisdictions and the enactments of their legislatures are confined in their territorial operation because a State is a fragment of the whole. In other States the recognition of its statutes depends upon the general common law principles governing the extra-territorial recognition and enforcement of rights, as affected by the full faith and credit clause.127

How then to deal with competition or inconsistency between the laws of different states? As indicated above, one method, which commends itself to the present majority of the High Court, involves the relinquishment of the field to private international law principles. Given the fundamental importance found by their Honors in the common law in 1900 (or at least the presently acceptable sections thereof) as the basis for the constitutional arrangements of the country, it is not a surprising result. However, it was expressly rejected by Justice Deane in the following terms:

So to apply private international law principles to resolve competition or inconsistency between the laws of the Australian States seems to me, however, to be objectionable on three overlapping grounds. It ignores the significance of the federation of the former Colonies into one nation. It frustrates the manifest intention of the Constitution to create a unitary national system of law. It discounts the completeness of the Constitution which, by the national legal structure which it establishes and by its own provisions, itself either precludes or provides the means of resolving competition and inconsistency between the laws of different States.128

In particular, to apply the rule in Phillips v. Eyre,129 or any variation that gave substantive operation to the laws of the forum, would, as his Honor saw it, preclude or undermine that unity of the national system of law and deny the jurisprudence that it reflects.130 From that conclusion, Justice

126. Breavington, 169 C.L.R. at 130.
127. Sources of Legal Authority, in JESTING PILATE, 198, 201 (1965) (emphasis added). The writer is indebted to Mr. G. O'L. Reynolds of the New South Wales bar for drawing his attention to this passage.
129. (1870) L.R. 6 Q.V. 1 (Eng. Q.B.).
Deane has gone on to identify as the *lex causae*, at least in tort cases, the law of the state with which there is the predominant territorial nexus. That law will determine liability and calculation of damages.131

In so doing, Justice Deane was aware of the resonance with the vested rights theory. That, as a rationale for a common law choice of law rule for Australian interstate torts, had been rejected by the High Court in 1951 in *Koop v. Bebb*,132 but Justice Deane asked whether the rejection of the vested rights theory was consistent with the fundamental tenet, already referred to, that in a federal system such as Australia there is a “basic distinction between the objective existence or operation of law on the one hand and its judicial declaration or application on the other.”133

The position in this controversy taken by Chief Justice Mason is between those taken by the other disputants, but the result is that his Honor does not give section 118 an operation in choice of law for interstate torts. The Chief Justice’s position may be summarized as follows: (1) “Australia is one country . . . and that the same significance or importance cannot be ascribed to a person’s conduct in moving from one State to another” as to an action of a person moving from one country to another;” there should be avoided a resolution of conflictual issues that give too much prominence to the law of the forum because this “inevitability” will encourage forum shopping by plaintiffs.134 (2) Section 118 is not a choice of law provision; once the choice of law is made by the common law, then full faith and credit must be given to the law chosen.135 The first part of this proposition does not necessarily lead to the second. Section 118 may require effect to be given to the statutory law of a fellow state that purports to reach subject matter in the forum, in the writer’s opinion, irrespective of the choice of law rules at common law. Given the unitary nature of the common law in Australia, what would be the point of mandating by section 118 the choice made by the common law? That is not to deny the force of his Honor’s suggestion that section 51(xxv), in using the term “recognition throughout the Commonwealth,” extends to authorize a federal statutory revision of the choice of law rules. (3) Legislation will provide a flexibility not found with a constitutional mandate. Thus,

If any provision in the Constitution is to be regarded as the source of a solution to the inter-jurisdictional conflicts of law problems within Australia, it is perhaps section 51(xxv). It is preferable that Parliament

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132. 84 C.L.R. 629, 644 (Austl. 1951).
133. *Breavington*, 169 C.L.R. at 128.
should provide a solution by an exercise of legislative power, if that be legitimate, than that the Court should spell out a rigid and inflexible approach from the language of section 118.136

(4) The “demolition” of the “vested rights” theory does not mean that the lex loci delicti is not the primary or basic law to be applied. (5) Statutes of limitation should be classified as substantive and available to be pleaded as a good defence in circumstances where they form part of the law of the cause applied by the forum according to its choice of law rules.137

With respect to the third point, the apprehended inflexibility of section 118, it has been pointed out that this by no means reflects the United States full faith and credit doctrine.138 Further, Justice Deane himself returned to the debate in McKain saying:

In a case where there is a substantive nexus with the territory of more than one State, the determination of predominant territorial nexus may well involve a discretionary weighing of competing factors, including considerations of what is fair and just, in which the rules of private international law may be important by way of analogy. Any uncertainty or flexibility involved in that process is, however, an aspect of the determination of the content of the applicable law in the circumstances of the case. It does not undermine or destroy the essential unity of the Australian legal system since the reference point—i.e. predominant territorial nexus—will be same regardless of the place within the Commonwealth in which the proceedings are brought.139

The selection in the High Court judgments of rather different starting points has led to a different destination in determining the relationship between full faith and credit in the Australian Constitution and the choice of law rules of the common law. It is worth noting that the differences of opinion as to the

136. Breavington, 169 C.L.R. at 83. Professor Brainerd Currie was of the view that the courts are not equipped to resolve the conflict where each of the states involved has a “legitimate interest” in the application of its own law and that such a function was for legislation under the “effec” clause of the full faith and credit provision: The Constitution and The Choice of Law: Governmental Interests And The Judicial Function, in SELECTED ESSAYS ON THE CONFLICT OF LAWS 188, 271-73 (1963).

137. McKain, 174 C.L.R. at 26-27. It should be noted that Justice Deane reached the same conclusion on this issue. Id. at 51-52. In the United States, the prevailing doctrine is that the application by the forum of its own statute of limitations to claims governed by the laws of other states is consistent with the requirements of full faith and credit and due process. See Sun Oil Co. v. Wortman, 486 U.S. 717 (1988).


139. 174 C.L.R. at 53.
nature of the common law in the federal system have this much in common; they reflect differing views of an undoubted common law unity that does not exist in the United States and so cannot easily guide the evolution of full faith and credit doctrines in that country.

The recent Australian decisions have concerned tort actions in which there is a well-developed, if, as the cases illustrate, not well-settled, body of choice of law doctrine. That circumstance assisted the conclusion of the majority that section 118 is not a choice of law provision. However, it did not focus attention upon the constitutional text.

**CONSTITUTIONAL CONFLICT BETWEEN STATE LAWS**

The High Court has not been presented with cases in which a statute creates a new species of right or obligation; in which the law of one or more states purports to have a direct operation in the territory of a third; and all affect by their terms or in their operation the same persons, transaction, or relationships. The existence of such a class of case was noted in the joint judgment of all members of the High Court in *Port MacDonell Professional Fishermen's Association Inc. v. State of South Australia.*\(^{140}\) The High Court also has not been presented with cases where the statutes of one or more states abrogate or modify common law rights and duties and, by their terms or in their operation, affect the same persons, transactions, or relationships, but do so by connecting factors that do not provide any *lex causae* reflecting the common law choice of law rules.

Here, there will be conflict in the constitutional sense. It is not easy to see how the conflict is to be resolved by ignoring section 118 and relying on the decisions, given in a different context, that section 118 is not a choice of law provision. On the other hand, the scheme of the constitution as seen by Justices Wilson, Deane, and Gaudron provides resolution of inconsistency between state laws. Thus, one must ask whether the last has been heard of the doctrine of which they seek acceptance.

In *Rothwells Limited (In Liq.) v. Connell*\(^{141}\) the question was whether a deed executed in Western Australia, not stamped with duty in accordance with the law of that state but stamped in Queensland was inadmissible in a Queensland court by reason of noncompliance with the law of the other state. The Queensland law made the deed admissible in evidence and available for all purposes. The Queensland Court of Appeal concluded that even if the proper law of the deed was that of Western Australia, the Queensland


\(^{141}\) 119 A.L.R. 538 (Austl. 1993). Special leave to appeal was refused by the High Court (Brennan, Dawson, Gaudron, J.J.) on 13 May 1994.
legislation prevailed over an inconsistent statutory provision of another state.\footnote{142}{Id.}

Judge of Appeal, Justice McPherson took the recent High Court authorities as deciding generally that section 118 leaves it to the common law principles of private international law to determine the choice between conflicting laws.\footnote{143}{Id. \at 548.} It should, however, be noted that it was not submitted that by its own terms the law of Western Australia purported to apply outside that state. There was, therefore, in Queensland, no conflict with the laws of that state in any constitutional sense. Therefore, in the writer’s opinion, Western Australia sought no faith and credit elsewhere for its law.

In Canada, the scope for conflict in this constitutional sense between the laws of the provinces is diminished by a view of extra-territorial competence, which is narrower than prevailing Australian doctrine, that the requirement for a relevant connection between the state and the circumstances on which the state legislation operates should be liberally applied and that even a “remote and general” connection between the subject matter of the legislation and the state will suffice.\footnote{144}{Union S.S. Co. of Austl. Pty. Ltd. v. King 166 C.L.R. 1, 14 (1988) (a joint judgment of all members of the High Court).} On the other hand, speaking of the Canadian position, Professor Hogg has said: “As a general proposition, it is plain that a province may not regulate extraprovincial activity. What is often difficult is distinguishing extraprovincial activity from intraprovincial activity, and distinguishing the incidental effects of a statute from its pith and substance.”\footnote{145}{Hoog, \textit{supra} note 8 at 323.}

Thus, in \textit{Interprovincial Co-operatives Ltd. v. The Queen}\footnote{146}{[1976] 1 S.C.R. 477.} the majority of the Supreme Court of Canada held that Manitoba could not create a statutory right of action for damages against out-of-province firms that introduced pollutants into rivers eventually flowing into Manitoba, thereby destroying Manitoba fisheries.\footnote{147}{Id.} However, Justice McIntyre explained an associated doctrine in \textit{Churchill Falls (Labrador) Corp. v. Newfoundland (Attorney General)}:

Where the pith and substance of the provincial enactment is in relation to matters which fall within the field of provincial legislative competence, incidental or consequential effects on extra-provincial rights will not render the enactment \textit{ultra vires}. Where, however, the pith and substance of the provincial enactment is the derogation from or elimination of extra-provincial rights then, even if it is cloaked in the proper constitutional form, it will be \textit{ultra vires}. A colorable attempt to preserve the appear-
ance of constitutionality in order to conceal an unconstitutional objective will not save the legislation.\textsuperscript{148}

It may be noted that in \textit{Hunt}\textsuperscript{149} the Canadian Supreme Court, having decided that the Quebec statute was constitutionally inapplicable because it violated the principles of \textit{Morguard},\textsuperscript{150} found it unnecessary to consider whether that statute was unconstitutional because, in pith and substance, it related to a matter outside Quebec.\textsuperscript{151}

Issues that the Australian and Canadian courts have yet to face have been litigated in the United States. It is appropriate now to turn to the United States experience.

\textbf{The United States, Choice of Law, Conflict of Laws and Full Faith and Credit}

In the Australian cases, the stance has been taken that the teaching of the United States jurisprudence is, first, that “vested rights” theories have been consigned to history, and, further, that the prevailing doctrines of full faith and credit exhibit inflexibility. Neither proposition accurately reflects the situation in the United States.

The practical question with which much of the United States full faith and credit learning has been concerned is whether the court of the forum state must entertain and allow recovery on an action admittedly created by the statutory law of another state and admittedly not governed by the substantive law of the forum, including the forum’s choice of law rules. Involved in such cases is the further question of the constitutional impact of full faith and credit doctrine upon what otherwise would be the operation of the “vested rights” theory of choice of law. The same is true where what is relied upon in the forum state is a substantive defence established by the statutes law of another state.

In its classical (or primitive) form, the vested rights theory, exemplified in the first \textit{Restatement of Conflict of Laws},\textsuperscript{152} fixed upon the premise that a right vested under the law of the place of the last event necessary to assert the right. In \textit{Pozniak v. Smith},\textsuperscript{153} after referring to the attraction of the place of the tort as providing the \textit{lex causae}, Justice Mason continued:

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\textsuperscript{149} Hunt v. Lac d'Amiante du Québec Ltée, [1993] 4 S.C.R. 289, 331.
\textsuperscript{151} Hunt, [1993] 4 S.C.R. at 331.
\textsuperscript{152} See \textit{RESTATEMENT (FIRST) OF CONFLICT OF LAWS} §§ 311-31 (1934). Professor Joseph H. Beale was the reporter.
\textsuperscript{153} 151 C.L.R. 38 (Austl.: 1982).
\end{flushleft}
In saying this I do not indorse the theory that the act complained of
gives rise to an obligation by the lex loci delicti and that this obligation
follows the actor with a result that it may be enforced against him
wherever he is found. This theory, which seems to have originated with
Willes J. in Phillips v. Eyre, was elaborated by Holmes J. in Slater v.
Mexican National Railroad Co. and Western Union Telegraph Co. v.
Brown and by Reynolds J. in New York Central Railroad Co. v. Chisholm,
and adopted by Cardozo J. in Loucks v. Standard Oil Co. of New York,
though rejected by Judge Learned Hand in Guinness v. Miller. The theory
was discarded by Dixon, Williams, Fullagar and Kitto JJ. in Koop. They
said “courts applying the English rules of private international law do not
accept the theory” and went on to say:

English law as the lex fori enforces an obligation of its own
creation in respect of an act done in another country which would
be a tort if done in England, but refrains from doing so unless the
act has a particular character according to the lex loci actus.
His Lordship, speaking of the theory, said “It can hardly be
restored now by anything less than a revolution in thought.”

In Breavington Chief Justice Mason and Justices Brennan, Dawson and Toohey
referred with apparent approval to what they regarded as the demise of the
vested rights theory. However, as earlier indicated in this Paper, Justice
Deane took a different view. Further, in their joint judgment, Justices Wilson
and Gaudron said:

Although acceptance of the ‘vested rights’ theory involves the conse-
quence that liability is determined according to the law of the place of the
wrong, the rejection of that theory does not necessarily entail the
consequence that liability or the extent thereof is co-extensive with the
liability which would arise if the act giving rise to the action had been
committed within the law district of the forum. Even accepting that the
obligation is one created by the law of the forum, it does not follow that
the nature or extent of the obligation should be determined in disregard of
the law of the place where the tort was committed.

Associated with the legal realist movement and perhaps with other
philosophies under the New Deal was the rejection of vested rights as overly
conceptualist (an odd term of criticism by one thinker of another) in favor of
the implementation of full faith and credit by reference to the judicially
perceived governmental interests involved. Which was the better law?

154. Id. at 52-53 (citations omitted).
156. Id. at 90.
157. In some states, there was no departure from the vested rights theory. In Fitts v.
Thus, one is brought inevitably to what was said and decided in Alaska Packers Association v. Industrial Accident Commission of California.\textsuperscript{158} It is necessary to refer briefly to the dreary facts of the case. The California worker’s compensation law provided compensation for injuries sustained out of the state only for workers who were residents in California at the time of the injury and whose contract of employment was made there.\textsuperscript{159} At the time the appellant injured worker contracted for employment, the California Supreme Court had held in Quong Ham Wah Co. v. Industrial Accident Commission\textsuperscript{160} that the legislation was in conflict with the Privileges and Immunities Clause because it granted to the citizens of California a privilege withheld from those of other states, and that the effect of the Constitution was to invalidate the discrimination.\textsuperscript{161} As a result of this invalidation of the restriction in favor of residents the statute was interpreted as extending its benefits to nonresident workers, including aliens.\textsuperscript{162} Further, the Supreme Court of California had held that the legislation of the then territory of Alaska was so drawn that the California Industrial Accident Commission could not apply and administer the Alaska act.\textsuperscript{163} The facts of Alaska Packers must be understood against this background.

In Alaska Packers a nonresident alien, by a written contract executed in San Francisco, agreed to work for the appellant in Alaska during the salmon canning season.\textsuperscript{164} The appellant was obliged by the contract to transport the worker to Alaska and at the end of the season to return him to San Francisco where he was to be paid his stipulated wages. The worker was injured in the course of his employment in Alaska.\textsuperscript{165} The California statute gave the respondent Commission jurisdiction in respect of the injury. The statute also provided that no contract would exempt the employer from liability for

\textsuperscript{158} Minnesota Mining & Manufacturing Co., 581 So. 2d 819, 823 (Ala. 1991), the Supreme Court of Alabama retained the status quo, saying that “[t]he newer approaches to choice of law problems are less confusing nor more certain than the traditional approach” and citing decisions of at least twelve states (including South Carolina in Algie v. Algie, 261 S.C. 103, 198 S.E.2d 529 (1973)) to the same effect as those of Alabama. See Elizabeth Webb, Note, Fitts v. Minnesota Mining & Manufacturing Co.: Alabama’s Stronghold Against the Second Restatement, 44 Ala. L. Rev. 599 (1993).

\textsuperscript{159} 294 U.S. 532 (1935).

\textsuperscript{160} Id. at 538.

\textsuperscript{161} 192 P. 1021 (Cal. 1920).

\textsuperscript{162} Id. at 1026.

\textsuperscript{163} See Alaska Packers Assoc. v. Industrial Accident Comm’n, 34 P.2d 716, 718-19 (Cal. 1934) (per curiam). The significance of the circumstance that Alaska was then but a federal territory, not a sister state of California, is discussed by Professor Currie, supra note 136, at 264-65.

\textsuperscript{164} Alaska Packers Ass’n v. Industrial Accident Comm’n, 294 U.S. 532, 538 (1935).

\textsuperscript{165} Id.
compensation fixed by the statute. While the contract had recited an election by the worker to be bound by the worker’s compensation law of Alaska, the worker applied for and received an award from the Commission in California.

The issue was not one of a choice between the law of California or that of Alaska. Still less was there a conflict between the reach of the two laws. The issue was whether California law would be applied to the worker’s claim or whether the worker would be denied relief in that state. The immediate issue before the United States Supreme Court was whether the California court, on review from the Commission, had failed to accord the Alaska law full faith and credit by refusing to allow it as a defence to the award by the Commission. The Supreme Court held that there was no denial of full faith and credit in refusing that defence. Speaking of California, Justice Stone said: “Its interest is sufficient to justify its legislation and is greater than that of Alaska, of which the employee was never a resident and to which he may never return.” The governmental interest of California had been formulated as follows by the State Supreme Court:

[T]he policy of the act . . . is to charge to the industry those losses which it should rightfully bear, and to provide for the employee injured in the advancement of the interests of that industry, a certain and prompt recovery commensurate with his loss and, in so doing, lessen the burden of society to care for those whom industry has deprived, either temporarily or permanently, of the ability to care for themselves.

Significantly, Justice Stone pointed out that the California law did not purport to have any extra-territorial effect in the sense of undertaking to impose a rule for foreign tribunals. Nor did the Court decide that the Alaska statute imposed any rule for the tribunals of California; to the contrary, the Alaska Act provided that no action was to be brought under it in any court outside Alaska, save where it was impossible to serve the defendant within Alaska. It was conceded that it was possible to do so in this case.

Therefore, there must be much to be said for the proposition that there was no conflict between the two statutes in the sense that they competed in concurrent application to the claim made in California. The Supreme Court did not decide what the result would have been if the worker had sought

166. *Id.*
167. *Id.*
168. *Id.*
170. *Alaska Packers Ass’n v. Industrial Accident Comm’n*, 34 P.2d 716, 720 (Cal. 1934) (per curiam).
compensation in Alaska and contended that full faith and credit required effect to be given by way of defense to the law of California.

The purpose of the reliance in California on the Alaska law as a defense was to invoke the vested rights theory as it had been developed as a choice of law rule at common law. If accepted, the result would have been that the only rights of the worker in respect of his injury had vested in Alaska, were contained in the law of Alaska, and had followed him to California, but were of no use there. Translated into constitutional terms, the question, as Justice Stone saw it, was whether California was required to give full faith and credit to the Alaska law, thereby denying the application in its own courts of the California statute, enacted in pursuance of the domestic policy of California.

The Supreme Court decided that the Full Faith and Credit Clause did not require California to deny enforcement of its own laws in its own courts. Professor Currie preferred to treat the case as one in which the interest of the forum was so dominant as to present a case of a false conflict, even though there were facts that provided contacts with the other state.171 However, Justice Stone said that the full-faith-and-credit issue was to be determined "by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight,"172 suggesting that the issue is not whether the forum is shown to have sufficient governmental interest, but whether that interest predominates.

The existence of a conflict was more readily apparent in Pacific Employers Insurance Co. v. Industrial Accident Commission,173 in which the opinion of the court also was delivered by Justice Stone. Under Massachusetts law, insured employers were deemed to have waived their rights of action "at common law or under the law of any other jurisdiction."174 This was treated as an attempt by that state "to project its laws across state lines so as preclude the other from prescribing for itself the legal consequences of acts within it."175 The California law stipulated that no "contract, rule, or regulation" would exempt an employer from liability under California law.176 California was not obliged by full faith and credit to allow the Massachusetts law as a defense to a claim under California law.

Likewise, in Carroll v. Lanza177 the Missouri worker's compensation statute was "in terms applicable and exclusive as to the rights of workmen injured outside that State while under Missouri employment contracts."178

171. See Currie, supra note 136, at 201-14; Leflar, supra note 89, § 92.
172. Alaska Packers, 294 U.S. at 547.
174. Id. at 498.
175. Id. at 504-05.
176. Id. at 499.
178. Id. at 422 (Frankfurter, J., dissenting).
However, the Full Faith and Credit Clause did not require Arkansas, the state where the injury was sustained, to allow the law of Missouri to bar an action in Arkansas to recover common-law damages.\textsuperscript{179}

The governmental interest analysis has been criticized as foreign to the traditional objectives of choice of law doctrine. It has been said that the forum uses private international law rules, including those of choice of law, not in order to serve its own goals, but rather in search of justice in the relations of individuals so that the interests at stake in a conflicts case are not governmental so much as private.\textsuperscript{180} It might also be said that in this field the principles are developed by the forum as a matter of enlightened self-interest. Such considerations serve to point out the confusion of thought that arises from translating choice of law into the analysis of constitutional full faith and credit. In a federal system, freedom of state action is constrained by the union between them, and a fundamental problem is the reconciliation or resolution of the conflicting interests of the several states.\textsuperscript{181} In a country such as Australia where there is a uniform common law, those interests are represented solely by conflicting statutes.

In \textit{Hughes v. Fetter}\textsuperscript{182} the Supreme Court decided in the affirmative what Justice Black called the narrow question of whether the forum, Wisconsin, was obliged by the Full Faith and Credit Clause of the Constitution to open what otherwise would have been the closed doors of its courts to a cause of action created by an Illinois wrongful death act.\textsuperscript{183} It has been said that this is the last state choice of law decision invalidated by the Supreme Court.\textsuperscript{184}

As has been pointed out earlier in this Paper, to treat each state as required by full faith and credit to apply the law of the others is absurd. To let each state always apply its own law denies the giving of full faith and credit in any substantive sense. The question then is one of ascertaining those occasions when the forum is bound to apply the law of another state and those when it is not so bound. Thus, Australia Constitution section 118 assumes the existence of constitutional conflict rules without specifying their content.

\textsuperscript{179} Id. at 413-12. Other authorities in which the forum applied its own substantive law when clearly in conflict with the statute of another state are collected in the dissenting opinion of Justice Frankfurter. See \textit{id.} at 416.


\textsuperscript{181} See Jackson, \textit{supra} note 58.


\textsuperscript{183} \textit{id.} at 611, 613-14.

\textsuperscript{184} Laycock, \textit{supra} note 33, at 257. However, the learned author also contends that there are many decisions of the lower courts that, upon analysis, show that "governmental interest" never fully displaced all variants of vested rights theory.
The governmental interest doctrine was such an attempt, but there were a number of difficulties with it. First, Professor Currie himself did not favor the courts as the medium for determining of any closely balanced dispute as to where the greater weight of governmental interest lies between the laws of the forum and another state or states. Second, the role of federal government has expanded in all three federations, and the area for predominant or even significant state concern in many areas of social policy has correspondingly diminished. Rival state interests now exist at best under the brooding omnipresence of the greater federal interest. Third, as the background to the Alaska Packers case illustrates, the governmental interest theory tended to focus attention upon and give weight to the parochial interests of the forum. In the United States, this idea immediately suggests conflict with the operation of the Privileges and Immunity Clause, which must be read with the Full Faith and Credit Clause so that the latter is not read in a way that clashes with the objectives of the former. 185

Section 117 of the Australian Constitution forbids the subjection of the resident of one state to any disability or discrimination in another that would not be equally applicable to a resident of that other state. Thus, in respect of an action brought in State A by a resident of State B, the law of State A may not validly limit the amount of damages recoverable by the plaintiff to that which would have been recoverable if the plaintiff had sued in State B. The Australian Constitution requires this result, notwithstanding the fact that the cause of action arises out of the defendant’s use of a vehicle registered in State A where the law creates a cooperative insurance welfare scheme financed by premiums collected by State A residents for the benefit of plaintiffs who, on the whole, are residents of that state. 186

The application in such a case of the theory of national legal structure advanced by Justice Deane would require that the damages be calculated in accordance with the law of State B, where the cause of action arose, not under the law of the forum. 187 Accordingly, a law of the forum limiting damages in accordance with the law of the plaintiff’s state of residence at the time of the accident will be valid only where the accident occurs in the forum. Even though the accident occurs in State B, if State A "tops up" damages recoverable in its courts by its residents for accidents in State B, but denies this to a plaintiff who is a resident of State B, section 117 operates to free that plaintiff from the requirement of residence in State A. Justices Deane and Gaudron attribute this result to the constitutional proposition that damages are to be assessed by the law of the place of the accident, rather than the forum, in conjunction with the further constitutional mandate against discrimination.

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185. Laycock, supra note 33, at 261-88.
187. Id.
based on residence. However, upon the hypothesis that the *lex loci delicti* governs the calculation of damages regardless of the forum in which the claim is brought or the state of residence of the plaintiff, there remains a basic question: How does the availability of top-up damages under the *lex fori* avail a plaintiff whose injury was sustained outside the forum? Why does section 117 apply to free the plaintiff from a residence requirement when the result is to provide the plaintiff with damages calculated other than by the *lex loci delicti*? Surely, if on its face the law had conferred the top-up benefit irrespective of residence, on the national legal structure hypothesis it would not validly have supplemented the damages provided by the *lex loci delicti*.

Finally, the existence of federal diversity jurisdiction in the United States and Australia, with its objective of avoidance of feared state parochialism, suggests that conflicts between state laws are not, within the federal constitutional structure, to be resolved by preferring the governmental interest of one state to that of another.

The admonitions of Professor Currie against involvement by the courts in the evaluation of finely balanced conflicting governmental interests have been reflected in the course taken by the United States' decisions in the last forty years. Broadly, the result has been to treat the full faith and credit mandate as only infrequently requiring the forum to defer to the conflicting law of another state. What one might call the choice-of-law decision of each state thereby is respected. That result in terms of the concern of the High Court of Australia favors forum shopping and produces great uncertainty. Full faith and credit is anything but inflexible. The situation was summed up as follows in *Sun Oil Co. v. Wortman*, in which Justice Scalia said that:

[S]ince the legislative jurisdictions of the States overlap, it is frequently the case under the Full Faith and Credit Clause that a court can lawfully apply either the law of one State or the contrary law of another . . . . ("[I]n many situations a state court may be free to apply one of several choices of law").

The result in *Shutts* was perhaps an exception to the general trend. There it was held that the Kansas court's application of the law of the forum to every claim in the case was sufficiently arbitrary and unfair as to exceed constitutional limits under the Due Process Clause and the Full Faith and Credit Clause because of the lack of interest of Kansas in most of the claims involved and the putative conflicts with the law of a number of states.

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188. *Id.* at 477-80 (Deane, Gaudron, J.J.).
190. *Id.* at 727 (quoting Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 823 (1985)).
192. *Id.* at 822-23.
with a connection to the litigation, especially Texas and Oklahoma.\textsuperscript{193} The litigation concerned class actions involving gas leases between non-Kansas residents. The leases were situated outside Kansas. In reaching its decision, the Supreme Court applied the now current orthodoxy in \textit{Allstate Insurance Co. v. Hague}.\textsuperscript{194} In announcing the decision in \textit{Shotts}, Judge Rehnquist described the \textit{Allstate} decision as follows:

In that case we were confronted with two conflicting rules of state insurance law. Minnesota permitted the “stacking” of separate uninsured motorist policies while Wisconsin did not. Although the decedent lived in Wisconsin, took out insurance policies and was killed there, he was employed in Minnesota, and after his death his widow moved to Minnesota for reasons unrelated to the litigation, and was appointed personal representative of his estate. She filed suit in Minnesota courts, which applied the Minnesota stacking rule.

The plurality in \textit{Allstate} noted that a particular set of facts giving rise to litigation could justify, constitutionally, the application of more than one jurisdiction’s laws. The plurality recognized, however, that the Due Process Clause and the Full Faith and Credit Clause provided modest restrictions on the application of forum law. These restrictions required “that for a State’s substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.”\textsuperscript{195}

It is in this setting that there has been in the last decade renewed interest by scholars in the United States in territorial connections as a means of guiding the courts from what one commentator has described as “the apparent end of all meaningful limits”\textsuperscript{196} on state forum choice of law, as in \textit{Allstate}. One learned author, after referring to the current mechanics of interstate litigation as a “forum shopping system,” says:

A number of factors converge to make things easy for plaintiffs. These include relaxed standards of personal jurisdiction, the general obligation of states to provide a forum, choice of law theories that encourage the use of forum law, and minimal scrutiny by the Supreme Court of state choice of law decisions . . . .

\textsuperscript{193} \textit{Id.} at 816.
\textsuperscript{194} \textit{449} \textit{U.S.} 302, 312-13 (1981). The result in this decision has been described as “maddeningly unresponsive to virtually any important question concerning the theoretical aspects or practical consequences of the choice-of-law revolution.” Korn, \textit{supra} note 180, at 797.
\textsuperscript{195} \textit{472} \textit{U.S.} at 818.
\textsuperscript{196} Laycock, \textit{supra} note 33, at 257.
... The plaintiff's shopping will consist generally of a twofold search for a jurisdiction with a favorable substantive law and a choice of law theory that will point to the application of that law. 197

Earlier in this Paper, I referred to the apparent impact of Professor Dane's paper upon the reasoning of Justice Deane and to the writings of Professors Brilmayer, Laycock, and Korn. They are but four of the many writers in the field who discount the effectiveness of the earlier search for the better law by interest analysis. 198

Consequently, the interpretation of full faith and credit as regards conflicting statutes by means of interest analysis through judicial decision has run into sand and left forum choice of law greatly strengthened. In reaction to this shift, a growing measure of scholarly opinion favors the direction taken in Australia by the minority in recent Australian High Court decisions. The situation in the United States, however, is anything but clear. The United States is in “an era when the diversity among the States in choice-of-law principles has become kaleidoscopic.” 199

CONCLUSION—WHITHER CANADA?

The foregoing discussion may only confirm to Canadians that they may not after all have been greatly prejudiced by the absence of an express full faith and credit provision from their constitution. The most readily apparent need for such a provision concerns recognition and enforcement of judgments. The effect of Hunt 200 is to give constitutional force to the remodeling of the common law by the Supreme Court of Canada in Morguard. 201 No doubt, the existing provincial registration regimes will develop over time to reflect that adjustment.


198. For a convenient collection of references to the publications by both the territorial school and those disaffected with the New Deal choice of law revolution, see Dane, supra note 97, at 1191 n.1; Laycock, supra note 33, at 253-54 nn.19-33.

199. Ferens v. John Deere Co., 494 U.S. 516, 538 (1990) (Scalia, J., dissenting) (concerning transfer between Federal District Courts under 28 U.S.C. § 1404(a)). In Australia, the federal courts are not bound to a particular district; a judge may hear a trial partly at one registry and partly at another. Section 48 of the Federal Court of Australia Act 1976 (Cth) empowers a judge at any stage of a proceeding to direct that the proceeding or any part of it be conducted or continued “at a place specified in the order.”


The requirement of a real and substantial connection with the province in which the judgment has been obtained may be compared with the determination of predominant territorial nexus as determinative of the law ensuring that the legal consequences attaching to an act or omission that occurs in a federation are the same, regardless of the forum in which the federation proceedings are brought. I refer there, of course, to the implications a minority of the High Court, notably Justice Deane, have drawn from the Australian Constitution as, in effect, indicative of a constitutional choice-of-law rule. May not this skein of thought suggest the approach of an area awaiting further development after *Morguard* and *Hunt*? This approach revises common-law-choice of law rules to reflect a national federal legal structure in which there is no directly mandated full faith and credit.

In *Grimes v. Cloutier* [202] Justice Morden referred, as had Justice Mason in *Pozniak v. Smith*, [203] to the passage in the judgment of Justice Willes in *Phillips v. Eyre* [204] that suggests the importance of the *lex loci delicti* and gives inferential support to the vested rights or territorial theory of liability in tort. Justice Morden also referred to what might be called federal considerations. The plaintiff, a resident of Ontario, before suing in that province in respect of an injury she suffered in Quebec, had received the benefits available to her under the Quebec statutory scheme that relieved the defendants, Quebec residents, of further civil liability. His Lordship held that for Ontario to ignore the Quebec legislation would be an “officious intermeddling” with the legal concerns of Quebec. [205]

Further, whatever may be the necessary adjustment in a federation to the choice-of-law rules as otherwise understood at common law, some mechanism is necessary to deal with conflicts in the true sense between laws of two or more states or provinces, even in the absence of an express constitutional provision. Sir Owen Dixon foreshadowed the process of implication upon which largely rests the doctrine now espoused by the minority of the High Court of Australia. Does this point to a path for the next steps in Canada after *Hunt*? Indeed, while the result in *Hunt* is not expressed in such direct terms by the Canadian Supreme Court, some of that doctrine may be involved in it. The Quebec law was constitutionally inapplicable in the courts of the second province.

The Supreme Court ordered the respondents to produce in British Columbia copies of the documents in question, holding that the Quebec statute should be read “as not applying” to the other provinces. The Quebec Provincial Courts had granted various orders preventing the respondents from

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204. (1870) L.R. 6 Q.B. 1 at 28.
205. *Id.* at 660.
sending the documents out of Quebec. The Courts of British Columbia had refused orders compelling production. The Supreme Court of Canada allowed the appeal from British Columbia. The reason given by the Supreme Court was that the Quebec “blocking law” sought to strike pre-emptively at the judgment that was sought in British Columbia.

But the effect of what was decided was to require the orders made under authority of Quebec law to yield to orders now made under authority of the law of British Columbia. Was there not a conflict of laws in the constitutional sense that was resolved by full-faith-and-credit doctrine?

The result in the decision of the Ontario Court of Appeal in Grimes v. Cloutier206 has been approved by the Supreme Court of Canada in Jensen v. Tolofson.207 The Supreme Court held that the lex loci delicti should generally be applied in tort cases. Justice La Forest delivered the leading judgment. His Lordship referred208 to what had been said by Justices Wilson and Gaudron and by Justice Deane in Breavington v. Godleman209 and continued:210

The nature of our constitutional arrangements — a single country with different provinces exercising territorial legislative jurisdiction — would seem to me to support a rule that is certain and ensures that an act committed in one part of this country be given the same legal effect throughout the country. This militates strongly in favor of the lex loci delicti rule.

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207. 15 Dec. 1994, unreported.
208. Id. 39-40 of print.
210. Id. 41 of print.